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Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers

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COUNTER-REVOLUTION IN CONSTITUTIONAL CRIMINAL PROCEDURE? TWO AUDIENCES, TWO ANSWERS

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"You'd be better informed if instead of listening to what we say, you watch what we do."[1]

I. INTRODUCTION: COUNTER-REVOLUTION?

When Richard M. Nixon ran for president in 1968, he campaigned on a now-familiar "law and order" platform. Among other things, he pledged to appoint Justices to the Supreme Court who would combat the Warren Court's controversial constitutional decisions limiting the power of law enforcement officials to investigate and prosecute crime. When Nixon won the presidency and then almost immediately had the opportunity to replace Chief Justice Earl Warren and three Associate Justices with appointees of his own, it was widely predicted that the major innovations of the Warren Court in constitutional criminal procedure — any list would include *Mapp*,[2] *Massiah*,[3] and *Miranda*[4] — would not long survive. In the almost thirty years since Nixon's victory, the Supreme Court's pulse-takers have offered periodic updates on the fate of the Warren Court's criminal procedure "revolution" in the Burger and Rehnquist Courts.

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1. This was Attorney General John N. Mitchell's famous response to criticism of the Nixon Administration's record on civil rights. "*Watch What We Do*," WASH. POST, July 7, 1969, at A22.

2. Mapp v. Ohio, 367 U.S. 643 (1961) (applying the Fourth Amendment exclusionary rule to the states).

3. Massiah v. United States, 377 U.S. 201 (1964) (holding that the Sixth Amendment precludes the use of incriminating statements deliberately elicited by law enforcement agents after a defendant's indictment in the absence of counsel).

4. Miranda v. Arizona, 384 U.S. 436 (1966) (holding that the Fifth Amendment requires warnings to suspects preceding any custodial interrogation).

The voluminous body of literature formed by these assessments[5] presents something of a puzzle. The unanimity of projection about the future of the Warren Court's criminal procedure soon gave way to widespread disagreement about the nature and extent of the response of the Burger and Rehnquist Courts. On the one hand, many commentators — usually admirers of the Warren court's handiwork — have lamented over the years about what they view as a wholesale repudiation of the Warren Court's work; their comments are full of words like "retreat,"[6] "decline,"[7] and "counter-revolution."[8] At the very same time, other commentators — many of them also defenders of the Warren Court — have maintained that these laments are "overstated,"[9] and "considerably exaggerated"[10] and that the basic structure of the Warren Court's criminal procedure jurisprudence is firmly "entrenched."[11] As one critic of the Warren Court recently has bemoaned, "The voice that continues

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5. It is fitting to note in this issue of the *Michigan Law Review* full of tributes to Jerold Israel that one of the seminal pieces of this literature is Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319 (1977). Other important contributions to this debate in chronological order are: Edward Chase, *The Burger Court, the Individual, and the Criminal Process: Directions and Misdirections*, 52 N.Y.U. L. REV. 518 (1977); Stephen A. Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151 (1980); Louis Michael Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980); Peter Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983); Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices*, *in* THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62 (Vincent Blasi ed., 1983); Charles H. Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 471 (1985); Craig M. Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?*, 62 IND. L.J. 273 (1987); Joseph D. Grano, *Introduction — The Changed and Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22 U. MICH. J.L. REF. 395 (1989); Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REF. 591 (1990); Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369 (1991); David J. Bodenhamer, *Reversing the Revolution: Rights of the Accused in a Conservative Age*, *in* THE BILL OF RIGHTS IN MODERN AMERICA: AFTER 200 YEARS 101 (David J. Bodenhamer & James W. Ely, Jr. eds., 1993); Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1 (1995).

6. Chase, *supra* note 5, at 595.

7. Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990).

8. Whitebread, *supra* note 5, at 498.

9. Israel, *supra* note 5, at 1324.

10. Kamisar, *supra* note 5, at 68.

11. Saltzburg, *supra* note 5, at 208.

to urge repentance [from the Warren Court's criminal procedure] today is truly '[t]he voice of him that crieth in the wilderness.' "[12]

One could attempt to resolve (or repudiate) this puzzling conflict in a variety of ways. One could, for example, attempt to explain disagreement about the nature of change by distinguishing between levels of abstraction — between "doctrinal" and "ideological" change.[13] Or one could note that the difficulties inherent in weighing and measuring any sort of jurisprudential shift are exacerbated greatly in the broad, diffuse, and fact-specific jungle that is constitutional criminal procedure. Or one could ascribe the debate to a dispute over semantics: just how much change, after all, is "revolutionary" or "counter-revolutionary"? Or one simply could write off the more extreme statements on either side of the divide as rhetorical flourishes offered in the spirit of academic "spin control."

I, however, want to resist these temptations to downplay or deny the conflict, because I believe that the debate over continuity and change in constitutional criminal procedure can best be accounted for in an entirely different way — a way that suggests a new kind of critique of the Burger and Rehnquist Courts' criminal procedure jurisprudence. I start with the contention that the Supreme Court *has* profoundly changed its approach to constitutional criminal procedure since the 1960s at least in the following fairly limited (but obviously important) sense: the Court has clearly become less sympathetic to claims of individual rights and more accommodating to assertions of the need for public order. In the last three decades, the Court has granted review to and found in favor of criminal defendants much less frequently than it did in the heyday of the Warren Court.[14] Thus, at least in Holmes' posi-

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12. Grano, *supra* note 5, at 400 (quoting *Isaiah* 40:3).

13. For example, Michael Seidman contends that, as a matter of ideology, the Burger Court was making social policy choices in exactly the same way the Warren Court had been doing, while hiding behind an illusorily purist "guilt and innocence" model of criminal procedure. *See* Seidman, *supra* note 5, at 445-46. Peter Arenella takes issue with Seidman and finds significant divergence in the ideologies of the Warren and Burger Courts by resurrecting Herbert Packer's "due process" and "crime control" models of criminal procedure. *See* Arenella, *supra* note 5, at 209. In other words, Seidman acknowledges doctrinal change but argues for ideological continuity, whereas Arenella acknowledges doctrinal continuity but argues for ideological change.

14. Liva Baker writes:

> In the mid-sixties . . . more than 90 percent of the Court's criminal docket was made up of cases brought by defendants who had lost in the lower courts, less than 10 percent brought by prosecutors, and at least one assistant in the office of Solicitor General Marshall that year "viewed it as either futile or foolhardy" to pursue to the Supreme Court a case which the government had lost in a lower court . . . .

tivist sense of law as a prediction of what courts will do in fact, the law has changed radically.[15]

The *way* in which this change has occurred, however, may help explain the academic divide. My contention is that much of this change has occurred quite differently from what was predicted at the close of the Warren Court era. The Burger and Rehnquist Courts have not altered radically — and indeed, occasionally have bolstered — the Warren Court's constitutional norms regarding police practices. The edifice constructed by the Warren Court governing investigative techniques under the Fourth, Fifth, and Sixth Amendments remains surprisingly intact. Rather than redrawing in any drastic fashion the line between constitutional and unconstitutional police conduct, the Supreme Court has revolutionized the consequences of deeming conduct unconstitutional. This revolution has not taken the form of wholesale abolition of the Fourth Amendment's exclusionary rule, or the Fifth or Sixth Amendments' mandates of exclusion; rather, the Court has proliferated a variety of what I would term "inclusionary rules" — rules that permit the use at trial of admittedly unconstitutionally obtained evidence or that let stand criminal convictions based on such evidence. Examples of "inclusionary rules" are the doctrines regarding standing, the good-faith exception to the warrant requirement, the "fruit of the poisonous tree,"[16] impeachment, harmless error, and limitations on federal habeas review of criminal convictions.

Thus, for the purposes of my argument, I adapt Professor Meir Dan-Cohen's distinction (which he in turn borrowed from Jeremy Bentham)[17] between "conduct" rules and "decision" rules. Bentham and Dan-Cohen make this distinction in the context of substantive criminal

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> By the mid-seventies, however, the proportion of cases brought by criminal defendants which the Court agreed to hear had dropped below 25 percent, the prosecutor's share had risen above 75 percent, and prosecutors . . . were filing three times as many criminal appeals . . . .

LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS 352 (1983).

15. "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

16. *See* Wong Sun v. United States, 371 U.S. 471, 485-88 (1963) (using the "fruit" metaphor to describe the mode of analysis for determining when the connection between illegal police conduct and recovered evidence is sufficiently attenuated to permit the use of the evidence at trial) (citing Justice Frankfurter's famous opinion in Nardone v. United States, 308 U.S. 338, 341 (1939)).

17. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 626 (1984) (quoting JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT AND AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 430 (Wilfrid Harrison ed., Basil Blackwell & Mott, Ltd. 1948) (1776 & 1789)).

law; for their purposes, "conduct" rules are addressed to the general public in order to guide its behavior (for example, "Let no person steal") and "decision" rules are addressed to public officials in order to guide their decisionmaking about the consequences of violating conduct rules (for example, "Let the judge cause whoever is convicted of stealing to be hanged"). But as any teacher of both substantive and procedural criminal law knows, constitutional criminal procedure is a species of substantive criminal law for cops. Thus, for my purposes, "conduct" rules (my "constitutional norms") are addressed to law enforcement agents regarding the constitutional legitimacy of their investigative practices and "decision" rules (my "inclusionary rules") are addressed to courts regarding the consequences of unconstitutional conduct.

My primary descriptive claim, elaborated in Parts II and III, is that the Supreme Court's shift in constitutional criminal procedure from the 1960s to the 1990s has occasioned much more dramatic changes in decision rules than in conduct rules. I illustrate this claim by comparing the relative stability of constitutional norms regarding police practices under the Fourth, Fifth, and Sixth Amendments to the profusion of significant inclusionary rules affecting these same areas. This claim is qualitative rather than quantitative, and comparative rather than absolute. I do not mean to say that the Supreme Court has deployed decision rules more than conduct rules in any strict numerical sense, nor do I contend that constitutional norms have not shifted *at all;* rather, I argue that the Court's decision-rule cases have diverged far more from the Warren Court's starting point than have its conduct-rule cases. Thus, the dichotomy between decision rules and conduct rules helps to explain the existence of such a deep academic divide. The proponents and debunkers of the "counter-revolution" hypothesis turn out to *both* be right: the Burger and Rehnquist Courts have accepted to a significant extent the Warren Court's definitions of constitutional "rights" while waging counter-revolutionary war against the Warren Court's constitutional "remedies" of evidentiary exclusion and its federal review and reversal of convictions.

This primary descriptive claim, if accepted, leads to a secondary descriptive claim, which I explain in Part IV. Professor Dan-Cohen used the distinction between conduct rules and decision rules to illustrate the concept of what he termed "acoustic separation." Certain areas of substantive criminal law, observed Dan-Cohen, reflect such divergence between the decision rules courts use to enforce the law and the conduct rules announced to the general public, that it is as if the decision-makers and the members of the public are in separate, sound-proof

rooms, unable to hear the rules announced to each other.[18] I argue that the transformation of decision rules in constitutional criminal procedure creates a similar sort of "acoustic separation" between the law enforcement community and the general public. The law enforcement community, through training and on-the-job experience, has direct access to the decision rules used by courts. The general public, which receives its information largely through the media, has much greater access to conduct rules governing police behavior (i.e., the public's "constitutional rights") than to decision rules in criminal procedure cases as they are implemented by courts (i.e., which violations of constitutional rights actually result in a court-imposed sanction).

This second descriptive claim leads to a normative question, which I raise in Part V: should we worry or even care about the relative sophistication or naivete of the police and the people regarding the Supreme Court's constitutional criminal procedure? I think we should both care and worry. The law enforcement community's easy access to decision rules should create concerns that sophisticated law enforcement agents will see some incentives to violate conduct rules when no court-imposed sanction will follow. And the public's lack of access to decision rules should cause us to worry that the public overestimates the court-imposed constraints on law enforcement. Some available empirical data about the attitudes of law enforcement agents and the public lend credence to these fears and suggest avenues for future data collection. I conclude that the public's overly sanguine picture of the role of the courts in constraining police power may be one factor, among many, that leads Americans to place more and more public trust and money in the institutions of law enforcement and the criminal justice system to solve our most pressing social problems.

II. Relative Constancy in Conduct Rules

The Warren Court established and embellished conduct rules governing police practices under three main constitutional rubrics: the Fourth Amendment's prohibition of unreasonable searches and seizures, the Fifth Amendment's privilege against compelled self-incrimination, and the Sixth Amendment's guarantee of assistance of counsel in all criminal cases. It is easy to identify the chief innovation of the Warren Court in the Fifth Amendment area: *Miranda v. Arizona*[19] required a completely new set of procedures for the interrogation of suspects in the custody of law enforcement agents. The Warren Court's Sixth

18. *See id.* at 630-34.
19. 384 U.S. 436 (1966).

Amendment norms of police conduct likewise derive from a single case: *Massiah v. United States*[20] drastically curtailed law enforcement contact with defendants for investigatory purposes after the commencement of adversary proceedings. It is a bit harder to identify in any neat and simple way the germ of the Warren Court's Fourth Amendment norms. *Mapp v. Ohio*[21] extended the exclusionary rule to the states by incorporating it through the Due Process Clause of the Fourteenth Amendment, but it did not purport to change in any way the conduct rules establishing which searches and seizures are constitutionally "unreasonable." Nonetheless, it is possible to identify some core Fourth Amendment norms of the Warren Court, and I do so below. In each of these constitutional arenas, the Burger and Rehnquist Courts have left substantially intact (and sometimes even have reinforced or expanded) the edifice of norms constructed by the Warren Court. To the extent that the Burger and Rehnquist Courts retreated from the Warren Court's normative constitutional commitments, these retreats generally were either strongly foreshadowed by the Warren Court's own work or dwarfed by much more dramatic changes in decision rules.

A. *Sixth Amendment:* Massiah

The strongest example of constancy in conduct rules is the continuity of the Supreme Court's Sixth Amendment jurisprudence over time. The Sixth Amendment contains a large number of discrete provisions, united by their apparent relationship to the conduct of criminal trials.[22] Yet in the *Massiah* case, the Warren Court revolutionized that understanding of the amendment by holding that the provision guaranteeing "assistance of counsel" in "criminal prosecutions" extended not only to assuring the competent service of counsel at the trial or related judicial proceedings, but also to restraining the conduct of law enforcement agents on the streets.[23]

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20. 377 U.S. 201 (1964).

21. 367 U.S. 643 (1961).

22. The Sixth Amendment reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

23. Hence, when I refer to the Court's "Sixth Amendment jurisprudence" for the purposes of this paper, I mean its cases relating to police practices — *Massiah* and its progeny — all of which fall under the "assistance to counsel" rubric.

In *Massiah,* a federal agent had obtained, without Massiah's knowledge, the agreement of one of Massiah's co-defendants to engage Massiah in conversation about the narcotics charges they were jointly facing while the agent listened by way of a radio transmitter installed under the front seat of the co-defendant's car. Massiah had already been formally charged and had retained a lawyer to represent him; he was free on bail at the time of the conversation at issue. The Court held that the Sixth Amendment guarantee of assistance of counsel was violated whenever the government "deliberately elicited"[24] incriminating statements from a criminal defendant "after he had been indicted and in the absence of his counsel"[25] and sought to use such statements as evidence against him at trial.[26]

In essence, the *Massiah* decision created a privilege against the use of any incriminating testimony intentionally procured by the government from the defendant after the formal charging decision, absent an explicit waiver of the Sixth Amendment right to counsel, which the Court later made fairly difficult to obtain.[27] *Massiah* thus represents a substantial, even dramatic extension of restrictions on police conduct, reaching law enforcement practices that otherwise were condoned under the Fourth or Fifth Amendments, even as construed by the Warren Court. Under the Fourth Amendment, the Court held that the elicitation of incriminating statements from a suspect by the government through the use of informants violated no reasonable expectation of privacy of the suspect because the suspect was not entitled to rely upon his "misplaced confidence" that his friends and associates would not "reveal his wrongdoing."[28] But *Massiah* essentially precludes the use of informants to elicit incriminating statements from defendants after the for-

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24. 377 U.S. at 206.

25. 377 U.S. at 206.

26. *See* 377 U.S. at 205-06. The *Massiah* right, as well as the *Miranda* right, are explicitly rights not to have evidence admitted at trial, rather than rights to be free from any particular form of treatment. They thus represent a challenge to my attempt to divide criminal procedure into conduct rules and decision rules. I call *Massiah* and *Miranda* conduct rules, but they both include as a necessary part of the prohibited conduct a court's decision to admit evidence at trial. Presumably, police conduct in violation of these rules, without the admission at trial of the offending evidence, would not itself violate the Constitution. (At least, it would not violate the Sixth or Fifth Amendments; it might still violate the Due Process Clause). I attempt, nonetheless, to maintain my distinction. Because the vast majority of police behavior that violates *Massiah* and *Miranda* is motivated solely or primarily by the desire to obtain evidence to admit at criminal trials, it makes sense to view the rules as rules of general conduct. And, indeed, both courts and the police themselves have tended to view *Massiah* and *Miranda* in just this way — as a code of constitutionally mandated police conduct.

27. *See infra* text accompanying notes 41-52.

28. Hoffa v. United States, 385 U.S. 293, 302 (1966).

mal charging decision. Under the Fifth Amendment, the Court held that special waivers of the Fifth Amendment's rights to silence and counsel needed to be obtained only if a suspect was subject to the "inherently compelling pressures" of interrogation while in police custody.[29] Yet *Massiah* applies to all elicitation of incriminating statements post-indictment, whether or not the defendant is in custody, and whether or not the government's actions constitute "interrogation" for the purposes of *Miranda*. Finally, under the Fifth Amendment, the test for the admissibility of incriminating statements elicited outside of the custodial interrogation context remained the old "voluntariness" standard,[30] whereas *Massiah* prohibits the use of statements deliberately elicited from an indicted defendant, even when, as in Massiah's own case, it was apparent that they were made voluntarily. The significance of the effect of the *Massiah* rule on government investigatory practices was reflected at the time in the vehemence of the arguments made on behalf of the federal government before the *Massiah* Court[31] and continues to be reflected a bit more indirectly today in the ongoing controversy about whether or not federal prosecutors should be subject to state ethical rules barring communications with represented defendants in the absence of their counsel.[32]

In light of both the significance of the *Massiah* ruling to federal and state criminal investigations[33] and the ruling's demonstration of the Warren Court's notorious penchant for novel, categorical, and sweeping

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29. Miranda v. Arizona, 384 U.S. 436, 467 (1966).

30. *See* Spano v. New York, 360 U.S. 315, 323-24 (1959) (asking whether the suspect's will was overborne in light of the totality of the circumstances).

31. *See* Brief for the United States at 26-28, Massiah v. United States, 377 U.S. 201 (1964) (No. 63-199).

32. This controversy deals with former Attorney General Richard Thornburgh's attempt to exempt federal prosecutors altogether from the ubiquitous state ethical rules barring contact with persons represented by counsel. The ethical "no contact" rule differs from the *Massiah* rule in that it is obviously nonconstitutional in origin, applies only to the conduct of lawyers as opposed to law enforcement agents, applies to civil and criminal cases alike, does not turn on whether or not the represented person is "charged" with a crime, and is enforced primarily by disciplinary proceedings as opposed to exclusion of evidence at trial. Yet the government's concerns that state "no contact" rules will interfere unduly with its investigatory activities, *see* F. Dennis Saylor, IV & J. Douglas Wilson, *Putting a Square Peg in a Round Hole: The Application of Model Rule 4.2 to Federal Prosecutors*, 53 U. PITT. L. REV. 459 (1992), echo many of the concerns voiced by the Solicitor General in *Massiah* itself. *See generally* Symposium, 53 U. PITT. L. REV. 271 (1992) (discussing state ethics rules and federal prosecutors); Alafair S.R. Burke, Note, *Reconciling Professional Ethics and Prosecutorial Power: The No-Contact Rule Debate*, 46 STAN. L. REV. 1635 (1994).

33. One year prior to the *Massiah* decision, the Court had incorporated the Sixth Amendment right to appointed counsel for indigent defendants. *See* Gideon v. Wainwright, 372 U.S. 335 (1963). One year after *Massiah*, the Court summarily reversed a

rules in the constitutional criminal procedure area, it is truly remarkable that the rule not only survived, but flourished in the Burger and Rehnquist Courts. While the Warren Court followed *Massiah* by enforcing it through summary disposition,[34] the Burger Court was silent for some time on the merits of *Massiah,* neither "following" nor "limiting" (nor even "explaining" or "questioning") the ruling, at least according to Shepard's use of those terms.[35] Then, in 1977, the Burger Court in *Brewer v. Williams,*[36] dramatically and emphatically reaffirmed the *Massiah* rule, holding inadmissible the incriminating statements of the murderer of a 10-year-old girl because the defendant had been induced to reveal the location of the body of his young victim by the famous "Christian burial speech" given by a police detective during a long car ride after the defendant's Sixth Amendment right to counsel had attached.[37]

The *Williams* decision is notable for my purpose of demonstrating constancy in police conduct rules in a number of ways. Perhaps most strikingly, the Supreme Court not only reaffirmed *Massiah,* it rejected the urging of twenty-one state Attorneys General to overrule *Miranda.*[38] Given that the lower court had ruled for Williams on both Sixth and Fifth Amendment grounds, it is not surprising that "many observers thought the Court might take the occasion to overrule the controversial *Miranda* doctrine."[39] Yet *Miranda*'s conduct rule survived unscathed.[40] Moreover, *Massiah*'s rule was revitalized — not only reaffirmed, but actually strengthened in at least three significant ways.

First, *Williams* established a fairly high standard for the waiver of the *Massiah* right to counsel. The *Massiah* Court had not dealt with the

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state court decision attempting to distinguish and evade the *Massiah* rule. *See* McLeod v. Ohio, 381 U.S. 356 (1965) (per curiam).

34. *See McLeod,* 381 U.S. at 356.

35. *See* SHEPARD'S FEDERAL CITATIONS inside cover (8th ed. 1995). Scholars agree that the fate of *Massiah* was very much an open question until 1977. *See, e.g.,* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.4(d), at 305 (2d ed. 1992) (arguing that the status of the *Massiah* holding was "uncertain" until "the Supreme Court breathed new life into [it]" in the *Williams* case); YALE KAMISAR, POLICE INTERROGATION AND CONFESSIONS: ESSAYS IN LAW AND POLICY 160 (1980) ("Until the Christian burial speech case *[Williams]* was decided a year ago, lasting fame had eluded *Massiah* . . . .").

36. 430 U.S. 387 (1977).

37. 430 U.S. at 392-93, 404-06.

38. An organization called Americans for Effective Law Enforcement and 21 state Attorneys General joined in an amicus brief in *Brewer v. Williams* urging the reconsideration and rejection of *Miranda. See* 430 U.S. at 389.

39. Phillip E. Johnson, *The Return of the "Christian Burial Speech" Case,* 32 EMORY L.J. 349, 352 (1983).

40. *See infra* section II.B.

issue of whether and how the new Sixth Amendment right it conferred could be waived, because that issue is simply not presented when a defendant does not even realize that he is dealing with a government agent. But in *Williams,* the defendant knew that he was dealing with the police, and his capitulation to the subtle entreaties of the detective led the government to claim that Williams had waived any right to counsel that he may have had. Accepting the possibility that a defendant may waive the Sixth Amendment right to counsel without initially having counsel present (as the Court had already accepted in the Fifth Amendment right to counsel context[41]), the *Williams* Court nonetheless invoked the *Johnson v. Zerbst*[42] waiver standard, which required the government to prove "an intentional relinquishment or abandonment of a known right."[43] This standard requires at a minimum some form of notice to the defendant of his right to have counsel present. While the *Zerbst* standard was a familiar one by 1977, only four years earlier in *Schneckloth v. Bustamonte,*[44] the Court had used a less rigorous "voluntariness" standard to determine whether defendants had consented to a search by police officers, thus effectively "waiving" their Fourth Amendment rights. Applying this lower standard, the *Bustamonte* Court held that defendants need not be informed by the police of their right to refuse consent in order for their consent to a search to be deemed voluntary. In justifying its use of a lower standard, the Court distinguished Fourth Amendment rights, which protect privacy at the cost of truth, from "trial" rights — such as the right to assistance of counsel — which promote truth-seeking by ensuring fair judicial proceedings.[45] Yet the *Massiah* rule transported the traditional "trial" right to counsel from the courtroom to — in the *Williams* case — the backseat of a police car. Thus, it is notable that despite the apparently investigative aspect of the police conduct in *Williams,* the Court continued to apply the high waiver standard reserved for "trial" rights.[46]

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41. *See* Miranda v. Arizona, 384 U.S. 436, 444 (1966). The Court later held that the warnings sufficient to permit waiver of the Fifth Amendment right to counsel — i.e., the *Miranda* warnings — were also sufficient to permit waiver of the Sixth Amendment right to counsel at the same time. *See* Patterson v. Illinois, 487 U.S. 285 (1988). Thus, a defendant in custody whose Sixth Amendment right to counsel already had attached could be read *Miranda* warnings and, if the undefined "right to have counsel present" was waived, could be interrogated in accordance with both the Fifth and Sixth Amendments.

42. 304 U.S. 458 (1938).

43. 304 U.S. at 464.

44. 412 U.S. 218 (1973).

45. *See* 412 U.S. at 241.

46. *See* JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 157-58 (1993) (arguing that the *Massiah* rule is not a proper interpretation of the Sixth Amend-

The Burger Court later established an even stricter standard for establishing a valid waiver after a defendant actually had invoked the Sixth Amendment right to counsel. In *Michigan v. Jackson*[47] the Court held that when a defendant entitled to representation by counsel invoked that right, any later waiver of the right was invalid if it was the product of police-initiated interrogation. In essence, the Court imported the *Edwards v. Arizona*[48] bright-line rule from the *Miranda* invocation and waiver context.[49] Yet the *Edwards* rule worked even more powerfully in the Sixth Amendment context: the Court held that if a defendant asserted the right to counsel at arraignment, such an invocation triggered the no-initiation rule regardless of the fact that the request for counsel was general and not targeted specifically to police interrogation,[50] and regardless of the fact that the police might be ignorant of the fact that the defendant had asserted the right in court.[51] The only limitation that the Court imposed on the broad sweep of this powerful prophylactic rule is that the invocation of the Sixth Amendment right to counsel is "offense specific," so that if a defendant at an arraignment invoked the right to counsel as to those charges, the police still could initiate questioning in the absence of counsel about unrelated charges about which the right to counsel had neither attached nor been invoked at the time.[52]

Second, the *Williams* decision established a fairly broad definition of what constitutes "deliberate elicitation" of incriminating statements. After all, Detective Leaming had been careful not to ask Williams any direct questions about the location of the victim's body. Instead, he began the "Christian burial speech" with the vague injunction: "I want to give you something to think about while we're traveling down the road . . . ." When Williams responded to the Detective's suggestion that "this little girl should be entitled to a Christian burial" with a question, Leaming then said, "I do not want you to answer me. I don't want to discuss it any further. Just think about it as we're riding down the

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ment right to counsel because it is unrelated to that provision's historical goal of promoting truth-seeking).

47. 475 U.S. 625 (1986).

48. 451 U.S. 477 (1981).

49. *See infra* text accompanying notes 84-88.

50. *See Jackson,* 475 U.S. at 633 (holding that a defendant's invocation of the right to counsel at arraignment should lead courts to "presume that the defendant requests the lawyer's services at every critical stage of the prosecution").

51. *See* 475 U.S. at 634 (holding that "[o]ne set of state actors (the police) may not claim ignorance of defendants' unequivocal request for counsel to another state actor (the court)").

52. *See* McNeil v. Wisconsin, 501 U.S. 171 (1991).

road."[53] The Court could have narrowed the meaning of "deliberate elicitation" to some form of direct questioning (whether by an informant, as in *Massiah,* or by a known law enforcement agent), but it chose instead to recognize that an experienced detective like Leaming had means at his disposal to elicit incriminating statements "just as surely as — and perhaps more effectively than — if he had formally interrogated [Williams]."[54] *Williams* not only set a generous standard for Sixth Amendment "elicitation," but its loose equation of Detective Leaming's tactics with "interrogation"[55] also set the stage for a fairly broad definition of interrogation for the purposes of the *Miranda* Fifth Amendment right to counsel (and silence).[56]

Finally, the *Williams* Court made clear that it was not merely indictment, as in the *Massiah* case, that signalled the need for counsel when law enforcement agents sought to elicit incriminating statements from a defendant. Rather, the fact that Williams had been arraigned before a judicial officer sufficed to indicate that "judicial proceedings had been initiated against [him]."[57] The Court later solidified and expanded this holding in two ways. First, the Court made clear that it was not necessary for the defendant to enter a plea at an arraignment (thereby rendering the arraignment a "critical stage" in the judicial process requiring the presence of counsel) for the arraignment to count as the initiation of judicial proceedings.[58] Second, the Court established that arraignment or formal charging of the defendant gave rise to the right to counsel regardless of whether the defendant was in fact repre-

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53. Brewer v. Williams, 430 U.S. 387, 392-93 (1977).

54. 430 U.S. at 399. The Court later reaffirmed, in the jailhouse informant context, that deliberate elicitation did not require actual interrogation. In United States v. Henry, 447 U.S. 264 (1980), the use of a paid informant who engaged in conversations with the incarcerated defendant was held to violate the Sixth Amendment even though the informant had been instructed "not to initiate any conversation with or question" the defendant. 447 U.S. at 266. In Kuhlmann v. Wilson, 477 U.S. 436 (1986), the Court backtracked from the broadest possible reading of *Henry* by clarifying that an informant could, consistent with the Sixth Amendment, act as a mere "listening post." 477 U.S. at 456 n.19 (quoting Maine v. Moulton, 474 U.S. 159, 177 n.13 (1985)). But once again, the Court reiterated that the *Massiah* rule covered not only direct questioning but also "secret interrogation by investigatory techniques that are the equivalent of direct police interrogation." 477 U.S. at 459.

55. *See Williams,* 430 U.S. at 399.

56. *See* Rhode Island v. Innis, 446 U.S. 291 (1980), discussed *infra* text accompanying notes 76-80.

57. *Williams,* 430 U.S. at 399.

58. *See* Michigan v. Jackson, 475 U.S. 625 (1986). Some states have an arraignment procedure that constitutes merely the defendant's first appearance before a judicial officer rather than a formal pleading stage.

sented by appointed or retained counsel at the time the government sought to elicit incriminating statements.[59]

In sum, if one were to look only at the treatment of the Sixth Amendment police conduct rules established by the Warren Court in the hands of the Burger and Rehnquist Courts, one could not possibly conclude that any sort of "counter-revolution" occurred. Indeed, it would be only fair to acknowledge that the later Courts actually have strengthened *Massiah,* rendering its dictates both clearer and more potent today than they were in 1964.

B. *Fifth Amendment:* Miranda

The later Courts' treatment of *Miranda* — the Warren Court's primary contribution to police conduct rules in the Fifth Amendment context — is less starkly positive than their treatment of *Massiah.* Yet given the vociferous outcry against *Miranda,*[60] which was clearly the most notorious (to detractors) of the Warren Court's criminal decisions, *Miranda*'s basic requirements — that police administer set warnings and obtain valid waivers before statements obtained as a result of custodial interrogation may be admitted — have remained largely, even surprisingly, unaltered. Not only did the Burger and Rehnquist Courts decline opportunities to overrule *Miranda* outright, but they also elaborated on the major components of the *Miranda* conduct rules in ways that often stabilized and sometimes even strengthened *Miranda*'s restraints on custodial interrogation of suspects. In particular, the elaborations of the meaning of "custody" and "interrogation" and the rules for obtaining valid waivers after the invocation of *Miranda* rights illustrate significant stability in the *Miranda* regime. And the decisions that have created exceptions to the broad reach of *Miranda*'s conduct rules, while not insignificant, do not come close to outweighing either the relative stability in the rest of the doctrine or the significance of the changes in decision rules, which I discuss in Part III.

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59. *See* Edwards v. Arizona, 451 U.S. 477 (1981) (citing McLeod v. Ohio, 381 U.S. 356 (1965)).

60. *See* BAKER, *supra* note 14, at 170, 201 (describing in detail the "uproar" that resulted from the *Miranda* decision and the "tirades" against it). Perhaps the most telling expression of hostility to *Miranda* came in Congress's purported "overruling" of the decision in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 3501-3501(b) (1994), which required the admission into evidence in federal courts of all voluntary confessions and re-instituted the pre-*Miranda* totality of the circumstances approach to the issue of voluntariness. This legislation remains on the books, although it has not been relied upon by the federal government, and thus its constitutionality has not been ruled upon by the federal courts.

First, in light of the intense opposition that it inspired, it is notable simply that *Miranda* was not overruled directly.[61] As remarked above, the Court ignored the plea of almost half of the nation's state Attorneys General to do so in 1977.[62] And in the years that followed, two of the "conservative" appointees to the Court expressly noted their opposition to overruling *Miranda.*[63] But perhaps it is not so surprising that the Court was reluctant to overrule *Miranda* directly despite its apparent disagreement with the decision:[64] either the members of the Court sincerely felt bound by the doctrine of *stare decisis,* or they more calculatingly realized that overruling such a well-known decision might appear to be "political" in exactly the way in which the Warren Court was maligned for being.[65] What *is* surprising is the extent to which the Burger and Rehnquist Courts, despite opportunities to limit *Miranda* without overruling it directly, left relatively intact *Miranda*'s requirements as rules of conduct for police officers.

Two significant opportunities to cut back on *Miranda* came in the inevitable cases requiring the Court to give further content to the idea of "custodial interrogation."[66] Yet the Court's later construction of the bounds of "custody" and "interrogation" for the purposes of *Miranda* was fairly generous. In *Miranda* itself, Chief Justice Warren had defined "custody" for the Court as being "taken into custody or otherwise deprived of . . . freedom of action in any significant way."[67] The Warren Court had gone on to conclude that a suspect could be in "custody" for *Miranda* purposes while serving a prison sentence for an

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61. *See* Louis Michael Seidman, Brown *and* Miranda, 80 CAL. L. REV. 673, 719 (1992) ("[T]he failure of *Miranda*'s opponents to overturn a five-to-four decision that has always been unpopular borders on the miraculous.").

62. *See supra* note 38 and accompanying text.

63. *See* New York v. Quarles, 467 U.S. 649, 660 (1984) (O'Connor, J., concurring in part and dissenting in part) ("*Miranda* is now the law . . . ."); Rhode Island v. Innis, 446 U.S. 291, 304 (1980) (Burger, C.J., concurring) ("I would neither overrule *Miranda,* disparage it, nor extend it at this late date.").

64. *See* Geoffrey R. Stone, *The Miranda Doctrine in the Burger Court,* 1977 SUP. CT. REV. 99, 99 (noting that the majority of the members of the Burger Court apparently believed *Miranda* "to be seriously misguided or worse").

65. *See* David Kairys, *Legal Reasoning, in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 11, 15 (David Kairys ed., 1982) (arguing that the Court's "decision not to overrule is based on the likely public perception of and reaction to such a decision and the effect on the Court's power and legitimacy").

66. *See* Miranda v. Arizona, 384 U.S. 436, 545 (1966) (White, J., dissenting) ("Today's decision leaves open such questions as whether the accused was in custody . . . [and] whether his statements were spontaneous or the product of interrogation . . . .").

67. 384 U.S. at 444.

offense different from the one he was questioned about,[68] or even while he remained in his own home (indeed, his own bedroom), if surrounded by police officers.[69] Although in a later case the Burger Court found that a suspect questioned in his home was not in custody under the particular facts of that case,[70] the Court soon thereafter cited the two Warren Court custody decisions approvingly,[71] and it has not to this day questioned or overruled them. While the Burger and Rehnquist Courts have established that mere presence in a police station does not constitute custody if it is voluntary,[72] and that "traffic stops" of motorists generally do not constitute custody,[73] both of these cases purported to construe rather than to displace the "significant deprivation of freedom" standard articulated in *Miranda* itself. Most significantly, the Burger Court established that this standard was to be determined from the point of view of a reasonable person *in the suspect's position,*[74] thus rendering irrelevant easily fabricated and virtually undisprovable testimony from police officers about their (benign) perceptions of the situation or intentions toward the suspect. The Rehnquist Court, too, has validated and enforced vigorously this "objective suspect" standard.[75]

The elaboration of the standard for "interrogation" has been, if anything, more generous. In *Rhode Island v. Innis*[76] the Court took the important step of rejecting an easy way to cut out the heart of the concept of "interrogation" when it held that interrogation was not limited to express questioning of a suspect but also encompassed "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the sus-

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68. *See* Mathis v. United States, 391 U.S. 1 (1968).

69. *See* Orozco v. Texas, 394 U.S. 324 (1969).

70. *See* Beckwith v. United States, 425 U.S. 341 (1976) (holding that the mere fact that the I.R.S.'s criminal investigation had "focused" on the defendant was insufficient to render an interview in his home "custodial" for the purpose of *Miranda*).

71. *See* Oregon v. Mathiason, 429 U.S. 492, 494-95 (1977) (per curiam).

72. *See* 429 U.S. at 492. Although the *Mathiason* decision did little to change the governing standard for custody, its application of that standard to the defendant, a parolee "invited" to the police station and told of strong (albeit false) evidence against him, seems somewhat dubious. It is questionable whether *Mathiason* would be decided the same way today, now that the Court has clarified that the correct standard views the situation from the perspective of a person in the defendant's shoes.

73. *See* Berkemer v. McCarty, 468 U.S. 420 (1984).

74. *See* 468 U.S. at 442.

75. *See, e.g.,* Stansbury v. California, 114 S. Ct. 1526 (1994) (per curiam) (reversing and remanding because the state court's determination that the defendant was not in custody relied in part on the testimony of police officers as to their subjective impressions, and citing numerous other Supreme Court cases rejecting such subjective testimony).

76. 446 U.S. 291 (1980).

pect."[77] This definition of interrogation often will preclude the police from evading the *Miranda* requirements by engaging in powerful psychological ploys to elicit incriminating statements without questioning suspects directly — such as by confronting a suspect with physical evidence (real or fabricated); confronting a suspect with an accomplice's confession (real or fabricated); staging a (real or fabricated) identification of the defendant; or musing out loud, perhaps to another officer, about the (real or fabricated) strength of the government's case or the likely fate of the defendant.[78] The Court's *application* of this standard in *Innis* itself seems rather dubious,[79] but the standard itself reflects an important acceptance of one of *Miranda*'s central insights — that psychological ploys lay at the center of the "inherent compulsion" of the custodial atmosphere.[80]

The strongest support for *Miranda*'s conduct rules in the Burger and Rehnquist Courts is apparent in the cases exploring whether and how police may obtain valid waivers after a suspect initially has invoked the rights to silence or counsel pursuant to *Miranda*. The most draconian rule, of course, would have precluded any waiver after invocation in any circumstances. Such a rule, however, would allow for no

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77. 446 U.S. at 301 (footnote omitted). The Supreme Court expressly noted that the "reasonably likely to elicit" standard for *Miranda* interrogation was not exactly the same as the "deliberately elicit" standard for *Massiah* interrogation, *see infra* text accompanying notes 53-56, but it seems likely that the generous *Massiah* standard established in Brewer v. Williams, 430 U.S. 387 (1977), influenced the Court's decision in *Innis* three years later.

78. Although these strategies are now generally considered "interrogation" so as to require the administration of *Miranda* warnings and a waiver of *Miranda* rights by a suspect in custody, it is important to note that the post-Warren Court has found nothing wrong with the use of deceptive interrogation tactics (such as falsely characterizing the evidence against a suspect) as long as they are "laundered" through the *Miranda* process. In no case has the Burger or Rehnquist Court found a confession or a waiver of rights to be "involuntary" as a result of such deceptive techniques. While this tolerance might be viewed as an important limit on *Miranda* as a conduct rule, it was strongly foreshadowed by a decision of the Warren Court itself holding that when an interrogating officer falsely told a suspect that his co-defendant had already confessed, such a misrepresentation did not render the suspect's ensuing statements involuntary. *See* Frazier v. Cupp, 394 U.S. 731 (1969).

79. The Court found no interrogation despite a colloquy among several officers in the presence of a suspect who was being transported to the stationhouse about the likelihood that a child at a nearby school for handicapped children might stumble upon the shotgun that the officers suspected the suspect had hidden in area (and despite the fact that the suspect then led the officers to the gun). *See Innis*, 446 U.S. at 291.

80. Yale Kamisar, too, has argued that the *Innis* Court's generous standard is more important than its dubious application, asserting that "in *Miranda*'s hour of peril, the *Innis* Court rose to its defense." Yale Kamisar, Miranda: *The Case, the Man, and the Players*, 82 MICH. L. REV. 1074, 1088 (1984) (reviewing LIVA BAKER, MIRANDA: CRIME, LAW AND POLITICS (1983)).

possibility that a suspect ever could change his or her mind. The Court did not go quite so far, but it nonetheless erected substantial barriers to obtaining waivers after invocation — barriers that prevented the *Miranda* requirements from slipping back toward the old flexible-but-indeterminate "voluntariness" standard.

The Burger Court declined its biggest opportunity to gut *Miranda* in 1975, when it held in *Michigan v. Mosley*,[81] that the police must "scrupulously honor[]" a suspect's assertion of his right to silence.[82] Crucially, the Court rejected the suggestion of Justice White, the author of a vehement dissent in *Miranda* itself, that the only question should be whether or not the waiver was made voluntarily, regardless of whether the waiver was obtained before or after an invocation of the right to be silent. Had Justice White's suggestion been accepted, there would have been no limit to the number of times police interrogators could approach a suspect in custody despite the suspect's declaration of a desire not to speak, so long as the ultimate decision to waive the right to silence could be deemed voluntary. The centerpiece of the *Miranda* warnings — their guarantee of a "right" to silence — thus would have been seriously undermined by the sanctioning of ongoing police efforts to obtain a statement even in the face of an assertion of the right to silence. To ask merely whether waivers obtained under such circumstances were "voluntary" would virtually recreate the old "voluntariness" regime that *Miranda* had rejected. Had the Burger Court wished to eviscerate *Miranda* without overruling it, *Mosley* presented a golden opportunity — which the Court decisively rejected.[83]

The Court's approach to waiver after invocation of the *Miranda* right to counsel has been even more severe than its treatment of waiver after invocation of the right to silence. In *Edwards v. Arizona*[84] the Burger Court held that once a suspect asserts the right to counsel in response to *Miranda* warnings, police-initiated interrogation is banned completely. Not even "scrupulously honoring" a defendant's assertion

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81. 423 U.S. 96 (1975).

82. 423 U.S. at 104 (internal quotation marks omitted).

83. While the *Mosley* Court did find valid Mosley's waiver after his initial invocation of his right to silence, it did so on the narrow facts of the case, which presented five circumstances not likely to be found in a large number of cases: after his assertion of his right to silence, Mosley was (1) left alone for more than two hours; (2) moved to a different location; (3) approached by a different police officer; (4) readvised of his *Miranda* rights; and (5) questioned about a different offense. *See* 423 U.S. at 97-98. The Court did not indicate what other circumstances might constitute "scrupulous honoring" of a suspect's assertion of his right to silence, and it has not revisited the question since.

84. 451 U.S. 477 (1981).

will do; the police are strictly forbidden by *Edwards*' bright-line rule from initiating "interrogation," as generously defined by *Innis*. The Rehnquist Court took this powerful prophylactic rule and pushed it two steps further. First, in 1988 the Court held that *Edwards* was not merely specific to the offense for which the defendant was in custody; once a defendant invokes the Fifth Amendment right to counsel, the police may not initiate interrogation with regard to *any* offense.[85] Then, in 1990, the Court held that even after a defendant who had invoked the Fifth Amendment right to counsel had consulted with counsel, police still could not re-initiate interrogation unless counsel *was present* at the re-initiation.[86] In language very reminiscent of that of *Miranda* itself, the Court insisted on the need for "particular and systematic assurances that the coercive pressures of custody [are] not the inducing cause" of waivers and admissions.[87] Indeed, Justice Scalia's 1990 dissent eerily echoed Justice White's 1966 *Miranda* dissent, asserting that such powerful rules reflect a misguided disdain for all confessions.[88]

True, the Burger and Rehnquist Courts also have issued a number of opinions that have limited to some extent the restraining force of the *Miranda* conduct rules. In the waiver-after-invocation context, the Court has made it fairly easy for a court to find that the suspect rather than the police "re-initiated" contact so as to avoid the *Edwards-Minnick* rule.[89] And the Court has made it increasingly less difficult for police to obtain waivers in the first instance by allowing waivers to be implied as well as express,[90] by permitting some deviation from the specific cate-

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85. *See* Arizona v. Roberson, 486 U.S. 675 (1988). Contrast the broad reach of the *Miranda* right to counsel with the offense-specific nature of the Sixth Amendment right to counsel. *See* McNeil v. Wisconsin, 501 U.S. 171 (1991).

86. *See* Minnick v. Mississippi, 498 U.S. 146 (1990).

87. 498 U.S. at 155.

88. *Compare* Miranda v. Arizona, 384 U.S. 436, 537-38 (1966) (White, J., dissenting) ("The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions. . . . [A]s the Court all but admonishes the lawyer to advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should be not used against him in any way, whether compelled or not.") *with Minnick*, 498 U.S. at 167 (Scalia, J., dissenting) ("We should, then, rejoice at an honest confession, rather than pity the 'poor fool' who has made it; and we should regret the attempted retraction of that good act, rather than seek to facilitate and encourage it.").

89. *See* Oregon v. Bradshaw, 462 U.S. 1039, 1042 (1983) (holding that a suspect's general informational question posed after his invocation of the right to counsel — "Well, what is going to happen to me now?" — constituted initiation of contact by the suspect so as permit the police to seek and obtain a valid waiver without first providing counsel).

90. *See* North Carolina v. Butler, 441 U.S. 369, 373 (1979) (holding valid a defendant's implicit waiver of his *Miranda* rights despite his refusal to sign an "Advice of Rights" form, asserting that "in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated").

chism of the *Miranda* warnings,[91] and by condoning the continuation of interrogation in the face of a suspect's "equivocal" or "ambiguous" allusion to *Miranda* rights.[92] The Court even has created one wholesale exception to *Miranda* by permitting custodial interrogation of suspects when "public safety" demands it.[93]

These decisions limiting the scope of *Miranda* are not negligible, but they do not nearly outweigh the stability in the rest of the Court's *Miranda* doctrine. Indeed, I would view many of the constraining decisions as a reaction to such stability. It is not accidental that the Court's decisions cutting back on *Miranda* focus largely on making it easier to obtain valid waivers in the first instance: the consequences of an invocation of the right to silence or counsel or both are so stringent that they have created countervailing pressure in the doctrine to create realistic opportunities for waiver prior to invocation. And while the public safety "exception" to *Miranda* announced in *Quarles* led to dire predictions about the future of the *Miranda* doctrine,[94] that exception has not spawned any others, nor has the Court expanded it beyond its fairly narrow facts. Indeed, the *Quarles* exception to *Miranda*'s conduct rules has had a much less significant impact on the admissibility of confessions than have changes in decision rules relating to *Miranda,* which I discuss below.[95]

C. *Fourth Amendment*

It is more difficult to assess the extent to which the Burger and Rehnquist Courts have departed from the police conduct rules of the Warren Court in the Fourth Amendment area than in the Fifth and Sixth

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91. *See* Duckworth v. Eagan, 492 U.S. 195, 198 (1989) (holding that the police could add, without violating *Miranda,* the following caveat to the warning about the right to appointed counsel: "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court." (internal quotation marks omitted)).

92. *See* Davis v. United States, 114 S. Ct. 2350, 2353, 2355 (1994) (holding that the defendant's statement during interrogation, "Maybe I should talk to a lawyer," was not an assertion of the right to counsel and permitting the police to continue interrogation unless a suspect "articulate[s] his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney" (internal quotation marks omitted)).

93. *See* New York v. Quarles, 467 U.S. 649 (1984) (holding that the question, "Where is the gun?" asked by a police officer of a just-apprehended suspected armed rapist who was wearing an empty shoulder holster fell within a justified "public safety" exception to the *Miranda* doctrine).

94. *See, e.g.,* Marla Belson, Note, *"Public Safety" Exception to* Miranda: *The Supreme Court Writes Away Rights,* 61 CHI.-KENT L. REV. 577 (1985); Mary M. Keating, Note, New York v. Quarles: *The Dissolution of* Miranda, 30 VILL. L. REV. 441 (1985).

95. *See infra* Part III.

Amendment areas because it is harder to identify with an emblematic case or two the Warren Court's vision of appropriate Fourth Amendment police conduct. The most famous and controversial Fourth Amendment decision of the Warren Court was not a conduct rule case at all; rather, *Mapp v. Ohio*[96] was a decision rule case that extended the exclusionary rule for unconstitutionally seized evidence to the states without purporting to alter the definition of unconstitutional police behavior. The Warren Court's cases that do attempt to mark the bounds of constitutional police conduct under the Fourth Amendment are far less emphatic and far more ambivalent than its Fifth and Sixth Amendment conduct rule cases. Nonetheless, it seems fair to say that one principal idea about the Fourth Amendment that characterized the Warren Court was the centrality of the warrant process. In a much quoted sentence, Justice Stewart wrote for the Court in 1967: "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment — subject only to a few specifically established and well-delineated exceptions."[97] The importance of the judicial warrant and the concern that exceptions to the warrant process be *few* and *clear* is the police-conduct rule whose treatment I will trace in the Burger and Rehnquist Courts. First, I sketch three ways in which these later Courts actually validated and even expanded the Warren Court vision. Then, I identify the three most significant ways in which the later Courts departed from the Warren Court paradigm and attempt nonetheless to maintain my claim of relative stability in the doctrine.

In a series of cases dealing directly with the scope of the warrant requirement and the nature of the warrant process, the Burger and Rehnquist Courts have explicitly endorsed and expanded upon the preference for warrants expressed by Justice Stewart on behalf of the Warren Court. In *Payton v. New York*[98] the Court held that warrantless entries into a home in order to make an arrest were prohibited by the Fourth Amendment, despite the fact that a substantial majority of the states that had considered the issue permitted such warrantless entries. The Court distinguished its previous holding that arrests in a public place do not require a warrant so long as the arresting officer has probable cause to believe that the arrestee is a felon,[99] which relied upon not merely a majority view, but "virtual unanimity" among the states[100] ad-

96. 367 U.S. 643 (1961).
97. Katz v. United States, 389 U.S. 347, 357 (1967) (footnote omitted).
98. 445 U.S. 573 (1980).
99. *See* United States v. Watson, 423 U.S. 411 (1976).
100. *Payton*, 445 U.S. at 600.

hering to a "well-settled common-law rule."[101] In the absence of such overwhelming support for an exception to the warrant requirement, the Court adhered to the " 'basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable"[102] — a corollary of the very principal that I have identified with the Warren Court.

The following year, the Court extended *Payton* in order to protect the privacy of a third party whose home was invaded for the arrest of a suspect named in an arrest warrant. The Court held that to execute an arrest warrant for a suspect at the home of a third party, the police also must obtain a search warrant indicating that there has been a judicial determination of probable cause to believe that the suspect is to be found in the third party's home.[103] Once again, the Court relied upon the premise that the warrant process is the presumptive means by which to "safeguard[] an individual's interest in the privacy of his home and possessions against the unjustified intrusion of the police."[104] A few years later, the Court further strengthened this presumptive rule that searches and seizures in the home must be accompanied by a warrant when it narrowed one of the principal exceptions to the rule, holding that "application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed."[105] The Court emphasized that this limitation relied upon prior decisions that "emphasized that exceptions to the warrant requirement are 'few in number and carefully delineated.' "[106] Most recently, the Court held last year that the common-law "knock and announce" requirement — the long-established rule that officers executing a warrant at a home must knock and announce their presence and identity as police officers before entering — was not merely a time-honored and sensible practice, but was constitutionally required under the Fourth Amendment.[107] While the Court recognized, as does the common law, that there are exceptions to

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101. 445 U.S. at 590.

102. 445 U.S. at 586 (quoting Coolidge v. New Hampshire, 403 U.S. 443, 477 (1971)).

103. *See* Steagald v. United States, 451 U.S. 204 (1981).

104. 451 U.S. at 213.

105. Welsh v. Wisconsin, 466 U.S. 740, 753 (1984) (refusing to justify the warrantless arrest of the defendant in his home on a drunk driving charge, finding it immaterial that evidence of his blood alcohol level might be lost).

106. 466 U.S. at 749 (quoting United States v. United States Dist. Ct., 407 U.S. 297, 318 (1972), which in turn quoted the Warren Court's landmark *Katz* opinion).

107. *See* Wilson v. Arkansas, 115 S. Ct. 1914 (1995).

the "presumption in favor of announcement,"[108] its decision nonetheless serves as a reminder that each step of the warrant process is governed by constitutional norms and thus is subject to judicial oversight.

Aside from these cases directly bolstering the warrant requirement, the Burger and Rehnquist Courts were the source of two important doctrines that limited the nature and scope of exceptions to the warrant requirement. First, in a set of three cases, the Court resoundingly banned discretionary, suspicionless searches and seizures, even when the state interest was high and the intrusion on the individual was minimal. The Court first rejected the practice of having roving border patrols randomly stop cars on roads near the border in an effort to thwart the surreptitious entry of illegal aliens.[109] Four years later, the Court held both that the police may not stop cars randomly in order to check the motorist's driver's license and car registration[110] and that the police may not stop individuals without individualized suspicion and require them to identify themselves or to explain their presence, even in high drug areas.[111] It is true that these cases left the door wide open to permitting *non*-discretionary, suspicionless searches and seizures in order to achieve the same or similar governmental ends.[112] But the Court's ban on discretionary spot checks by law enforcement agents in the absence of individualized suspicion accomplished two important things. At the level of police practices, it marked a clear and powerful limit to the scope of warrantless searches and seizures. At a more abstract level, it signalled a recognition that, even in the service of important governmental ends, "standardless and unconstrained discretion" remains an "evil"[113] that creates a "grave danger of abuse of discretion"[114] — a recognition that reflects and reinforces the Warren Court's vision of the Fourth Amendment.[115]

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108. 115 S. Ct. at 1918.

109. *See* United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

110. *See* Delaware v. Prouse, 440 U.S. 648 (1979).

111. *See* Brown v. Texas, 443 U.S. 47 (1979).

112. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (permitting fixed checkpoints near the border for discretionless stops of all vehicles passing through, although individual vehicles could be detained for a brief secondary inspection on less than the reasonable suspicion necessary to permit a roving border patrol to stop a car); Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (permitting discretionless stops of all vehicles at a sobriety checkpoint, without reaching the issue of the degree of suspicion necessary to prolong the brief initial stop).

113. *Prouse*, 440 U.S. at 661.

114. 440 U.S. at 662 (internal quotation marks omitted) (quoting *Martinez-Fuerte*, 428 U.S. at 559).

115. One of the staunchest defenders of the Warren Court's view of the Fourth Amendment, Professor Tracey Maclin, has attempted to buttress that view by arguing that "the central meaning of the Fourth Amendment is distrust of police power and dis-

Second, the Court has limited the kinds of factors that may create the reasonable suspicion or probable cause that justifies many searches and seizures in the absence of a warrant. In the same case forbidding suspicionless stops of individuals for identification, the Court also held that mere presence in an area with "a high incidence of drug traffic" could not create the minimum level of suspicion required by the Fourth Amendment.[116] The Court explained that though "[t]he record suggests an understandable desire to assert a police presence . . . [in such an area], that purpose does not negate Fourth Amendment guarantees."[117] Similarly, the Court also established that mere presence at a location where a valid search warrant is being executed does not give rise to the suspicion necessary for the police to conduct even a pat-down frisk.[118] The Court articulated its holding broadly, asserting that "mere propinquity to others independently suspected of criminal activity" is insufficient to permit a search or seizure and citing a Warren Court precedent that had rejected the defendant's association with drug addicts as a basis for searching him for drugs.[119] Finally, the Court never has approved of the use of an individual's flight from the police as a sufficient basis for a valid search or seizure. Though it was asked to so hold in 1988, the Court ducked the issue,[120] despite a concurrence by Justices Kennedy and Scalia noting that they would have found the defendant's flight from the approach of a marked police car sufficient to justify his seizure. Three years later, Justice Scalia intimated again, in dictum, that he would find flight sufficient for seizure,[121] but the state government party to the case apparently considered the position so untenable that it conceded the issue in the state courts.[122] In all of the recent controversy over U.S. District Judge Harold Baer's (temporary) decision to suppress drugs when the police relied heavily on the suspects' flight in order to

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cretion." Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993).

116. Brown v. Texas, 443 U.S. 47, 49 (1979).

117. 443 U.S. at 52.

118. *See* Ybarra v. Illinois, 444 U.S. 85 (1979).

119. 444 U.S. at 91 (citing Sibron v. New York, 392 U.S. 40 (1968)).

120. *See* Michigan v. Chesternut, 486 U.S. 567 (1988) (holding that the defendant was not seized by the police at the time that he discarded the drugs that gave rise to his valid arrest, rather than that his flight from the police justified his seizure).

121. *See* California v. Hodari D., 499 U.S. 621, 623 n.1 (1991) ("That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. See Proverbs 28:1 ('The wicked flee when no man pursueth'). We do not decide that point here . . . .").

122. *See* 499 U.S. at 623 n.1.

justify the search and seizure at issue,[123] it is little noted that the Supreme Court never has permitted the inference that Judge Baer was loath to draw to suffice as the sole basis for such an intrusion.

These three holdings together — prohibiting the use of a person's location, association, or flight, without more, as a sufficient foundation for a search or seizure — substantially limit warrantless searches and seizures by law enforcement agents. If these factors were permitted, without more, to give rise to probable cause or reasonable suspicion, law enforcement agents would have a much reduced need to resort to the warrant process, given that they would have the power to stop and search or frisk large segments of the population virtually at will. These cases, along with the Court's cases banning discretionary spot checks, indirectly support the Warren Court's preference for warrants by precluding some of the potentially largest exceptions to the warrant process.

I do not mean to suggest by the foregoing that the Burger and Rehnquist Courts' constructions of the Fourth Amendment have not moved the understanding of acceptable police practices in any discernible direction. They have, and I now wish to explore the nature of that direction. Although a large number of individual cases have led to claims, by dissenting Justices and commentators, that the Burger or Rehnquist Court has performed the *coup de grace* on the Warren Court's Fourth Amendment jurisprudence,[124] I believe that the most sig-

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123. In United States v. Bayless, 913 F. Supp. 232 (S.D.N.Y. 1996), Judge Harold Baer ruled that the police did not have a reasonable suspicion that Carol Bayless was involved in criminal activity when they stopped her automobile at five o'clock in the morning in the Washington Heights neighborhood of New York City and (successfully) searched it for drugs. The police argued that the defendant's presence at an unusual hour in an area known for its high incidence of drug activity, in addition to the fact that she was driving a car with out-of-state license plates, factored into their decision to pull her over. Critical to the officer's argument that they had the requisite "reasonable suspicion," however, was the observation by one of the officers of several men placing large duffel bags in the trunk of the defendant's car and then running away upon seeing the officers. In his initial ruling, Judge Baer held that even if this officer's testimony were truthful, these factors together did not add up to the suspicion necessary for a constitutional stop. In particular, Judge Baer discounted the importance of the men's flight from the police, noting that given the known level of police corruption in this particular neighborhood, "it would have been unusual" for the men not to have run away from the police. 913 F. Supp. at 242. After a hailstorm of criticism, including some hints that President Clinton might seek his resignation, Judge Baer reversed his initial decision to exclude the evidence. *See* Don Van Natta Jr., *Not Suspicious To Flee Police, Judge Declares*, N.Y. TIMES, Jan. 25, 1996, at B1; Don Van Natta Jr., *Under Pressure, Federal Judge Reverses Decision in Drug Case*, N.Y. TIMES, Apr. 2, 1996, at A1.

124. *See, e.g.*, United States v. Robinson, 414 U.S. 218, 238-39 (1973) (Marshall, J., dissenting) (accusing the majority of "turn[ing] its back" on "fundamental principles" of Fourth Amendment jurisprudence); Greenwood v. California, 486 U.S. 35, 46

nificant changes in police conduct rules can be grouped into three principal categories: (1) the definition of voluntary cooperation with the police, through the doctrines defining "seizures" and "consent"; (2) the definition of "reasonable expectations of privacy," through the doctrines defining "searches"; and (3) the development of a category of searches reflecting "special needs" that render the warrant requirement inapplicable. In each of these areas, there has been a noticeable shift during the Burger and Rehnquist Court eras toward loosening constraints on law enforcement. I argue, however, that this shift does not represent as significant a departure from the Warren Court's Fourth Amendment jurisprudence as might superficially appear, nor does it compare to much greater changes in decision rules that I discuss in more detail below.[125]

The later decisions that are most out of sync with the spirit (if not the letter) of the Warren Court's criminal procedure are the cases involving determinations of what constitutes free and voluntary cooperation with the police. In 1973 in *Schneckloth v. Bustamonte,* the Burger Court held that an individual's consent to a search by the police[126] could be deemed valid even though the person was not informed and, indeed, did not know that he was free to decline the police request for such consent.[127] The Court distinguished *Miranda,* in which the Warren Court had recognized that suspects in some circumstances need information about their rights in order for the waiver of them to be deemed voluntary, by limiting *Miranda*'s insight to its factual context of custodial interrogation.[128] The Court also distinguished the waiver standard for trial rights, which required that the government demonstrate the defendant's "intentional . . . abandonment of a known right or privilege" in order to establish a valid waiver,[129] by essentially creating a hierarchy of constitutional rights with trial rights above Fourth Amendment rights because the former but not the latter have the purpose of

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(1988) (Brennan, J., dissenting) (asserting that "members of our society will be shocked to learn" of the majority's holding); Lynn S. Searle, *The "Administrative" Search from* Dewey *to* Burger: *Dismantling the Fourth Amendment,* 16 HASTINGS CONST. L.Q. 261 (1989); James J. Tomkovicz, California v. Acevedo: *The Walls Close in on the Warrant Requirement,* 29 AM. CRIM. L. REV. 1103 (1992).

125. *See infra* Part III.

126. Presumably, any search falls within the *Schneckloth* holding, whether it is of the defendant's "person[], house[], papers, [or] effects," *see* U.S. CONST. amend. IV, even though the search in *Schneckloth* itself involved a car.

127. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

128. *See* 412 U.S. at 246 ("The considerations that informed the Court's holding in *Miranda* are simply inapplicable in the present case.").

129. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

"promoting the fair ascertainment of truth."[130] Instead of requiring *Miranda*-style warnings or other proof that the defendant had knowledge of the right to refuse consent, the Court held that the validity of consent to search was to be determined by the familiar, pre-*Miranda* "voluntariness" test, which evaluated the totality of the circumstances. The Court simply was unpersuaded by Justice Marshall's argument in dissent that " 'a reasonable person might read an officer's "May I" as the courteous expression of a demand backed by force of law.' "[131]

The Rehnquist Court issued an opinion of similar spirit, though in a slightly different doctrinal context, when it elaborated on the definition of "seizures" under the Fourth Amendment in *Florida v. Bostick*[132] in 1991. The standard that the Court purported to apply — that a seizure of the defendant's person by the police takes place when a reasonable person would not feel free to leave[133] — does not seem very different from a standard that the Warren Court itself might have invented. But its application in *Bostick* led the Court to conclude that "bus sweeps" by law enforcement agents — in which armed officers board interstate buses stopped en route to "request" that some or all of the passengers permit their baggage to be searched for drugs — do not necessarily constitute "seizures" of the passengers.[134] As in *Schneckloth,* the Court was unconvinced that the police conduct at issue necessarily "convey[ed] a message that compliance with their requests [was] required."[135]

There can be no question that both *Bostick* and *Schneckloth* are quite different in tone from the Warren Court's precedents in the Fifth and Sixth Amendment contexts *(Miranda* and *Massiah).* The Warren Court clearly took a much more jaundiced view of the possibility for freedom rather than coercion in interactions between citizens and the police, and its skepticism led it to create strong prophylactic rules designed to prevent the most coercive situations from developing, given the difficulty of identifying such situations *ex post.* It thus seems quite likely that the Warren Court would have approached and resolved the particular issues presented in *Bostick* and *Schneckloth* differently. I cannot and do not wish to minimize the distance in both world-view and

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130. *Schneckloth,* 412 U.S. at 242.

131. 412 U.S. at 275-76 (Douglas, J., dissenting) (quoting Bustamonte v. Schneckloth, 448 F.2d 699, 701 (9th Cir. 1971)).

132. 501 U.S. 429 (1991).

133. *See* 501 U.S. at 435.

134. *See also* INS v. Delgado, 466 U.S. 210 (1984) (holding that INS agents did not "seize" workers when they entered factories to randomly question workers, despite the fact that some of the agents stationed themselves by the factory exits).

135. *Bostick,* 501 U.S. at 435.

doctrinal approach between, say, *Miranda* and *Schneckloth*. The Burger and Rehnquist Courts quite definitely have refused to extend *Miranda*'s concerns and prophylactic solution into the Fourth Amendment arena. These cases thus present something of a challenge to my "relative stability" thesis. The most that can be said in defense of stability of conduct rules in this context across Courts is that the Burger and Rehnquist Courts, in fashioning their "consent" and "seizure" doctrines, never purported to overrule or even limit Warren Court precedent regarding the Fourth Amendment. Rather, their approach diverged from the understanding of police-citizen contact reflected in the Warren Court's Fifth and Sixth Amendment precedents, and it thus represented a departure more from the spirit than from the letter of the Warren Court's work. Moreover, even if I fully accepted the contention that the Burger and Rehnquist Courts' cases in this area have, in some important sense, "changed" conduct rules for the police, I still would maintain that this change — even when combined with the two other changes I explore next — pales in comparison to the Courts' radical reworking of decision rules.

The second area in which the Burger and Rehnquist Courts have most diverged from the Warren Court in fashioning police conduct rules is the definition of "reasonable expectations of privacy." The *Katz* opinion, which I have used as an exemplar of the Warren Court's Fourth Amendment jurisprudence,[136] re-imagined the boundaries of "searches" under the Fourth Amendment when it rejected the then-reigning understanding that the Fourth Amendment protected certain "constitutionally protected areas"[137] by reference to the common law of trespass, and instead embraced the more fluid and more openly normative concept of "reasonable expectations of privacy."[138] This concept and phraseology have remained constant from 1967 until today, but the Burger and Rehnquist Courts have elucidated notions of "reasonableness" in expectations of privacy that are increasingly deferential to the government.

For example, in the last twenty years the Court has held that the government invades no reasonable expectation of privacy (and thus needs no probable cause or, indeed, suspicion of any kind) when it flies over and photographs a securely fenced-in backyard,[139] seizes and

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136. *See supra* text accompanying note 97.

137. *See* Katz v. United States, 389 U.S. 347, 351 & n.9 (1967).

138. 389 U.S. at 360 (Harlan, J., concurring).

139. *See* California v. Ciraolo, 476 U.S. 207 (1986). The Supreme Court has not yet found any airplane "fly-over" to infringe upon reasonable expectations of privacy. The same term as *Ciraolo*, the Court held that the Environmental Protection Agency did

searches garbage left at the curb for collection,[140] subpoenas financial information about a banking customer from a bank,[141] or arranges for the phone company to set up a "pen register" to record the telephone numbers dialed from a particular residence.[142] In each of these cases, the Court invoked one or both of the following two concepts: first, that the government should not be required to "avert its eyes" from things that a person knowingly exposes to public view, and second, that a person has no reasonable expectation of privacy in his or her "misplaced trust" that a third party will not reveal secrets to the government.

One could argue (and many have) that the Court's applications of these concepts in the above cases are extreme and unpersuasive.[143] After all, how likely is it that a member of the public will fly over one's backyard (or industrial complex) at an altitude low enough to see any details, much less that the aircraft's occupants will have a $22,000 pre-

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not conduct a "search" of the defendant's business premises when it hired a commercial aerial photographer to fly over the plant and photograph it with a highly sophisticated camera after the defendant had refused to permit an on-site inspection. The Court analogized the open areas of Dow's industrial complex to nonprivate "open fields" rather than to protected "curtilage," relying on the commercial as opposed to residential nature of the premises. In addition, the Court noted that the equipment used by the government was available commercially to members of the public and that the information revealed by the fly-over was limited in nature. *See* Dow Chem. Co. v. United States, 476 U.S. 227 (1986). Three years later, five members of the Court found that the government's use of a helicopter hovering at 400 feet to view a backyard greenhouse, where marijuana was found to be growing, also did not constitute a "search" under the Fourth Amendment, *see* Florida v. Riley, 488 U.S. 445 (1989) (plurality opinion), though Justice O'Connor noted in her separate concurrence that flight below 400 feet might begin to infringe upon reasonable expectations of privacy if it was shown that public use of airspace below that point was sufficiently rare. *See* 488 U.S. at 455 (O'Connor, J., concurring).

140. *See* California v. Greenwood, 486 U.S. 35 (1988).

141. *See* United States v. Miller, 425 U.S. 435 (1976).

142. *See* Smith v. Maryland, 442 U.S. 735 (1979).

143. *See, e.g.*, CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS § 4.03(c), at 113 (3d ed. 1993) (maintaining that the "fly-over" cases "stretch to the breaking point the pronouncement in *Katz* that Fourth Amendment protection does not extend to what a person 'knowingly exposes to the public' "); Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-first Century*, 65 IND. L.J. 549, 575 (1990) (arguing that the Burger and Rehnquist Courts' "search" cases "demonstrate the Court's misuse of the *Katz* knowing exposure rationale to sidestep the fourth amendment reasonableness requirement"); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 271 (1984) ("[F]ar from proving an impediment to expanding the unregulated investigative powers of the police, *Katz* has supplied the Burger Court with a handy verbal formula for exempting a variety of intrusive law enforcement practices . . . ."); Michael Campbell, Note, *Defining a Fourth Amendment Search: A Critique of the Supreme Court's Post-*Katz *Jurisprudence*, 61 WASH. L. REV. 191, 200 (1986) (suggesting that the Court "has too readily equated the potential exposure of information with the absence of any privacy interest in that information").

cision camera with which to photograph the premises?[144] And given the remoteness of these possibilities, is it fair to conclude that one has "knowingly" exposed the contents of one's backyard (or the layout of one's industrial complex) to public view? Moreover, it is not entirely plausible to describe a decision to place one's garbage at the curb — when required to so by local ordinance[145] — as evincing "misplaced trust" in the reliability of the local garbage removal crew rather than mere acquiescence in the garbage collection procedures established by law. Similarly, it may not be "trust" but rather the necessity of functioning in the modern world that leads people to reveal information to, say, banks and telephone companies.

But while the Burger and Rehnquist Courts' application of these concepts may seem far-fetched or excessively deferential to the government's interests in information gathering, it is important to recognize the ways in which the Warren Court's own Fourth Amendment cases set the stage for these later developments. It was the *Katz* Court that came up with the "reasonable expectations of privacy" rubric for Fourth Amendment "searches," without giving any guidance on how to determine "reasonableness" in the myriad of circumstances that were likely to (and did) arise later, thus creating a normative vacuum for later Courts to fill. Moreover, the "avert the eyes" concept derived directly from the *Katz* Court's rejection of the notion that privacy adheres to certain physical "areas":

> [T]he Fourth Amendment protects people, not places. *What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.* But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.[146]

Once again, having announced that "knowing exposure" falls outside of the Fourth Amendment, the *Katz* Court — and the Warren Court in the few years that remained post-*Katz* — were crucially and tantalizingly silent on what sorts of behavior constituted such exposure, even as to the facts of the *Katz* case itself. Each year, a new crop of first-year law students asks whether an undercover agent instructed by the government to lean casually against the glass wall of Katz's telephone

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144. *Cf.* Dow Chem. Co. v. United States, 476 U.S. 227, 242 n.4 (1986) (Powell, J., concurring in part and dissenting in part) (noting cost of camera used by EPA's hired photographer).

145. *See* California v. Greenwood, 486 U.S. 35, 54-55 (1988) (Brennan, J., dissenting).

146. Katz v. United States, 389 U.S. 347, 351-52 (1967) (citations omitted and emphasis added).

booth and listen to his conversations (in lieu of an electronic "bug") would have constituted a "search" or whether Katz's decision to converse within earshot of the government agent would have constituted "knowing exposure" to the public.[147] Although one can speculate that the Warren Court would not have construed "knowing exposure" in the broad way that the later Courts did, the Warren Court's work not only did not foreclose these later constructions but in fact opened the door to them by replacing the common law of trespass with a broad, but empty, normative concept as the reigning constitutional standard.

Similarly, it was the Warren Court that created the "misplaced trust" doctrine and extended it to a variety of contexts. In *Hoffa v. United States*[148] the Court gave birth to the "misplaced trust" doctrine when it held that no search occurred when the government instructed a confidential informant to befriend the infamous Jimmy Hoffa during the proceeding known as the Test Fleet trial. The informant was successful at being included among Hoffa's trusted associates during the trial, and he listened to and reported upon the conversations carried on in his presence, thus helping the government make out a case of jury tampering against Hoffa. Focusing not on the government's intent or actions in enlisting the informant, but rather upon Hoffa's state of mind, the Court explained that Hoffa was not entitled to rely upon "his misplaced confidence that Partin [the informant] would not reveal his wrongdoing."[149] On the same day as its decision in *Hoffa,* the Court also endorsed a version of the "misplaced trust" doctrine in *Lewis v. United States,*[150] when it found that an undercover agent's purchase of illegal drugs from the defendant in the defendant's home was not a "search." Once again, the Court concluded that the government's "fraud and deception" as to the true identity of the undercover agent was not the issue, given that the defendant had "invited the undercover agent to his home for the specific purpose of executing a felonious sale of narcotics" and that the agent's actions went no further than necessary to achieve that goal.[151]

As in the "avert the eyes" cases, the Warren Court's "misplaced trust" cases failed to articulate any limiting principle to the concept.

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147. The class tends to go on in this vein for a while: What if the government hired a lip-reader who stood not far from Katz's glass telephone booth in order to read his lips? What if Katz were to use one of the new unenclosed public telephones which permit those at the next phone or two to overhear one's conversations? What if Katz were to use his own portable cellular phone in a public place, like a bus stop or a park bench?

148. 385 U.S. 293 (1966).

149. 385 U.S. at 302.

150. 385 U.S. 206 (1966).

151. 385 U.S. at 210.

The same first-year students who question the reach of *Katz* also ask whether *Hoffa* means that the government could have hired the hotel staff (dining room waiters, room service deliverers, maids, etc.) to listen to and report upon what they could hear while "invited" into Hoffa's presence, or whether *Lewis* means that government agents can pose as meter readers or package deliverers in order to gain "invited" access to residences. Once again, while we might guess that the Warren Court would not extend its concept as far as later Courts have done, neither the *Hoffa* nor *Lewis* majority made any attempt to articulate limiting principles other than by simply articulating the facts of the individual cases. It is thus hard to make a case that the Burger and Rehnquist Courts' interpretations of the "misplaced trust" doctrine represent a major departure — much less a "counter-revolution" — from the work of the Warren Court. Even more fundamentally, *Hoffa* and *Lewis* together reflect the Warren Court's own ambivalence about the very Fourth Amendment principal with which I have sought to identify it (that exceptions to the warrant requirement be few and clear). It would be easy to recast the arguments made by the *Hoffa* and *Lewis* Court in the following way: sending government agents to look and listen in places where they would not otherwise have access to information is both a "search" and a "seizure" of the defendant's conversation, but such searches and seizures are not "unreasonable" ones prohibited by the Fourth Amendment, regardless of the lack of a judicial warrant, given the needs of the government and the expectations of the defendant.[152] Viewed in this light, *Hoffa* and *Lewis* in effect create a large and ill-defined exception to the preference for warrants articulated in *Katz*, though they do so almost invisibly, by deeming a potentially wide range of governmental activity simply beyond the scope of the Fourth Amendment. These cases thus demonstrate more continuity between the Warren Court and later Courts than initially meets the eye.

The third and most direct challenge to the Fourth Amendment principal that I have associated with the Warren Court has been the extensive development of an exception to both the warrant process and the warrant-related probable cause requirement for searches and seizures in contexts in which the government can demonstrate "special needs." The Court first articulated this idea in 1985 in *New Jersey v. T.L.O.*,[153] when it held that searches of students by school officials could be conducted without warrants and with less than the "probable

152. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 803-04 (1994) (arguing that the "search" and "seizure" cases should be reconceived as general "reasonableness" cases).

153. 469 U.S. 325 (1985).

cause" required when law enforcement agents make warrantless searches. It was actually Justice Blackmun, concurring in the judgment in *T.L.O.*, who turned the phrase that later became so important when he acknowledged that sometimes "exceptional circumstances" arise "in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[154] The need for school officials to have quick and flexible procedures for maintaining order was envisioned by the Court as one such circumstance, but in the next ten years, the Court used Justice Blackmun's *T.L.O.* locution five more times. The Court held that warrants and probable cause are not always necessary when the government as employer searches the office of a public employee,[155] when law enforcement agents conduct an administrative search of a closely regulated business as authorized by statute,[156] when a probation officer searches the home of a probationer,[157] when the government as employer requires some of its employees to take drug tests under certain conditions,[158] or when school officials require random drug testing of a certain subset of the student body.[159] In each of these cases, the Court rejected a rigid warrant or probable cause "requirement," but instead conducted a more free-wheeling "balancing" of governmental needs against individual privacy.[160]

The proliferation of cases under the "special needs" rubric is an obvious and direct challenge to the idea that the warrant process should dominate the realm of governmental searches and that exceptions to this process should be few and clearly delineated. The sheer number of circumstances in which the Court has found the existence of "special needs" is in tension with the goal of the Warren Court that exceptions to the warrant requirement be "few." But the number of cases (and of potential future cases) within the exception is itself a function of the haziness of the concept of "special needs beyond the normal need for law enforcement." What, after all, constitutes the "normal" need for law enforcement? One could argue that a strong limiting principle is implicit in the Supreme Court's cases: perhaps the "special needs" cat-

154. 469 U.S. at 351 (Blackmun, J., concurring).

155. *See* O'Connor v. Ortega, 480 U.S. 709 (1987).

156. *See* New York v. Burger, 482 U.S. 691 (1987).

157. *See* Griffin v. Wisconsin, 483 U.S. 868 (1987).

158. *See* Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

159. *See* Vernonia Sch. Dist. v. Acton, 115 S. Ct. 2386 (1995).

160. *See, e.g., Skinner*, 489 U.S. at 619 ("When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context.").

egory applies when the government is acting to achieve some regulatory goal separate and distinct from its goal of enforcing the criminal laws and when it does so through governmental actors separate and distinct from criminal law enforcement personnel.[161] The enforcement of school discipline by school officials and the monitoring of compliance with conditions of employment by the government-as-employer[162] present clean examples of such cases. The administrative-search doctrine[163] departs slightly from this model in that it permits such searches to be done by law enforcement agents, though with non-criminal goals. Such a limiting principle would prevent the "special needs" category from challenging my thesis about relative stability in police conduct rules because it would limit the category to actions taken by nonpolice governmental actors in noncriminal cases.[164]

This implicit limiting principle, however, has become much more dubious in the wake of the Court's decision in *Michigan Department of State Police v. Sitz*,[165] when it upheld against constitutional challenge a state police initiative establishing a program of suspicionless stops and brief inspections of all vehicles passing through "sobriety checkpoints" set up on public roads. The goal of the program was to enforce a criminal prohibition against driving while under the influence of alcohol, and the state police were the personnel who created and implemented the program. For once, it was a criminal *defendant* who invoked the Court's "special needs" cases, arguing that the enforcement of drunk driving laws fell, if anything at all did, within the category of "the normal need for law enforcement" and thus that the government should have to demonstrate either probable cause or reasonable suspicion before exe-

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161. This rationale would have reflected a belief that the Fourth Amendment requires different procedures for searches and seizures relating to "criminal" as opposed to "noncriminal" law enforcement. Professor Bill Stuntz has offered a theory of the Fourth Amendment that would support such a distinction, arguing that the Court's Fourth Amendment jurisprudence should be reoriented toward the special threats posed by the police, rather than toward the lack the informational privacy that necessarily attends the regulatory state. *See* William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995).

162. *See supra* notes 153-59 and accompanying text.

163. *See* New York v. Burger, 482 U.S. 691, 702 (1987) (involving search of closely regulated business by police officers).

164. Indeed, the "special needs" category, when limited in this way, plausibly represents an *expansion* rather than a contraction of Fourth Amendment rights. Before the 1970s, it was not clear that the Fourth Amendment applied at all to searches and seizures in schools or government offices. While the Burger and Rehnquist Courts have maintained a relatively low and easily manipulable standard for evaluating such searches and seizures, they also have insisted that students and public employees did not leave their rights at the schoolhouse or office door.

165. 496 U.S. 444 (1990).

cuting a warrantless stop of an automobile.[166] The Court effectively dodged the defendant's argument, holding that the "special needs" cases in no way displaced the Court's prior holdings regarding suspicionless stops of motorists. The Court noted that it had once before upheld suspicionless stops of motorists by approving fixed checkpoints at or near the border to detect the entry of illegal aliens.[167] The Court then invoked more general language from its decision in *Brown v. Texas*[168] to the effect that determining the constitutionality of "seizures that are less intrusive than a traditional arrest . . . involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty."[169] This balancing test is identical to the free-wheeling balancing that the Court has employed under the rubric of "special needs" and thus represents a potentially enormous extension of that analysis to cases of run-of-the-mill criminal law enforcement.[170]

Thus, I obviously *do* think that the "special needs" exception, especially after *Sitz,* represents a challenge to my thesis of relative stability in police conduct rules. I have three somewhat different responses to this challenge. The first response is that the Court has not yet simply converted the warrant requirement and its expanding exceptions into the less rigid, more free-wheeling balancing act that is evident in the "special needs" context. The Court's decision in *Arizona v. Hicks*[171] is the clearest example of its resistance to the use of a free-wheeling balancing test to determine generally the reasonableness of Fourth Amendment searches and seizures. The *Hicks* Court held that a police officer's moving of stereo equipment in order to read obscured serial numbers constituted a "search" requiring probable cause, rejecting the suggestion of three dissenters that mere "cursory inspections" required a lesser degree of suspicion. The majority explained that the dissent's attempt to finely calibrate the level of justification for a search to the level of intrusion resulting from it would create a "new thicket of

166. 496 U.S. at 449.

167. *See* 496 U.S. at 449-50, 453-54 (citing United States v. Martinez-Fuerte, 428 U.S. 543 (1976)).

168. *See* 496 U.S. at 499-50, 453-54 (citing Brown v. Texas, 443 U.S. 47 (1979) (holding that the police may not, consistent with the Fourth Amendment, stop individuals and require them to identify themselves without individualized suspicion)).

169. 443 U.S. at 50-51.

170. Indeed, some state courts have read *Sitz* in just this manner, permitting suspicionless stops in the most routine cases of "normal law enforcement." *See, e.g.,* People v. Cascarano, 587 N.Y.S.2d 529 (Crim. Ct. 1992) (upholding a checkpoint to enforce the criminal prohibition against auto theft); State v. Graham, No. 57622, 1990 Ohio App. LEXIS 4744 (Nov. 1, 1990) (upholding a checkpoint to aid in drug interdiction).

171. 480 U.S. 321 (1987).

Fourth Amendment law"[172] and that the Court previously had permitted such balancing of justification and intrusion only in cases of "special operational necessities."[173] The *Hicks* case is remarkable not only because it emphatically rejected the "special needs" balancing test as the dominant Fourth Amendment standard, but because it did so on such unsympathetic facts, leading Justice Powell to inquire plaintively "what [the police officer] should have done in these circumstances."[174] Indeed, it is cases like *Hicks* that fueled Professor Akhil Amar's urgent call for a general reasonableness standard to govern Fourth Amendment search and seizure law.[175] Amar's recent and outraged[176] critique of current law is perhaps the best evidence that a general reasonableness standard has not yet won out in the Supreme Court.

My second response to the change represented by the proliferation of "special needs" cases is that it not as much of a "change" from the Warren Court's own approach to special circumstances as might first appear. The forebear of all of the later "special needs" cases is itself a Warren Court decision, *Camara v. Municipal Court of San Francisco.*[177] The *Camara* Court overturned an earlier decision, *Frank v. Maryland,*[178] which permitted a municipal health inspector to perform a home inspection without a warrant. But though the *Camara* majority, true to the vision that I have ascribed to the Warren Court, held that administrative inspections to enforce safety and health standards must be authorized by a judicial warrant, the Court also held that the standard of probable cause should be relaxed in such circumstances. Noting that "routine periodic inspections of all structures" were "the only effective way to seek universal compliance" with municipal health and safety codes,[179] the Court held that, in the housing inspection context, routine "area" inspections are "reasonable" under the Fourth Amendment. In so holding, the Court observed that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails"[180] — exactly the balancing test later

172. 480 U.S. at 328.

173. 480 U.S. at 327.

174. 480 U.S. at 332 (Powell, J., dissenting). Justice Powell noted that the police had lawfully entered the defendant's apartment after a shot was fired through the floor and had found several guns, a stocking-cap mask, drug paraphernalia, and two sets of expensive stereo components of a type that were frequently stolen. *See* 480 U.S. at 331.

175. *See* Amar, *supra* note 152, at 768 & n.38, 769 & n.42.

176. *See id.* at 757 ("The Fourth Amendment today is an embarrassment.").

177. 387 U.S. 523 (1967).

178. 359 U.S. 360 (1959).

179. *Camara*, 387 U.S. at 535-36.

180. 387 U.S. at 536-37.

used in all of the "special needs" cases. Therefore, the Court concluded, triumphantly but bizarrely, "it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling," even though such standards "will not necessarily depend upon specific knowledge of the condition of the particular dwelling."[181] The *Camara* Court thus redefined probable cause as flowing from the "reasonableness" of routine inspections rather than from any quantum of knowledge about the particular places searched. Although *Camara* used the language of probable cause standard and insisted on judicial process to implement that standard, in fact it approved suspicionless searches based on their general reasonableness under the Fourth Amendment, setting the stage for the "special needs" cases of the 1980s and 1990s.[182]

Finally, the Burger and Rehnquist Courts occasionally have used the reasonableness standard from the "special needs" cases in ways that actually have been *more* protective of individual liberties than the strict warrant and probable cause requirements could be. In *Tennessee v. Garner*,[183] the Court held that the use of deadly force to apprehend a fleeing felon was constitutionally unreasonable, despite the existence of probable cause to make a forcible seizure of the felon's person. The same year, the Court in *Winston v. Lee*[184] also held that the government could not surgically remove a bullet from the chest of a defendant for evidentiary purposes, despite the existence of both probable cause to believe that the bullet was evidence of a crime *and* a judicial order authorizing the removal of the bullet after a full hearing. These departures from the Warren Court's preference for warrants, while not actually foreshadowed by any particular Warren Court decision, seem in accord

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181. 387 U.S. at 538.

182. The *Camara* Court was careful, however, to distinguish criminal cases from civil regulatory ones, noting that "a routine inspection . . . of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime." 387 U.S. at 530. Thus, one might argue that *Sitz*, at least, is a major departure from *Camara*. I believe, however, that *Camara* prefigured the use of a reasonableness standard even in the criminal investigatory context by insisting that it merely was interpreting the textual "probable cause" standard in light of the Fourth Amendment's general command of "reasonableness" in both civil and criminal contexts. By stating its holding at this high level of normative abstraction — "[t]he warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest" — the *Camara* Court opened the door for later Courts to bring their own normative judgments about constitutional "reasonableness" to bear. 387 U.S. at 539.

183. 471 U.S. 1 (1985).

184. 470 U.S. 753 (1985).

with the Warren Court's concerns about police overreaching and the need to protect individual autonomy that are reflected most clearly in its Fifth Amendment cases.[185] And the vestigial members of the Warren Court who remained during the Burger and Rehnquist Court years enthusiastically supported these decisions. Indeed, Justice Brennan, writing for the *Lee* Court, explicitly noted that sliding scales can slide both ways:

> Where the Court has found a lesser expectation of privacy, . . . the Court has held that the Fourth Amendment's protections are correspondingly less stringent. Conversely, however, the Fourth Amendment's command that searches be "reasonable" requires that when the State seeks to intrude upon an area in which our society recognizes a significantly heightened privacy interest, a more substantial justification is required to make the search "reasonable."[186]

Thus, even if the Burger and Rehnquist Courts had not articulated the need for a general reasonableness analysis in cases of "special needs," the Warren Court, given enough time, might well have invented just such a category itself.

* * *

Even the Court's Fourth Amendment police-conduct norms, which have changed much more over the past twenty-five years than have its Fifth or Sixth Amendment norms, do not make out a case for radical change in conduct rules during the Burger and Rehnquist Courts. I do not mean to refute any claims about the different Courts' differing "ideologies,"[187] whether that term is taken to mean simply different rationales for individual doctrines, or different perspectives on larger concepts such as the purposes of criminal justice, the nature of freedom and coercion, and the relative characters and motivations of the police and criminal offenders. Rather, I contend merely that a conscientious description of what police investigative practices are permitted and forbidden by the Federal Constitution would not read very differently in 1969, the year of Earl Warren's retirement, and today, ten years after William Rehnquist succeeded Warren Burger as Chief Justice. What differences do exist between these two hypothetical lists — many though not all of which I have catalogued above — are not nearly as extreme as the differences in decision rules that have developed over the same period of time, to which I now turn my attention.

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185. *See supra* section II.B.
186. *Lee*, 470 U.S. at 767 (citation omitted).
187. *See* Arenella, *supra* note 5, at 188-89.

III. Relative Explosion in "Inclusionary Rules"

While the Court has left relatively intact its instructions to police officers about proper police practices (conduct rules), it has changed radically the consequences of violating those instructions (decision rules). While the Court did not purport to overrule the Fourth Amendment exclusionary rule, just as it declined to overturn *Miranda* or *Massiah,* the Court nonetheless promulgated a series of what I term "inclusionary rules." I use this term because I seek to sweep more broadly than the narrow category of what the Court and commentators have deemed "exceptions" to the exclusionary rules of the Fourth, Fifth, and Sixth Amendments; I mean to identify a larger and as yet unnamed category of rules that have the effect of mitigating the consequences to the government in criminal prosecutions of the unconstitutional behavior of law enforcement agents. Thus, my "inclusionary rules" are those that permit the use at trial of unconstitutionally obtained evidence or that let stand convictions resulting from trials at which such evidence was admitted. I intend to make no claim about whether or not the Court's inclusionary rules are a good idea or a bad idea, or about whether they are faithful or illegitimate exercises of constitutional interpretation (any more than I intended to defend or attack the conduct rules promulgated by the Warren Court and left relatively intact by later Courts). Rather, I argue simply that the Burger and Rehnquist Courts' inclusionary rules represent a departure from the Warren Court's understanding of the judicial consequences of constitutional violations by the police that is much more dramatic than the changes made in police-conduct rules over the same period of time. To the extent that there has been a "counter-revolution" in constitutional criminal procedure, it is here.

The inclusionary rules to which I refer can be organized into two general categories. First, there are rules that permit the government to avoid the exclusion of evidence at trial. The Court has generated a number of doctrines — among them, the doctrines relating to standing, the "good-faith" exception to the warrant requirement, "fruits" of constitutional violations, and impeachment — that permit the use at trial of evidence that was obtained unconstitutionally. Second, there are rules that deal with the review and reversal of convictions. The Court has structured the appellate and postconviction processes — through the doctrines relating to harmless error and the scope of habeas review — to permit convictions to stand despite the admission of unconstitutionally obtained evidence. In both of these areas, the Burger and Rehnquist Courts have been much more straightforward and much more extreme

in their rejection of the work of the Warren Court than they have been in the domain of conduct rules.

A. *Exclusion of Evidence*

Because the Fourth Amendment exclusionary rule is more clearly a remedy separate from the right itself than either the Fifth or even the Sixth Amendment's mandates of exclusion, and because the remedy of exclusion does much more to deter future violations than it does to "make whole" a defendant whose Fourth Amendment rights were violated,[188] the remedy has been particularly vulnerable to exceptions promulgated in the name of fine-tuning the rule to accord with its rationale of deterrence.[189] Ironically, however, the threshold requirement of standing, although not always conceived of as an "exception" to the exclusionary rule, in fact operates to limit the scope of exclusion in ways that seem to run counter to the deterrence rationale offered for the rule. The standing doctrine holds that only a defendant whose personal Fourth Amendment rights were violated by the government's misconduct can move to exclude the evidence that the government illegally seized. Many have noted that this doctrine is hard to square with the rationale of deterrence, given that the aggrieved or nonaggrieved nature of the defendant has no connection at all to the deterrent effect of a successful motion to suppress.[190] But the Warren Court and the Burger and

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188. This view of the Fourth Amendment exclusionary rule clearly has dominated in the Burger and Rehnquist Courts. The clearest statement of the prospective nature of the Fourth Amendment exclusionary rule is in United States v. Calandra, 414 U.S. 338 (1974), in which the Court described the rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." 414 U.S. at 348. But the Warren Court, too, even while asserting that the exclusionary rule was "part and parcel" of the Fourth Amendment, *see* Mapp v. Ohio, 367 U.S. 643, 651 (1961), nonetheless suggested that the rule had to be extended to state court prosecutions in part because of the failure of nonconstitutional local remedies to adequately deter Fourth Amendment violations. 367 U.S. at 651-53; *see also* Linkletter v. Walker, 381 U.S. 618, 636-37 (1965) (noting that "all of the cases since *Wolf* [in 1949] requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action").

189. *See* United States v. Leon, 468 U.S. 897, 908-11 (1984) (listing exceptions generated by the deterrence rationale, including Stone v. Powell, 428 U.S. 465 (1976) (habeas), *Calandra*, 414 U.S. at 348 (grand jury), United States v. Janis, 428 U.S. 433 (1976) (civil proceedings), and United States v. Havens, 446 U.S. 620 (1980) (impeachment)).

190. For the best exploration of how a robust theory of deterrence likely would lead to a different standard for Fourth Amendment standing and of why the Court nonetheless has rejected an alternative standard, see Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 275-78 (1988); *see also id.* at 274 n.132

Rehnquist Courts alike have insisted on a "personal rights" view of standing to invoke the exclusionary rules, even while acknowledging that the primary rationale for the rule is deterrence of official misconduct.[191]

This apparent similarity across Courts in general approaches to the issue of standing, however, obscures important differences. Part of the Warren Court's "revolution" in criminal procedure was a substantial expansion of the rules of Fourth Amendment standing. In the landmark case of *Jones v. United States*,[192] a defendant, charged with possession of drugs, sought standing to object to an illegal search of the apartment in which he was staying with the owner's permission in the owner's absence, despite the fact that the defendant had no property rights in the premises searched. The Warren Court reversed the lower courts' rejection of the defendant's claim to standing, holding that Fourth Amendment standing no longer should rest upon "the common law . . . of private property law."[193] Instead, the *Jones* Court, in true Warren Court fashion, offered two sweeping rules that briefly would govern a large percentage of future standing cases. First, the Court held that in cases such as *Jones* in which the defendant is charged with a possessory offense, the defendant should have automatic standing to contest the seizure of the items that are alleged by the government to be in the defendant's possession.[194] Second, as an independent, alternative ground for conferring standing upon Jones, the Court held that, regardless of formal property interests, "anyone legitimately on [the] premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him."[195] Between

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(citing other scholars who have noted and criticized the tension between the rationale of deterrence for the exclusionary rule and the doctrine of Fourth Amendment standing).

191. *See* Alderman v. United States, 394 U.S. 165 (1969) (reflecting the Warren Court's acceptance of both the deterrent rationale for the exclusionary rule and the "personal rights" basis for standing); Rakas v. Illinois, 439 U.S. 128 (1978) (same for Burger Court).

192. 362 U.S. 257 (1960), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980).

193. 362 U.S. at 266.

194. *See* 362 U.S. at 260-61, 264. The Court worried that in that absence of such a rule, the only way for a defendant to prove his standing would in effect convict him on the merits of the case, given that his suppression hearing testimony could be admitted against him at trial. Thus, the government often could win the suppression hearing and then win the trial by taking contradictory positions — first, that the contraband did not belong to the defendant at the suppression hearing and then that the contraband *did* belong to the defendant at trial. The *Jones* Court concluded: "It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government." 362 U.S. at 263-64.

195. 362 U.S. at 267.

the automatic standing rule for possessory offenses and the "legitimately on the premises" test for standing to contest nonpersonal searches, the Warren Court managed to define the scope of "personal" Fourth Amendment rights in such a broad and categorical fashion that the seemingly strict requirement that defendants be personally "aggrieved" by governmental misconduct in order to invoke the exclusionary rule was no longer a substantial barrier to standing.[196]

While the broadest and most categorical of the Warren Court's conduct rules for the police — *Miranda* and *Massiah* — have survived to this day, *Jones* was quickly and decisively rejected. In 1976, the Burger Court overruled the "legitimately on the premises" standard for determining standing to contest nonpersonal searches. In *Rakas v. Illinois*[197] the Court held that a passenger in a car had no standing to contest the legality of a search that led to the seizure of items from the glove compartment and the area under the seat. The standard of "legitimate presence," ruled the Court, provided "too broad a gauge for measurement of Fourth Amendment rights."[198] Instead of relying upon categorical rules for standing, the *Rakas* Court invoked the "legitimate expectations of privacy" language that the Warren Court had developed in *Katz* to reject, as *Jones* had done, the reliance on common law categories to determine Fourth Amendment rights.[199] But in explaining how courts should decide which expectations of privacy are reasonable ones, the *Rakas* Court appeared to take a large step back in time to the understandings that *Jones* and *Katz* sought to supplant when the only normative sources it offered for determinations of reasonableness were "concepts of real or personal property."[200] Noting that the defendant did not own the car itself and failed to claim ownership of the seized items, the Court concluded that the defendant lacked standing to challenge the

196. Indeed, in the two other major standing cases that reached the Supreme Court between 1960 (the year of the *Jones* decision) and Earl Warren's retirement in 1969, the Warren Court found for the defendants on the standing issue, citing *Jones* each time, even when the *Jones* holding did not control the disposition of these later cases. *See* Mancusi v. DeForte, 392 U.S. 364, 368, 370 (1968) (holding that a union official had standing to challenge the removal of documents from his office); Alderman v. United States, 394 U.S. 165, 174 (1969) (holding that a homeowner had standing to object to the electronic surveillance of conversations emanating from his home, even though he was not a party to the conversations).

197. 439 U.S. 128 (1978).

198. 439 U.S. at 142.

199. *See* 439 U.S. at 143; *supra* text accompanying notes 136-38.

200. *Rakas*, 439 U.S. at 144 n.12. The Court acknowledged that reasonable expectations of privacy need not always be based upon property rights, but it failed to identify any other source to which courts might refer in making a determination of standing.

search and seizure. Four years later in *Rawlings v. Kentucky*,[201] however, the Court further narrowed the possible grounds for asserting standing when it held that *mere* ownership of an item seized — the very claim that the Court noted Rakas had failed to make — was, in any event, insufficient by itself to establish a reasonable expectation of privacy.

And in a companion case to *Rawlings*, the Court dealt its final blow to *Jones* when it overruled the automatic standing rule for possessory offenses. Noting that the Warren Court's decision precluding the use of a defendant's pretrial suppression hearing testimony to establish the defendant's guilt at trial vitiated the concerns raised by the *Jones* Court,[202] the Court in *United States v. Salvucci*[203] relied on the reasoning of its decision in *Rawlings* to conclude that mere possession of a seized item was simply not "a substitute for a factual finding that the owner of the good had a legitimate expectation of privacy in the area searched."[204] This time the Court was completely silent about normative sources for "legitimate" privacy expectations, merely remanding the case to the lower courts. But *Rakas*, *Rawlings*, and *Salvucci* together suggested implicitly that only full authority to exclude others from the place searched, regardless of any possessory interests the defendant might have in the things seized, would suffice for standing.[205] Thus, by 1980, the Court not only had explicitly overturned both of the standing rules announced in *Jones*, but it also appeared to have replaced them with an exceedingly narrow and formalistic test, closely tied to common-law understandings of property rights, for assessing "the reasonable" or "legitimate" privacy interests that give rise to Fourth Amendment standing.

Ten years later, the Court backtracked somewhat from this extreme position when it reaffirmed the specific holding in *Jones*, though it continued to reject *Jones*' categorical standing rules. In *Minnesota v.*

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201. *See* Rawlings v. Kentucky, 448 U.S. 98 (1980) (holding that the defendant had no standing to contest the search of his companion's purse and the seizure of drugs found therein, despite his admitted possessory interest in the drugs themselves).

202. *See supra* note 193-94 and accompanying text.

203. 448 U.S. 83 (1980).

204. 448 U.S. at 92. The *Salvucci* Court left open, however, the question whether a defendant's pretrial suppression testimony could be used to impeach the defendant's trial testimony. Although the Supreme Court has not answered this question yet, most lower federal and state courts permit such impeachment. *See* Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567, 1644 n.253 (1986) (citing cases).

205. *See Rawlings*, 448 U.S. at 105 (using "right to exclude others" language); Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978) (same).

Olson[206] the Court held that the defendant had standing to contest his warrantless arrest in an apartment that he did not own, but in which he stayed as an overnight guest. Rejecting the state's (understandable, in light of the Court's previous cases) position that the defendant lacked standing because he lacked the right to exclude others from the apartment, the Court held that overnight guests possess reasonable expectations of privacy for their persons and their possessions[207] while in the home of another. In deeming these expectations "reasonable," the Court appeared to rely not upon traditional attributes of property ownership, but rather upon the recognition that the harboring of overnight guests in the home is a "longstanding social custom that serves functions recognized as valuable by society."[208] Whether *Olson* represents merely an special exception for expectations of privacy in homes because of the special nature of activities conducted there[209] or whether it also might suggest that individuals in cars or other less protected areas also might have expectations of privacy despite their inability to exclude others, remains an open question.[210] But even with *Olson*'s expansion of the potential sources for reasonable expectations of privacy, the post-*Rakas* standing regime still remains much stricter than the truly expansive standing doctrine formulated by the Warren Court in *Jones*.

The strictness of the current standing regime makes it much more likely that cases will arise in which law enforcement agents can exploit the fact that the "target" of their investigation will lack standing to contest searches and seizures designed to obtain evidence against him

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206. 495 U.S. 91 (1990).

207. *See* 495 U.S. at 99 ("From the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he *and his possessions* will not be disturbed by anyone but his host and those his host allows inside.") (emphasis added).

208. 495 U.S. at 98.

209. *See* 495 U.S. at 99 ("We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings.").

210. The year before its decision in *Olson*, the Court had declined to review, over a vehement dissent from denial of certiorari by Justice White (who later authored the *Olson* opinion), a decision by the Second Circuit holding that a defendant had no reasonable expectation of privacy in his own property that was found under the floor mat of the car in which he was a passenger. *See* Paulino v. United States, 490 U.S. 1052 (1989). The pre-*Olson* Court had made clear that neither mere legitimate presence on the premises searched nor mere ownership of the item seized can alone establish standing. But *Olson* demonstrates that, at least in the limited context of overnight house guests, the two together can be sufficient. It now remains an open question whether the *Olson* holding has implications outside the home. If it does, then the holding in *Rakas* itself might be undermined. But it is simply too early to tell whether *Olson* is merely an exception to the very strict standing regime established by *Rakas*, *Rawlings*, and *Salvucci*, or whether it substantially re-orients standing law.

or her. This possibility was illustrated dramatically by the facts of *United States v. Payner*[211] decided the same year as *Rawlings* and *Salvucci*. In *Payner* government agents burglarized a bank officer's hotel room in order to obtain the defendant's financial records, which were located in the bank officer's briefcase. The agents had been instructed that the defendant would lack standing to object to the blatantly illegal search, and thus they made a deliberate choice to exploit the gap in enforcement of Fourth Amendment standards created by the standing requirement.[212] Faced with such flagrant disregard of the Constitution, but lacking the power to apply the exclusionary rule because of standing doctrine, the District Court invoked its inherent "supervisory power" to exclude the illegally seized evidence, and the Court of Appeals affirmed.

The Supreme Court, however, reversed, holding that whatever inherent "supervisory power" the federal courts may have to address willful violations of a defendant's rights, they lack the power to address violations, however egregious, of the constitutional rights of a third party not before the court as a defendant. Such a limitation on the supervisory power of the federal courts — identical to the standing requirement of the Fourth Amendment itself — is necessary, the Court reasoned, because of "the considerable harm [to truth-seeking] that would flow from indiscriminate application of an exclusionary rule."[213] *Payner* was the first of several opinions in the Burger and Rehnquist Courts cabining the exercise of supervisory power by federal courts in criminal cases.[214] These decisions together reflect the view of the Burger and Rehnquist Courts that the federal courts have no inherent power to mandate either:

> (1) the adoption of standards that go beyond constitutional minimums in an effort to provide clear-cut and easily administered prohibitions applicable to federal trial courts or prosecutors or (2) the adoption of broader remedies than are constitutionally or statutorily mandated in order to more effectively deter violations of constitutional or statutory prohibitions by federal officials.[215]

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211. 447 U.S. 727 (1980).

212. The District Court in *Payner* found as a matter of fact that "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties, who are the real targets of the governmental intrusion." United States v. Payner, 434 F. Supp. 113, 132-33 (N.D. Ohio 1977), *affd.*, 590 F.2d 206 (6th Cir. 1979), *revd.*, 447 U.S. 727 (1980).

213. *Payner*, 447 U.S. at 734.

214. *See* United States v. Hasting, 461 U.S. 499 (1983); Bank of Nova Scotia v. United States, 487 U.S. 250 (1988); United States v. Williams, 504 U.S. 36 (1992).

215. LAFAVE & ISRAEL, *supra* note 35, § 1.5, at 31 n.3.

This narrow view of supervisory power is quite different from the ringing appeals made in early Warren Court opinions to the duty of federal judges "to see that the waters of justice are not polluted,"[216] and it, not surprisingly, has led to fewer exercises of supervisory power in the post-Warren Court era.[217] Thus, the gap in the deterrent effect of the exclusionary rule opened by the strict standing doctrine of the Burger and Rehnquist Courts has been maintained and reinforced by the contemporaneous narrowing of the scope of federal courts' supervisory power.

In addition to transforming the Warren Court's standing doctrine, the Burger and Rehnquist Courts either generated or expanded a number of other exceptions to the Fourth Amendment exclusionary rule. Although each of these other exceptions has its own distinct history and rationale, they all share a similar structure: the Court has permitted the admission of evidence obtained in violation of the Fourth Amendment when the deterrent effect of exclusion in such circumstances would be, in the Court's calculus, either negligible or outweighed by the substantial costs to society of suppressing reliable evidence of guilt. Unlike the Court's reworking of standing doctrine, which was not explicitly tied to — and indeed was in some tension with — the deterrence rationale for the exclusionary rule, the rest of the significant exceptions to exclusion all were promulgated with the explicit purpose of obtaining optimal deterrence. Whether or not one agrees with the Court's calculus, it is apparent that the sum of the exceptions generated in the name of fine-tuning deterrence has created a Fourth Amendment enforcement regime quite different from the one imagined by the Warren Court in *Mapp* and the early post-*Mapp* days.

One of the principal exceptions to the Fourth Amendment exclusionary rule is the so-called "good-faith exception" for searches and seizures made in "good-faith" reliance on a judicial warrant that turns out to be invalid. In such cases, there can be no question that the defendant's Fourth Amendment rights were violated, because the

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216. Mesarosh v. United States, 352 U.S. 1, 14 (1956). *See also* Elkins v. United States, 364 U.S. 206, 223 (1960) (maintaining that their supervisory power prevents the federal courts from being "accomplices in the willful disobedience of a Constitution they are sworn to uphold").

217. *See* Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1455 (1984) ("[T]he Burger Court has employed supervisory authority less frequently than its predecessors."); Robert M. Bloom, *Judicial Integrity: A Call for Its Re-Emergence in the Adjudication of Criminal Cases*, 84 J. CRIM. L. & CRIMINOLOGY 462, 474-75 (1993) ("[T]he present Supreme Court has clearly indicated that the use of supervisory powers should be curtailed."); Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 148 n.265 (1995) ("Lately . . . the Court has been hostile to the expansive use of supervisory powers by lower courts.").

defendant was subject to a search or a seizure for which, in fact, there was no probable cause,[218] or because the warrant was invalid in some other constitutionally significant way (such as by failing to meet the requirement that warrants be supported "by Oath or affirmation" or that they "particularly describ[e] the place to be searched, and the persons or things to be seized").[219] But if the law enforcement agent executing the warrant can demonstrate that it was objectively reasonable to rely on the warrant — that is, that the agents applying for the warrant did not mislead the issuing magistrate, that the issuing magistrate was not clearly biased, and that neither the affidavit nor the warrant itself was so patently lacking in constitutional sufficiency that reliance on it would be "entirely unreasonable"[220] — the evidence seized by the agent will be admitted, even if a reviewing court finds the warrant to be, in fact, constitutionally invalid. While the Court recognized that the "good-faith" exception represented a departure from its prior applications of the exclusionary rule,[221] it also noted that it had "frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment."[222] Reasoning that the purpose of evidentiary exclusion was to deter *police* misconduct, rather than mistakes by the magistrates and judges who issue warrants, the Court concluded that "the marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion."[223]

On a practical level, the good-faith exception represents a substantial break with Warren Court implementation of the exclusionary rule: no longer can criminal defendants, even those with "standing," litigate the constitutional sufficiency of warrants absent the extreme circum-

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218. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984) (holding that the exclusionary rule should not apply to a search made in good-faith reliance on a warrant that was, in the eyes of reviewing courts, unsupported by probable cause).

219. *See, e.g.*, Massachusetts v. Sheppard, 468 U.S. 981 (1984) (holding that the exclusionary rule should not apply to a search warrant that was technically defective because it failed to describe the items to be seized, where the accompanying affidavit did contain such a description).

220. *Leon*, 468 U.S. at 923 (quoting Brown v. Illinois, 422 U.S. 590, 610-11 (1975) (Powell, J., concurring in part)).

221. *See* 468 U.S. at 915-16 (noting that, prior to its decision in *Leon*, the Court had "simply excluded such evidence [that was seized in reliance on a warrant that turns out to be invalid] without considering whether Fourth Amendment interests will be advanced").

222. 468 U.S. at 918.

223. 468 U.S. at 922.

stances identified by the *Leon* Court that would render reliance upon them objectively unreasonable. On a theoretical level, the exception reflects a narrow view of the deterrent scope of the rule, a broad view of its costs, and a rejection of any rationale for evidentiary exclusion other than the balancing of deterrent benefits against social costs. As for deterrence, *Leon* rejected both the idea that magistrates and judges fell within the deterrent effect of the exclusionary rule[224] *and* the notion that the exclusionary sanction would deter police misconduct by promoting *institutional* compliance with the Fourth Amendment by affecting the training and monitoring of law enforcement agents in their applications for and execution of warrants.[225] On the cost side, *Leon* reiterated the concern of a long line of Burger Court opinions that evidentiary exclusion can " 'impede unacceptably the truth-finding functions of judge and jury' "[226] and thus may " 'generat[e] disrespect for the law and administration of justice.' "[227] Most significant, *Leon* represents the triumph of the Burger Court's cost-benefit approach to the application of the exclusionary rule, which would later be embraced by the Rehnquist Court as well. Justice Brennan's dissent in *Leon* is one of the last statements of the Warren Court view, present in *Mapp* itself, that exclusion of evidence is necessary not only to deter police misconduct but also to promote what the *Mapp* Court called "judicial integrity."[228] Just as the Burger and Rehnquist Courts rejected, in the supervisory-power context, the Warren Court's concern about "polluting the waters of justice,"[229] the later Courts also rejected the idea that the exclusionary rule should

224. *See* 468 U.S. at 917 ("Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions. The threat of exclusion thus cannot be expected significantly to deter them."). The Court expanded this idea a bit in Arizona v. Evans, 115 S. Ct. 1185 (1995), when it held that an officer's reliance on a clerical mistake by a courthouse employee also fell outside the proper scope of the exclusionary rule because courthouse personnel, like magistrates and judges, have no stake in the outcomes of criminal trials and thus are unlikely to be deterred from error by the exclusion of evidence.

225. *See Leon*, 468 U.S. at 918 (finding "speculative" arguments that suppression of evidence seized pursuant to judicial warrants would either deter inadequate affidavits and "magistrate shopping" or encourage officers to scrutinize more closely warrants that were issued to them in order to point out judicial errors).

226. 468 U.S. at 907 (quoting United States v. Payner, 447 U.S. 727, 734 (1980)).

227. 468 U.S. at 908 (alteration in original) (quoting Stone v. Powell, 428 U.S. 465, 491 (1976)).

228. Mapp v. Ohio, 367 U.S. 643, 659 (1961) (internal quotation marks omitted) (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)).

229. *See* Mesarosh v. United States, 352 U.S. 1, 14 (1956); *supra* text accompanying notes 213-17.

be used " 'to enforce ideals of governmental rectitude.' "[230] Rather, the Burger and Rehnquist Courts would seek to use the exclusionary rule only when, in their view, the benefits in deterrence of police misconduct outweighed the costs in harm to truth-seeking of the exclusion of evidence.

This calculus not only led to the good-faith exception as it now exists, it also may yet lead to a potentially much larger exception to the exclusionary rule. The rationale offered for the result in *Leon* — that the exclusionary rule is unlikely to deter "when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment"[231] — could apply, in theory, to *any* police action performed in "good faith" and not merely to police reliance on judicial warrants. Such a generalized good-faith exception would create a great deal of litigation to define its scope, requiring courts to develop, case by case, new conceptions about what kinds of mistakes would be "objectively reasonable" for the police to make in the field. Perhaps for this reason the Court has evaded up to this point government requests that it generalize the existing good-faith exception,[232] while at the same time clearly leaving that option open. But the Court soon may be forced to decide the issue, given that the House of Representatives, as part of its "Contract With America," passed a bill requiring the admission of evidence in federal courts when that evidence is obtained by law enforcement agents who have a "reasonable" but wrong belief in the constitutionality of their conduct.[233] Should some such provision pass both houses of Congress and become law, it seems inevitable that the Supreme Court would review its constitutionality. If a generalized good-faith exception were upheld and interpreted expansively, the Court could achieve through a reworking of constitutional remedy what it has been unwilling to accomplish directly through a reworking of constitutional right — the establishment of a general standard of "reasonableness" as the governing enforceable Fourth Amendment norm. Thus, *Leon* may do more than establish its already significant good-faith exception for reliance on judicial warrants; broadly construed, it may end up resetting the standard to which law enforcement agents will be held

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230. *Leon*, 468 U.S. at 907 (quoting *Payner*, 447 U.S. at 734).

231. 468 U.S. at 918.

232. *See, e.g.*, Arizona v. Evans, 115 S. Ct. 1185, 1194 n.5 (1995) (declining to decide the merits of the Solicitor General's suggestion, as *amicus curiae*, that the good-faith exception should be generalized to include all police action taken in good faith, whether or not authorized by warrant).

233. *See* H.R. 666, 104th Cong., 1st Sess. (1995). The drafters of the bill relied explicitly on the Supreme Court's reasoning in the *Leon* case. *See* H.R. REP. NO. 17, 104th Cong., 1st Sess. 4-7, 10-13 (1995).

in their conduct by enforcing through evidentiary exclusion not the current Fourth Amendment norms, but rather a "reasonable" approximation of those norms.

The same kind of cost-benefit analysis used in *Leon* also led the Burger and Rehnquist Courts to create exceptions to the exclusionary rule by narrowing the category of evidence that will be deemed the "fruit" of primary Fourth Amendment violations. It is true that the Warren Court itself acknowledged that not all evidence that is connected by a causal chain to some primary illegality is "fruit of the poisonous tree." In *Wong Sun v. United States*[234] the Court recognized that, at some point, the causal chain of connection between a Fourth Amendment violation and evidence that "would not have come to light but for the illegal actions of the police"[235] may become " 'so attenuated as to dissipate the taint.' "[236] But in the decades that followed, the Burger and Rehnquist Courts consistently narrowed the "fruits" doctrine to exempt entire categories of evidence from the exclusionary rule. Each time, the Court either questioned the likely deterrent effect on police misconduct of excluding the category of evidence before it, or relied on the importance of that evidence to the truth-seeking process, or both.

In three different fruits cases, the Burger and Rehnquist Courts expressed skepticism that exempting categories of evidence from the fruits doctrine would create perverse incentives for the police. First, in *Nix v. Williams*[237] the Court explicitly endorsed the "inevitable-discovery" exception to the exclusionary rule, holding that evidence that the police obtain as a result of illegal conduct[238] is nonetheless admissible in court if the government can show that it "inevitably" would have discovered the evidence by lawful means. If the evidence "inevitably" would have come to light, reasoned the Court, it is not really the "fruit" of the illegal police action, and suppressing it thus would create a windfall to the defendant by putting the government in a worse position than it would have been in had the illegality never occurred.[239] The Court explicitly

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234. 371 U.S. 471 (1963).

235. 371 U.S. at 488.

236. 371 U.S. at 487 (quoting Nardone v. United States, 308 U.S. 338, 341 (1939)).

237. 467 U.S. 431 (1984).

238. In *Williams* the illegal conduct was a Sixth Amendment *Massiah* violation, but it is clear that the Court meant its holding to apply to constitutional violations generally.

239. *See* 467 U.S. at 443 (explaining that "the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a *worse*, position that they would have been in if no police error or misconduct had occurred").

rejected the holding of the Iowa Supreme Court, adopted by the Eighth Circuit on habeas review in the *Williams* case, that the "inevitable-discovery" exception should be available to the government only when it can demonstrate that the police did not act in "bad faith" in obtaining the evidence.[240] The Eighth Circuit had argued that in the absence of such a limitation, "the temptation to risk deliberate violations of the [Constitution] would be too great, and the deterrent effect of the exclusionary rule reduced too far."[241] The Supreme Court stated simply that "[w]e reject that view," explaining that police officers rarely will be in a position to exploit in a calculating fashion the "inevitable-discovery" exception announced in *Williams,* and in those rare occasions, "the possibility of departmental discipline and civil liability" should suffice to fill in the gap in deterrence created by the exception.[242]

Second, in *Murray v. United States*[243] the Court expanded the already established "independent-source" exception to the exclusionary rule, which permitted the government to use evidence that otherwise would be tainted by unconstitutional conduct if the government could establish that the evidence was obtained from a source wholly independent of the illegal action. In *Murray* the Court held that the exception applied even when the very same law enforcement agents who performed an illegal, warrantless search later came back and performed a legal search with a warrant based on probable cause established with facts known to the police prior to the first, illegal search.[244] Once again, the Court simply rejected the fears of the dissenters that the *Murray* holding would give police officers incentive to conduct warrantless searches when they had what they believed to be strong probable cause, thus seeking to confirm their suspicions before bothering to obtain a

240. *See* 467 U.S. at 445-46. While the vast majority of both state and federal courts to consider the issue recognized the existence of an "inevitable-discovery" exception to the exclusionary rule before the Supreme Court formally announced one in *Nix v. Williams,* a number of states in addition to Iowa had limited the exception by imposing a requirement that the government prove lack of "bad faith." *See* Fain v. State, 611 S.W.2d 508 (Ark. 1981); People v. Superior Ct. of Alameda County, 145 Cal. Rptr. 795 (Cal. Ct. App. 1978); State v. Holler, 459 A.2d 1143 (N.H. 1983); State v. Adams, No. 83-CA-25, 1983 WL 2587 (Ohio Ct. App. Dec. 14, 1983).

241. Williams v. Nix, 700 F.2d 1164, 1169 n.5 (8th Cir. 1983), *revd.,* 467 U.S. 431 (1984).

242. *Williams,* 467 U.S. at 445, 446.

243. 487 U.S. 533 (1988).

244. *See* 487 U.S. at 541-42 & n.3. The federal agents in *Murray* suspected that the defendants were storing marijuana in a warehouse. Without obtaining a warrant or establishing the existence of any exception to the warrant requirement, they searched the warehouse, discovering the suspected marijuana. At that point, the agents obtained a search warrant, based on an affidavit stating only the facts as known to them prior to the illegal search, which the judicial officer found to constitute probable cause.

search warrant.[245] Instead, the Court merely asserted that police officers would be loath to take on the "onerous burden" of demonstrating to a court that the warrant was not tainted by the earlier illegal search.[246] In doing so, the Court ignored the fact that the testimony of the officers themselves would be the only possible source of evidence on the question of taint and thus that the *Murray* rule created an opportunity for those officers inclined to commit perjury to do so persuasively — with the information obtained by illegal search in hand.[247]

Finally, in *New York v. Harris,*[248] in a brief and rather obscure opinion, the Court held that a stationhouse statement taken from a suspect after he was arrested illegally in his home by the police without a warrant, although with probable cause, was not a "fruit" of the unlawful arrest. The Court reasoned that the statement was neither the "product" nor an " 'exploitation' " of the illegal home invasion because the requirement of an arrest warrant in addition to probable cause to arrest merely protects the privacy of the home from invasion and not the defendant himself from lawful custody and interrogation.[249] Despite strong evidence that the police in *Harris* were motivated to violate the *Payton* rule[250] that requires warrants for home arrests *in order* to obtain a statement from the defendant — because New York state law required that defendants arrested upon a warrant be provided with counsel at the time of any subsequent questioning, thus rendering the likelihood of a statement virtually nil[251] — the Court insisted that suppressing a stationhouse statement taken after a warrantless home arrest "will have little effect on the officers' actions."[252]

In *Williams, Murray,* and *Harris,* there was, consecutively, more and more reason to think that the Court's holding might create perverse incentives for law enforcement agents to knowingly violate Fourth

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245. *See* William J. Stuntz, *Warrants and Fourth Amendment Remedies,* 77 VA. L. REV. 881, 933-34 (1991) (explaining why police officers with solid probable cause may be given incentive under the *Murray* rule to search illegally first and seek a warrant later).

246. *Murray,* 487 U.S. at 540.

247. *See* Stuntz, *supra* note 245, at 934 (arguing that if one purpose of the warrant requirement is to combat police perjury by requiring the police to swear to a version of the facts before searching so that they will not be able to tailor their testimony to the facts that the search reveals, *Murray* creates exactly the incentives that the majority opinion denies).

248. 495 U.S. 14 (1990).

249. 495 U.S. at 19 (quoting United States v. Crews, 445 U.S. 463, 471 (1980)).

250. Payton v. New York, 445 U.S. 573 (1980).

251. *See Harris,* 495 U.S. at 25 n.2 (Marshall, J., dissenting) (citing N.Y. CRIM. PROC. LAW § 120.20 (McKinney 1981) and People v. Samuels, 400 N.E.2d 1344 (N.Y. Ct. App. 1980)).

252. 495 U.S. at 21.

Amendment norms. And in each case, more and more Justices dissented on just such grounds.[253] But in each case, the majority of the Court continued on the course charted in *Leon* of taking a narrow view of "adequate" deterrence of official misconduct. Essentially, the Court maintained that as long as there remained *some* deterrent in the law to unlawful police action — whether it be the civil remedies the Court alluded to in *Williams,* or the continuing risk that some evidence would be subject to suppression,[254] or some combination of the two — the cost of excluding reliable evidence of guilt outweighed the benefits of increased deterrence. In other "fruits" cases, the Court sounded *Leon*'s parallel theme of concern about the cost to the truth-seeking process of exclusion of evidence. For example, in *United States v. Ceccolini,*[255] the Court held that a witness discovered as the result of an illegal search[256] was not the "fruit" of that search in light of other factors "attenuating" the taint of the search, such as the witness's voluntariness in cooperating with the government investigation.[257] But the Court relied in large part on the high cost to the trial process of "permanently silencing" a live witness as a sanction for an illegal search.[258] The post-Warren Court "fruits" cases, taken as a whole, demonstrate how the Burger and Rehnquist Courts' cost-benefit calculus — weighted more sympathetically on the cost side than the benefit side — led to the development of substantial exceptions to the operation of the Fourth Amendment exclusionary rule.

The development of the "impeachment" exception to the exclusionary rule tells essentially the same story. As in the "fruits" context, the Warren Court itself recognized a limited exception to the exclusionary rule: in *Walder v. United States,*[259] the Court permitted the use of illegally obtained evidence to impeach a testifying defendant's credibility as a witness at his own criminal trial. But the *Walder* exception was a

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253. *Williams* had two dissenters, *Murray* had three, and *Harris* had four.

254. The Court explicitly noted that any statement or physical evidence obtained inside the home during a warrantless home arrest would continue to be subject to suppression after *Harris* and thus would continue to deter adequately such warrantless arrests. *See* 495 U.S. at 20.

255. 435 U.S. 268 (1978).

256. A government agent illegally opened an envelope he observed on the counter of the defendant's flower shop, discovering betting slips inside. As a result, one of the employees of the shop became a witness against the defendant. *See* 435 U.S. at 270-73.

257. 435 U.S. at 279-80.

258. 435 U.S. at 280; *see also* United States v. Crews, 445 U.S. 463, 474 & n.20 (1980) (emphasizing the grossly disproportionate windfall that would accrue to a defendant if his presence at trial were deemed a "fruit" of the unlawful seizure of his person).

259. 347 U.S. 62 (1954).

narrow one on its facts and its reasoning. The defendant in *Walder* was impeached on a matter collateral to the issue of his ultimate guilt or innocence of the charge at hand and in response to a patently false statement he offered during his direct examination by his own counsel.[260] The *Walder* Court emphasized the egregious nature of the defendant's perjury in justifying its exception to the exclusionary rule, noting that the defendant "must be free to deny all the elements of the case against him" without fear of impeachment with illegally obtained evidence.[261]

The Burger and Rehnquist Courts, however, took *Walder* and ran with it, using the same cost-benefit analysis to expand drastically the scope of the impeachment exception. In *United States v. Havens*[262] the Court managed to set aside every limiting aspect of the Warren Court's decision in *Walder.* First, unlike Walder, Havens was impeached not about a collateral matter, but about his denial of involvement in the very charge at issue in his trial. Thus, the suppressed evidence used to impeach Havens was much more likely than the evidence used against Walder to be considered by the fact finder as substantive evidence of the defendant's guilt, as opposed to evidence only of his lack of credibility as a witness.[263] Second, unlike Walder's statements, the statements by Havens that were impeached by the suppressed evidence were elicited not by Haven's own counsel, but by the government on cross-examination of Havens after Havens gave a general denial of the charges on direct. By approving the use of suppressed evidence to impeach denials elicited on cross, the *Havens* Court effectively obliterated the assurance of the *Walder* Court that a defendant "must be free to deny all elements of the case against him." In light of the generally broad rules governing the proper scope of cross-examination, it is highly likely that a general denial by a defendant will elicit proper cross-examination by the government regarding relevant suppressed evidence.

The *Havens* holding clearly makes suppressed evidence more valuable to the government because such evidence will now generally be

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260. Walder testified on direct examination that he never had purchased, sold, or possessed illegal narcotics. The Court upheld the government's impeachment of this statement with evidence that heroin had been seized, albeit in violation of the constitution, from the defendant two years earlier. *See* 347 U.S. at 63-64.

261. 347 U.S. at 65.

262. 446 U.S. 620 (1980).

263. In *Havens* the defendant's denial of participation in narcotics trafficking was impeached with a T-shirt illegally seized from his luggage, from which swatches had been cut. The swatches had been used to make "pockets" in the undershirt of the defendant's travelling companion for the transportation of cocaine. *See* 446 U.S. at 622-23.

admissible whenever a defendant takes the stand, thus forcing the defense to choose between allowing the defendant to testify and ensuring that constitutionally suppressed evidence stays out of the trial. But once again, the Court was skeptical that its new holding would create substantial incentives to disregard Fourth Amendment norms. The Court concluded that precluding *Havens*-type impeachment of defendants with suppressed evidence would have only an "incremental" deterrent effect on police misconduct, given that the government still is precluded from using such evidence in its case-in-chief.[264] Moreover, the Court once again found more powerful the need to further truth-seeking by combatting defendants' perjury than the need for deterrence by applying the exclusionary rule.

The greatest possible expansion of the impeachment exception was rejected by the Court in 1990 when, in *James v. Illinois*,[265] the Court held that only the defendant himself and not other defense witnesses could be impeached with suppressed evidence.[266] In essence, the Court refused to convert the idea of impeachment of the credibility of the defendant-as-witness into a general right to rebut the defense case with further evidence of the defendant's guilt. The opinion, one of the last written for the Court by Justice Brennan before his retirement, sounds themes at odds with those present in the Burger and Rehnquist Courts' other impeachment cases and, indeed, their exclusionary rule cases generally. Interestingly, Justice Brennan adopted for the purposes of the *James* opinion exactly the cost-benefit analysis he had bemoaned in earlier dissents, most notably his lengthy dissent in *Leon*. But Justice Brennan's opinion in *James* shows that cost-benefit analysis has no *inherent* tilt against application of the exclusionary rule; any tilt comes from the weights assigned to the inevitably unquantifiable costs and benefits. The *James* majority saw a great deal of deterrent benefit to precluding the impeachment of defense witnesses with constitutionally suppressed evidence: a contrary rule, feared the Court, would make such evidence much more valuable to the government and thus would create an unacceptable incentive for the police to violate the Fourth Amendment. And the *James* majority was correspondingly unimpressed with the "cost" of permitting defense witnesses to subvert the truth-seeking process by misrepresenting facts with impunity from impeachment, noting that the threat of prosecution for perjury should deter most mendacious defense witnesses.

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264. 446 U.S. at 627.

265. 493 U.S. 307 (1990).

266. In *James*, the suppressed evidence was a statement taken from the defendant after his arrest without probable cause. *See* 493 U.S. at 309-10.

It might seem that *James* is a challenge to my thesis of "counter-revolution" in decision rules, as it holds the line against a potentially powerful exception to the exclusionary rule. But *James* is remarkable mostly because it is so anomalous in the otherwise gross expansion of the impeachment exception. And even more important, *James* was a 5-4 decision in which four of the five members of the majority have since retired and been replaced,[267] while all four dissenters remain on the Court. Moreover, the Court has already overruled two other 5-4 Brennan majority opinions issued the same year as *James* (and Brennan's last year on the Court).[268] Thus, *James* in the impeachment context, like *Leon* in the generalized "good-faith" context, signals the possibility of even more massive change in decision rules on the horizon.

When the strands are considered together, the web of exceptions to the Fourth Amendment exclusionary rule created by simultaneous changes in the doctrines relating to standing, the good-faith exception, fruits, and impeachment represents a complete reworking of the exclusionary rule regime that existed during the 1960s — the post-*Mapp* Warren Court era. Our hypothetical conscientious list-maker attempting to chart when Fourth Amendment violations will lead to evidentiary exclusion would be compelled to create two very different lists in 1969 and 1996. The practical and conceptual differences between these two lists present some of the strongest evidence supporting those who argue that there has been a "counter-revolution" in constitutional criminal procedure in the Burger and Rehnquist Courts.

Marked as the changes in the scope of the Fourth Amendment exclusionary rule may be, the changes in Fifth Amendment decision rules are, if anything, even more dramatic. At first blush, it is hard to see how there could be any meaningful distinction in the Fifth Amendment context between "conduct" rules and "decision" rules. While it is quite plausible to claim that the Fourth Amendment "has" an exclusionary rule created by the courts that is a decision rule separate from the Amendment's substantive conduct rules relating to reasonableness, warrants, and probable cause, it is important to see that the Fifth Amendment "is" an exclusionary rule. The very "conduct" prohibited by the amendment is the "decision" by courts to admit compelled testimony from the accused against him or her at trial. Police practices that com-

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267. Justices Brennan, Marshall, White, and Blackmun have been replaced by Justices Souter, Thomas, Ginsberg, and Breyer.

268. *See* Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), *overruled by* Adarand Contractors, Inc. v. Pena, 115 S. Ct. 2097 (1995); Grady v. Corbin, 495 U.S. 508 (1990), *overruled by* United States v. Dixon, 509 U.S. 688 (1993).

pel an accused to speak do not themselves violate the Fifth Amendment[269] unless and until they are used "in a criminal case."[270]

One of the most striking changes wrought by the Burger and Rehnquist Courts has been the transformation of the *Miranda* decision from an interpretation of the Fifth Amendment itself into a subconstitutional, prophylactic rule whose violation is not necessarily an infringement of constitutional right. By reconceiving *Miranda* in this way, the later Courts were able to dispense with the absolute rule of exclusion that inheres in the Fifth Amendment itself and to portray *Miranda* as "having" an exclusionary rule subject to the same sorts of vicissitudes as the Fourth Amendment exclusionary rule.

The reconceptualization began early. In 1974 in *Michigan v. Tucker*,[271] the Court held that the government could call at trial a witness whose identity was obtained from a defendant who was interrogated by the police in violation of *Miranda*'s dictates at a time prior to *Miranda*'s decision by the Court.[272] The Court's opinion relied heavily on the unusual facts of the case — that the police action predated the *Miranda* decision, that the police nonetheless complied in large part with *Miranda*'s dictates (failing only to tell the defendant that an attorney would be appointed for him if he could not afford one), and that only the identity of a witness was obtained and used from the interrogation of the defendant. While the *Tucker* decision is thus of little precedential value on its facts, it is the first case in which the Court clearly characterized the *Miranda* decision as less than a straight-forward interpretation of the privilege against self-incrimination. Justice Rehnquist, writing for the Court, explained that the procedures mandated by *Miranda* were not part of the right to be free from compelled self-incrimination but rather were merely "prophylactic rules developed to protect that right."[273] As a result, reasoned the Court, disregard of *Miranda*'s prophylactic rules did not require automatic exclusion of all fruits the way a "real" Fifth Amendment violation would. Rather, the Court characterized the question before it as "how sweeping the judicially imposed consequences of this disregard shall be."[274]

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269. At least, such practices do not violate the privilege against self-incrimination. They may well violate the Due Process Clause.

270. *See* U.S. CONST. amend. V.

271. 417 U.S. 433 (1974).

272. *Miranda*'s dictates applied to the case because the trial occurred after the decision was handed down. *See* 417 U.S. at 435.

273. 417 U.S. at 439.

274. 417 U.S. at 445.

This characterization of *Miranda* in effect created a conduct rule/decision rule distinction in the heretofore unitary Fifth Amendment context. In the wake of *Tucker,* it became clear that while the Constitution required police to seek to comply with *Miranda*'s prophylactic conduct rules, failures to comply would not necessarily result in the exclusion of all fruits of such violations. Rather, the scope of *Miranda*'s decision rules was a matter for the Court to determine on a case by case basis. And in making such a determination, the Court found itself guided by exactly the calculus it had created in the Fourth Amendment exclusionary rule context: it sought to weigh the deterrent effect of excluding evidence against " 'society's interest in the effective prosecution of criminals' " through the admission of reliable evidence of guilt.[275]

Having created some space between *Miranda*'s conduct rules and its decision rules, the Court soon pared down the *Miranda* exclusionary rule in ways essentially parallel to its cutbacks of the Fourth Amendment exclusionary rule. Standing rarely comes up as an issue in the Fifth Amendment context because a defendant usually has standing to contest the use of his or her own statements or their fruits, and the government generally is precluded from using the out-of-court statements of others as evidence against a defendant by the defendant's Sixth Amendment right to confront the witnesses against him. But a "good-faith" exception of sorts made a brief appearance in the Fifth Amendment context in *Tucker* itself. The *Tucker* Court explained that, for police interrogations that occurred prior to the Court's decision in *Miranda,* it would not make sense to exclude the fruits of interrogations that did not comply with *Miranda*'s detailed strictures unless at least some negligence could be shown on the part of the interrogating officers: "[w]here the official action was pursued in complete good faith . . . the deterrence rationale loses much of its force."[276] This "good-faith" exception appears to be limited to cases of police action that antedated the *Miranda* opinion; given that the dictates of *Miranda* are so excruciatingly clear, there is little room for police officers to claim "good-faith" lack of compliance in post-*Miranda* interrogations.

The doctrines relating to "fruits" and impeachment, however, have proven to be the major growth areas in exceptions to *Miranda*'s exclusionary rule. *Tucker* was really the first *Miranda* fruits case because Tucker sought to suppress the testimony of a witness whose identity

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275. 417 U.S. at 450 (quoting Jenkins v. Delaware, 395 U.S. 213, 221 (1969)). Indeed, the *Tucker* Court made the parallel to Fourth Amendment jurisprudence explicit. *See* 417 U.S. at 446-47.

276. 417 U.S. at 447.

was obtained as a result of Tucker's interrogation in violation of *Miranda*. But it was unclear what the reach of *Tucker* might be beyond its unusual facts. In *Oregon v. Elstad*,[277] however, the Court reiterated *Tucker*'s characterization of *Miranda* as a "prophylactic" rule[278] and held that a statement obtained after waiver of rights from a properly warned defendant need not be suppressed as a "fruit" of an earlier, unwarned statement obtained by the police from the defendant in violation of *Miranda*. The Court explained that *Miranda* violations create merely a "presumption of compulsion"[279] that, while it is conclusive as to the admissibility of the defendant's statements in the government's case-in-chief, can be rebutted for other purposes by a showing that the unwarned confession was not actually "coerced" in violation of the Fifth Amendment. If the government can make such a showing, reasoned the Court, there is no need to suppress evidence derived from the defendant's statements, because this evidence is not really the "fruit" of any true constitutional violation. The *Elstad* Court's analysis would seem to have applicability to any possible "fruits" of *Miranda* violations and not merely the second statement scenario presented in *Elstad* itself.[280] Indeed, many state and lower federal courts have read it to mean that *Miranda* violations simply produce no suppressible "fruits" at all.[281]

Thus, the Court's "fruits" analysis in the *Miranda* context is even more radically restrictive than its Fourth Amendment "fruits" analysis. In the Fourth Amendment context, the Burger and Rehnquist Courts limited the category of suppressible fruits either by expanding existing exceptions (like the "independent-source" doctrine) or by creating new ones (like the "inevitable-discovery" doctrine or the rule in *New York v. Harris*). But in the Fifth Amendment context, the Court moved from an understanding of *Miranda* as an interpretation of the Fifth Amendment that would require the automatic exclusion of *all* derivative evidence to an understanding of *Miranda* as a mere prophylactic rule that requires the exclusion of *nothing* except the unwarned statement itself.

This same conception of *Miranda* as a prophylactic rule of subconstitutional status also led the Court to create a large exception to *Miranda*'s exclusionary rule under the rubric of impeachment. The set-

277. 470 U.S. 298 (1985).

278. 470 U.S. at 305.

279. 470 U.S. at 307.

280. For example, a defendant's statement can lead to witnesses, as in *Tucker*, or to physical evidence by creating probable cause to search.

281. *See* David A. Wollin, *Policing the Police: Should* Miranda *Violations Bear Fruit?*, 53 OHIO ST. L.J. 805, 811 & n.18 (1992) ("[F]ederal and state courts have read *[Elstad]* broadly to mean that the poisonous tree doctrine is inapplicable when a *Miranda* violation produces *any* derivative evidence.") (citing cases).

tled understanding of the Fifth Amendment, which has continued to be accepted by the Burger and Rehnquist Courts, is that statements that truly are "compelled" from a defendant in violation of the Fifth Amendment cannot be used even to impeach the defendant's credibility if the defendant testifies contrary to such statements at trial. To do so would make the defendant a "witness against himself" against the clear textual command of the Fifth Amendment.[282] But once the post-Warren Court defined statements taken in violation of *Miranda* not as truly "compelled," it found itself freed from the textual mandate of exclusion and thus able to treat *Miranda*'s requirement of exclusion of statements that would be deemed "voluntary" under the old Fifth Amendment as a judicially created remedy subject to the same cost-benefit analysis as the Fourth Amendment exclusionary rule. Dismissing as dicta language of the *Miranda* decision that indicated that statements taken in violation of its dictates may not be used at trial at all, the Court held, as it had in the Fourth Amendment context, that the costs in encouragement of perjury outweighed the benefits of any additional deterrence of police misconduct that would be obtained by forbidding impeachment of the defendant, given that the government already was precluded from using the suppressed evidence in its case-in-chief.[283] The Court later extended this holding, which permitted impeachment with a statement taken when *Miranda* warnings were not given, to permit impeachment with a statement taken when a defendant invoked his *Miranda* right to counsel but the police ignored his request and continued to interrogate him.[284] Once again, the Court emphasized that the "search for truth in a criminal case"[285] outweighed the deterrent effect of exclusion, despite the obvious incentive for police misconduct inherent in this latter situation.

It is fair to describe as pivotal, indeed, even "counter-revolutionary" the enormous shift from the Warren Court's conception of *Miranda* as recognizing the inherent compulsion present in custodial interrogation and thus *interpreting* the Fifth Amendment, to the Burger and Warren Court's interpretation of *Miranda* as merely *preventing* "real" Fifth Amendment violations through a judge-made exclusionary

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282. *See* New Jersey v. Portash, 440 U.S. 450, 459 (1979) (holding that the use of compelled statements to impeach the defendant, even when such statements are clearly reliable, is impermissible because it violates the Fifth Amendment "in its most pristine form"); *see also* Mincey v. Arizona, 437 U.S. 385, 398 (1978) (holding that a defendant's involuntary statements may not be used to impeach him in any criminal trial).

283. *See* Harris v. New York, 401 U.S. 222, 225 (1971).

284. *See* Oregon v. Hass, 420 U.S. 714 (1975).

285. 420 U.S. at 722.

rule. Yet it is important to note that this reconceptualization entailed no change at all in police conduct rules — *Miranda*'s requirements in terms of warnings and waivers remain untouched. Rather, the *Miranda* sea-change simply changed the consequences to the government in terms of evidentiary exclusion that flow from police failures to abide by *Miranda*'s requirements. It is here in the *Miranda* context that the contrast between stability in conduct rules and change in decision rules is the greatest.

The Sixth Amendment *Massiah* rule, which has enjoyed the most stability of all of the Warren Court's conduct rules,[286] has not been undermined quite as much by decision rules as has *Miranda,* although the Court has begun to move in that direction and well may accelerate its progress soon. For reasons identical to those in the *Miranda* context, standing to challenge *Massiah* violations is rarely an issue because a defendant always will have standing to object to the admission of his own statements, and the government rarely will seek to admit the out-of-court statements of others against the defendant because of separate Confrontation Clause concerns. The question of governmental "good faith" also almost never comes up because *Massiah*'s prohibition of "deliberate" elicitation of statements in the absence of counsel seems to contain within it a standard of government culpability. The Supreme Court has not had occasion to address the issue of what constitutes a suppressible "fruit" of a *Massiah* violation, but its treatment of the impeachment question suggests the direction that the Court may take.

In *Michigan v. Harvey,*[287] the Court held that the *Michigan v. Jackson* rule,[288] which prohibits any deliberate elicitation of statements from a defendant after an invocation of the Sixth Amendment right to counsel unless the defendant initiates contact with the police, is a prophylactic rule identical to Fifth Amendment rule in *Edwards v. Arizona,*[289] which prohibits interrogation of suspects after they invoke their *Miranda* right to counsel unless the suspect reinitiates contact. The Court reasoned that when the police violate the *Jackson* rule by continuing to question a defendant after he has invoked his Sixth Amendment right to counsel but then obtain a valid waiver of counsel and a statement, they have not violated the Sixth Amendment itself but only a prophylactic rule designed to prevent such violations.[290] Statements obtained in such a fashion thus can be used to impeach a testifying

286. *See supra* notes 33-60 and accompanying text.
287. 494 U.S. 344 (1990).
288. 475 U.S. 625 (1986).
289. 451 U.S. 477 (1981).
290. *See Harvey,* 494 U.S. at 351.

defendant at trial because the harm to the truth-seeking process caused by a defendant's perjury is greater than the deterrent effect likely to be obtained by precluding such impeachment.[291] The Court explicitly left open the question, however, whether a "core" *Massiah* violation — that is, a statement obtained from a defendant whose Sixth Amendment right to counsel has attached *and never been waived* — is itself a violation of the Sixth Amendment.[292] Thus, the Court has left open the door to concluding that *Massiah*'s ban on questioning in the absence of counsel after the commencement of adversary proceedings, like *Miranda*'s ban on the questioning of suspects in custody in the absence of warnings, is not an interpretation of the Constitution, but rather a prophylactic rule designed to sweep more broadly than the actual constitutional right in order to deter police misconduct.

If the Court so concludes, the consequences for the *Massiah* rule likely would be very similar to the consequences that have obtained already in the *Miranda* context. That is, derivative evidence obtained as a result of a *Massiah* violation — such as a second statement, the identity of a witness, or probable cause to seize physical evidence — likely would not be precluded from use by the government at trial. And statements taken in violation of *Massiah* likely would be permitted as impeachment against a defendant who testified contrary to such statements at trial. While the limited impeachment exception that the Court thus far has permitted in the Sixth Amendment context is not of the same proportion as the changes in decision rules in the Fourth and Fifth Amendment contexts, the Court has set the stage for a re-working of *Massiah* that would be equally significant. And even the limited impeachment exception already recognized by the Court in *Harvey* represents a greater change in decision rules in the *Massiah* context than is apparent in the completely stable conduct rules created in the *Massiah* case.

B. *Review and Reversal of Convictions*

In addition to promulgating "inclusionary rules" that make possible the admission of evidence that has been obtained through unconstitutional conduct of law enforcement agents, the Court also has changed rules governing the standard of review on appeal of constitutional errors and governing the availability of federal review of state court convictions. These latter rules are "inclusionary" in a less direct way than are the former: when the Court makes it harder for constitutional errors to lead to reversal of convictions and when it shuts the door to federal

291. *See* 494 U.S. at 353.
292. *See* 494 U.S. at 353-54.

postconviction review, the result is that convictions resulting from trials in which unconstitutionally obtained evidence has been erroneously admitted are left undisturbed by reviewing courts. Thus, these rules, like the rules directly governing the admission of evidence at trial, permit the government to reap the evidentiary benefits at trial of prior police misconduct without incurring any judicially imposed penalty.

The Burger and Rehnquist Courts have moved fairly consistently since the 1960s in the direction of permitting appellate courts to apply "harmless error" analysis to ever-expanding categories of constitutional error. It is true that it was the Warren Court that first held that *any* constitutional error could be deemed harmless, when, in the 1967 case of *Chapman v. California,*[293] it held that constitutional errors that occur in criminal trials on occasion might be "so unimportant and insignificant" as to be deemed harmless and thus preclude the need for reversal of the conviction.[294] The *Chapman* Court, however, also imposed two important limits on its holding. First, the Court concluded that constitutional errors require as a matter of federal law[295] a standard of harmless error review different from and more demanding than the one used in federal courts and in most state courts to assess the harmlessness of ordinary, nonconstitutional error. Instead of asking whether or not the error "affected substantial rights,"[296] courts reviewing constitutional error must assure themselves that the error is "harmless beyond a reasonable doubt" before permitting the conviction to stand.[297] Second, the *Chapman* Court noted that some constitutional errors are "so basic to a fair trial that their infraction can never be treated as harmless error"[298] and gave as examples the admission of a coerced confession, the denial of the right to counsel, and the denial of the right to trial before an impartial judge.[299]

The Burger and Rehnquist Courts, however, have "dramatically expanded the list of constitutional violations that are subject to harm-

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293. 386 U.S. 18 (1967).

294. 386 U.S. at 22.

295. For a discussion of whether the *Chapman* standard can be defended as deriving either from the constitution itself or from federal common law, see Daniel J. Meltzer, *Harmless Error and Constitutional Remedies,* 61 U. CHI. L. REV. 1 (1994).

296. Kotteakos v. United States, 328 U.S. 750 (1946), established the standard that reigns in federal court for the assessment of nonconstitutional error: unless a reviewing court can "say . . . with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." 328 U.S. at 764-65.

297. *Chapman,* 386 U.S. at 24.

298. 386 U.S. at 23.

299. *See* 386 U.S. at 23.

less-error analysis, while adding few to (and indeed, subtracting one from) the list of violations that are per se reversible."[300] For my purposes, what is important to note is that the Court by now has held that every error relating to the admission of evidence that was obtained by unconstitutional police conduct can be subject to harmless error review. The Warren Court itself held, fairly uncontroversially, that Fourth Amendment violations can be subject to harmless error analysis.[301] I say "fairly uncontroversially" because Fourth Amendment rights relate not to the conduct of trials at all, but to rights of security from government intrusion — privacy — that implicate the trial process only indirectly, if at all.

More controversially, the Burger and Rehnquist Courts went on to hold that violations of the *Massiah* rule also may be subject to harmless error analysis.[302] The extension of harmless error analysis to *Massiah* violations might be thought to run afoul of *Chapman*'s suggestion that the right to counsel is one of those rights "so basic to a fair trial that their infraction can never be treated as harmless." After all, the *Massiah* Court had based its proscription of postindictment contact with a defendant on the Sixth Amendment right to "assistance of counsel." But the Burger and Rehnquist Courts together effectively have limited *Chapman*'s special solicitude for the right to counsel to the right to counsel *at the trial proceeding itself.* Even as the Court expanded the substantive scope of the *Massiah* right by holding it applicable to a psychiatric interview with a defendant in a capital case,[303] the Court simultaneously subjected a violation of the right to harmless error review.[304] And the Court also has applied harmless error analysis to the right to counsel at pretrial identification procedures[305] and preliminary hearings.[306]

Most controversially, the Court in *Arizona v. Fulminante*[307] applied harmless error analysis to coerced confessions, controverting the explicit understanding of the *Chapman* Court. Of necessity, *Fulminante* also applies to violations of *Miranda,* which the Court had not yet explicitly subjected to harmless error analysis, though lower federal courts

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300. *See* Harry T. Edwards, *To Err Is Human, But Not Always Harmless: When Should Legal Error Be Tolerated?*, 70 N.Y.U. L. REV. 1167, 1176 (1995).

301. *See* Bumper v. North Carolina, 391 U.S. 543 (1968).

302. *See* Milton v. Wainwright, 407 U.S. 371 (1972).

303. *See* Satterwhite v. Texas, 486 U.S. 249 (1988).

304. *See* 486 U.S. at 258.

305. *See* Moore v. Illinois, 434 U.S. 220 (1977).

306. *See* Coleman v. Alabama, 399 U.S. 1 (1970).

307. 499 U.S. 279 (1991).

had anticipated that it would.[308] Whether or not the *Fulminante* decision is a good one,[309] it reflects the extent to which the Burger and Rehnquist Courts have diverged from the Warren Court's own understanding of the scope of constitutional harmless error review.

In addition to expanding the scope of harmless error review of constitutional violations, the post-Warren Court also moderated the high standard for assessing constitutional error articulated in *Chapman.* In *Brecht v. Abrahamson*[310] the Court held that the standard of "harmless beyond a reasonable doubt" is not generally the proper standard for federal courts to apply when they review constitutional challenges to state convictions under their habeas corpus jurisdiction. Instead, the Court concluded that considerations of federalism and states' interest in the finality of convictions mandate that the less stringent *Kotteakos* standard should apply in most cases.[311]

Some have suggested that *Brecht* is not a particularly significant departure because, in practice, the *Kotteakos* standard does not differ very much from the supposedly more exacting *Chapman* standard.[312] But *Brecht* is significant as much for its reflection of the Court's changing view of habeas corpus as it is for the Court's changing view of harmless error analysis. Many have noted and criticized the obvious trend in the Burger and Rehnquist Courts toward the restriction of habeas corpus review of state criminal convictions by federal courts.[313]

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308. *See* 499 U.S. at 292 & n.6 (citing lower federal court cases applying harmless error analysis to *Miranda* violations).

309. *Compare* Charles J. Ogletree, Jr., *The Supreme Court, 1990 Term — Comment:* Arizona v. Fulminante: *The Harm of Applying Harmless Error to Coerced Confessions,* 105 HARV. L. REV. 152 (1991) (criticizing the Court's approach) *with* Meltzer, *supra* note 295, at 4 n.15 (confessing to "seeing no reason why a coerced confession might not be deemed harmless").

310. 507 U.S. 619 (1993).

311. *See* 507 U.S. at 637-38 (citing Kotteakos v. United States, 328 U.S. 750, 776 (1946)). The Court left open the possibility that in "an unusual case" a federal court might grant habeas relief even if the error or errors were harmless under the *Kotteakos* standard. 507 U.S. at 638 n.9.

312. *See* 507 U.S. at 643 (Stevens, J., concurring) (maintaining that "the way we phrase the governing standard is far less important than the quality of the judgment with which it is applied"); Edwards, *supra* note 300, at 1179 (commenting that "if the truth be told, it is hard to discern any material differences in the two standards").

313. *See, e.g.,* Erwin Chemerinsky, *Thinking About Habeas Corpus,* 37 CASE W. RES. L. REV. 748 (1987); Barry Friedman, *Failed Enterprise: The Supreme Court's Habeas Reform,* 83 CAL. L. REV. 485 (1995); Kathleen Patchel, *The New Habeas,* 42 HASTINGS L.J. 939 (1991); Frank J. Remington, *Restricting Access to Federal Habeas Corpus: Justice Sacrificed on the Altars of Expediency, Federalism and Deterrence,* 16 N.Y.U. REV. L. & SOC. CHANGE 339 (1987-88); Yale L. Rosenberg, *Kaddish for Federal Habeas Corpus,* 59 GEO. WASH. L. REV. 362 (1991); Jordan Steiker, *Innocence and Federal Habeas,* 41 UCLA L. REV. 303 (1993); Larry W. Yackle, *Form and Func-*

Indeed, one commentator has suggested that habeas corpus is "[p]erhaps the area where the Burger Court [has] most dramatically departed from the Warren Court precedents."[314]

It is not my purpose here either to assess the critiques of the Supreme Court's habeas "reforms" or to examine those reforms in great detail. Rather, I wish briefly to canvass the ways in which the Burger and Rehnquist Courts have restricted the availability of federal habeas review, with special attention to review of constitutional issues relating to police misconduct. Thus, although *Stone v. Powell*[315] may not be at the top of most habeas scholars' list of the most significant departures from Warren Court precedent, the complete extinction of federal habeas review of Fourth Amendment violations has obvious import for my argument. By denying federal court review to *the* class of cases in which the temptation on behalf of often elected state court judges to tolerate police misconduct is probably the strongest (because physical evidence, unlike statements, is such undeniably reliable evidence of guilt), the post-Warren Courts signalled a willingness to tolerate a necessarily higher degree of constitutional error at trial than their predecessor Court. Although the Court declined to extend *Stone*'s complete exemption to the class of *Miranda* violations, it did so not because it rejected the "prophylactic" view of *Miranda,* but almost entirely because it pragmatically recognized that federal habeas courts still would have to review the claims of "involuntariness" under the Due Process Clause that almost invariably accompany defendants' claims that their *Miranda* rights were violated.[316]

And while *Miranda* (and *Massiah*) claims remain cognizable on habeas, they are subject to the significant limitations that the Court has imposed on all habeas litigants. The transformation of the standard for excusing state procedural defaults from the "deliberate-bypass" standard of *Fay v. Noia*[317] to the "cause-and-prejudice" standard of *Wainwright v. Sykes,*[318] the application of the *Sykes* standard to redefine the limits on successive petitions under the "abuse-of-the-writ" doc-

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tion in the Administration of Justice: The Bill of Rights and Federal Habeas Corpus, 23 U. MICH. J.L. REF. 685 (1990).

314. Chemerinsky, *supra* note 313, at 749. Of course, the work of the Supreme Court restricting the availability of the writ has in large part been rendered moot by the recent legislation substantially modifying the federal habeas statute. *See* Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 735, 110 Stat. 1214, 1217-1220.

315. 428 U.S. 465 (1976).

316. *See* Withrow v. Williams, 507 U.S. 680 (1993).

317. 372 U.S. 391 (1963).

318. 433 U.S. 72 (1977).

trine,[319] and the limits on the retroactive application of "new law" on habeas review,[320] are some of the most obvious departures from the Warren Court's understanding of the scope of federal postconviction review. Quite simply, no one can doubt that there has been a "counter-revolution" in habeas corpus from the 1960s to the 1990s.

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It is my hope that my canvassing of the enormous changes in what I have termed "inclusionary rules" speaks for itself. By promulgating numerous and wide-ranging exceptions to the exclusionary rules of the Fourth, Fifth, and Sixth Amendments, and by limiting the opportunities for review and reversal of erroneous admissions of constitutionally excludable evidence, the post-Warren Court has "honeycombed" with holes the scheme that existed at the close of the 1960s for the enforcement at criminal trials of police conduct norms. Whichever enforcement scheme is better policy or better constitutional interpretation, the two enforcement regimes bear little resemblance to one another, either in theory or in practice. In contrast, despite some significant ideological and theoretical shifts that have occurred between the 1960s and the 1990s, the constitutional police conduct norms of then and now are substantially — even remarkably — similar on the prosaic level of dictating what the police officer on the street is required to do with regard to searches, seizures, and interrogation of suspects.

IV. "ACOUSTIC SEPARATION"

This article's primary descriptive claim, elaborated at some length above, is that there has been a marked difference in the degree of change between what I variously have termed the Supreme Court's "conduct" rules and "decision" rules, or "constitutional norms" and "inclusionary rules," or "rights" and "remedies." This primary claim, in turn, suggests a second and related descriptive claim, which itself will require some explication. The second claim, in a nutshell, is that members of the law enforcement community — the police as a group — have, not surprisingly, a more accurate and sophisticated understanding of the Supreme Court's ever-changing constitutional adjudication in the criminal procedure area than does the public at large. In particular, the police have much greater access to the decision rules promulgated

319. *See* McCleskey v. Zant, 499 U.S. 467 (1991).
320. *See* Teague v. Lane, 489 U.S. 288 (1989).

by the Court than does the public, which tends to focus, and to have its attention focused by the media, on conduct rules.

This second descriptive claim starts from the premise that the Supreme Court's constitutional regulation of police practices under the Fourth, Fifth, and Sixth Amendments has at least two principal audiences. The police themselves, obviously, are one audience, as it is their behavior that the Court directly seeks to shape. The general public is the second audience, because they are "the people" whose rights the Fourth Amendment safeguards and who never know when they might become a suspect or even an "accused." These two audiences, however, have different modes of access to Supreme Court jurisprudence and thus to knowledge of the structure of constitutional rights and remedies. Though I do not claim that there is anything intentional or nefarious about how this has come to be, the gap between the understandings of the two audiences is so great that it is as if the Supreme Court speaks in one voice to one community and in a different voice to the other.

It is here that the elegant and evocative metaphor of "acoustic separation," devised and deployed by Professor Meir Dan-Cohen in a different context, helps to illustrate what I mean.[321] Dan-Cohen used the distinction between "conduct rules" and "decision rules" in substantive criminal law to give birth to the idea of "acoustic separation." According to Dan-Cohen, who borrowed the distinction himself from Jeremy Bentham, conduct rules are addressed to the general public through criminal prohibitions in order to guide individual behavior (for example, "Let no person steal").[322] On the other hand, decision rules are addressed to the judges who enforce the criminal prohibitions to guide their decisionmaking about what the consequences of violating such prohibitions should be (for example, "Let the judge cause whoever is convicted of stealing to be hanged").[323] Dan-Cohen observed that in the context of modern substantive criminal law, conduct rules and decision rules often diverge dramatically. For example, criminal prohibitions generally are written in broad and categorical terms. But the defense of duress also exists to mitigate the harshness of those prohibitions in instances in which leniency seems generally appropriate.[324] By separating the general prohibitions from the defense, the law effects a partial separation between conduct rules and decision rules and thus can achieve

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321. *See* Dan-Cohen, *supra* note 17, at 630-32.

322. *See id.* at 626 (quoting BENTHAM, *supra* note 17, at 430 (emphasis and internal quotation marks omitted)).

323. *See id.* (quoting BENTHAM, *supra* note 17, at 430 (emphasis and internal quotation marks omitted)).

324. *Id.* at 632-34.

both a higher level of compliance with conduct rules and higher degree of leniency in decision rules than otherwise could coexist if the two sorts of rules conformed entirely.[325] The real world of substantive criminal law thus on occasion approximates an imaginary world in which the general public (the audience of criminal-conduct rules) and the judges (the audience of criminal-decision rules) inhabit distinct, acoustically sealed chambers, unable to hear the rules communicated to each other.[326] These ideas of "acoustic separation" and "selective transmission" of rules not only describe the way that substantive criminal law actually works in the real world, argues Dan-Cohen, but they raise interesting questions about the legitimacy and the internal morality of the law.[327]

With very little adaptation, Dan-Cohen's metaphor sheds some light and raises some interesting questions in the criminal procedure area as well. As I tell my students when we switch from substantive criminal law to criminal procedure midsemester, the constitutional rules promulgated under the Fourth, Fifth, and Sixth Amendments are a species of substantive criminal law for the police: they are the conduct rules that the Supreme Court wants the police to follow just as substantive criminal prohibitions are the conduct rules that the legislature wants individual citizens to follow. What Dan-Cohen's metaphor helps to bring to light is the varying degrees of acoustic separation that exist between the Court and the police and between the Court and the public. I contend, for reasons that I explain below, that the relationship between the Supreme Court and the police is one of very low acoustic separation. That is, the police are very apt to "hear" the decision rules that the Supreme Court makes (and that lower federal and state courts apply) and thus to adjust their attitudes about what behavior "really" is required by the Court's conduct rules.[328] In contrast, while members of the general public have formal access to the Supreme Court's decisions, they are much more likely to be aware of the Court's conduct rules for the police than they are to understand the Court's decision rules, for reasons that I explain below. Hence, there is much greater acoustic separation between the Court and the public than between the Court and the police — which means that the public and the police "hear" different messages from the same body of law produced by the Court. This

325. *See id.* at 665.

326. *See id.* at 630.

327. *Id.* at 665-77.

328. *See id.* at 632 (explaining that when a decision rule conflicts with a conduct rule in the absence of acoustic separation, the decision rule undercuts the power of the conduct rule).

situation raises normative questions of its own, which I address in Part V.

What is the nature of the access that the police have to the decision rules that the Supreme Court promulgates through constitutional interpretation? Well, one could simply say, "it's their job" to know what the supreme law of the land commands and forbids them to do and what the legal consequences of noncompliance are. But there is a bit more to it than that. The job of most modern American law enforcement agents brings with it a number of different and overlapping opportunities and incentives to learn both the conduct rules and the decision rules that are made by courts. First, police officers are taught by their own departments how to comply with Supreme Court directives and what the consequences of failures to comply will be — whether those consequences involve the exclusion of evidence, personal civil liability, or internal discipline.[329] Both federal and state law enforcement agents initially are trained in "academies" that offer formal instruction on all aspects of policing, but which generally include instruction in constitutional criminal procedure.[330] Also common is on-going internal instruction, which may include continuing education classes and the periodic dissemination of written material with judicial opinions relating to police work.[331]

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329. There is also some reason to believe that this information is sometimes conveyed in a fashion that encourages strategic disobedience. *See, e.g.*, Stephen L. Wasby, *Police Training About Criminal Procedure: Infrequent and Inadequate*, 7 POLY. STUD. J. 461, 466-67 (1978) (arguing that police department training materials transmit negative attitudes about Supreme Court rulings that encourage officers to seek to evade them).

330. *See* National Association of State Directors of Law Enforcement Training 1978 Survey, *reproduced in* JOHN D. FERRY & MARJORIE KRAVITZ, POLICE TRAINING: A SELECTED BIBLIOGRAPHY (National Criminal Justice Reference Service of the U.S. Dept. of Justice, 1980); *see also* telephone conversations in March 1996 of Hartley Kuhn, research assistant, with Michael Callahan, Chief Legal Counsel of the Boston Division (explaining that all new agents must attend the F.B.I. Training Academy in Quantico, VA, for sixteen weeks during which they receive extensive education about Fourth, Fifth, and Sixth Amendment case law), and Lieutenant James Moore of the Boston Police Academy (explaining that all new recruits receive thirty-six hours of training on constitutional law).

331. In a telephone conversation with Hartley Kuhn, my research assistant, in March 1996, Michael Callahan, Chief Counsel of the Boston Division of the F.B.I., explained that all F.B.I. agents are required to attend an annual legal training session, which serves to update the agents on all relevant federal constitutional decisions of the previous year. Mr. Callahan also explained that if a federal court decides a case that is of immediate importance, he prepares a written analysis of the decision and distributes it to each agent in his division. In a separate telephone conversation with Ms. Kuhn in March 1996, Lieutenant James Moore of the Boston Police Academy explained that when new constitutional law decisions are handed down, Lt. Moore issues Commissioner's Memoranda or conducts new training sessions to inform recruits of changes in the law. *See also* Paul G. Cassell, *The Mysterious Creation of Search and Seizure Exclu-*

In addition to internal instruction, however, police officers obtain important information about the trial consequences of violating constitutional prohibitions in their interactions with prosecutors. It is commonplace in the federal system and in some state systems[332] for the police to work in close collaboration with prosecutors in investigating cases in order to determine whether and what formal charges should be brought. Prosecutors have both the knowledge (because of their extensive legal training) and the incentive (because they will often bear primary public responsibility for the conviction or acquittal that results from such investigations) to ensure that the law enforcement agents working with them know all of the rules — and all of the loopholes. The possibility that the sophisticated legal knowledge of prosecutors may lead them to see how the Supreme Court's decision rules undercut the prohibitions of the Court's conduct rules is illustrated by the infamous *Payner* "briefcase caper" case.[333] In testimony before the District Court in that case, it came to light that a Mr. Hyatt, an attorney with the Department of Justice, explicitly had instructed the I.R.S. agents in the case that the bank officer whose briefcase was stolen to obtain information against the defendant would be the only individual to have standing to object to the blatantly illegal search and that he was not a target of the investigation.[334]

Investigations are only one arena in which prosecutor/police contact is likely to give rise to transmission of both conduct and decision rules. In the sorts of cases most common in state courts — where a police officer makes an arrest and perhaps conducts a search or an interrogation and then presents his or her already completed investigation to the prosecutor's office — instruction on both the validity of the search and seizure itself *and* on the admissibility of the evidence obtained at trial is forthcoming in the prosecutor's decision to charge or to decline to charge the defendant. Whether or not the prosecutor takes the oppor-

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sionary Rules Under State Constitutions: The Utah Example, 1993 UTAH L. REV. 751, 851-52.

332. The Fifth Amendment requirement of indictment by grand jury for felony cases has not been incorporated through the Due Process Clause to apply to the states. Nonetheless, nearly half of the states require grand jury indictments as a matter of state law, and those that do not require such indictments still give the prosecutor the option of empaneling a grand jury. And even in those states that do not generally use grand juries, judges nonetheless review charging decisions at preliminary hearings, at which investigating police officers are likely to testify. *See* Jerold H. Israel, *Grand Jury, in* 2 ENCYCLOPEDIA OF CRIME AND JUSTICE 810, 815-16 (Sanford H. Kadish ed., 1983).

333. *See* United States v. Payner, 447 U.S. 727 (1980); *supra* text accompanying notes 211-13.

334. *See* United States v. Payner, 434 F. Supp. 113, 131 & n.69 (N.D. Ohio 1977), *affd.*, 590 F.2d 206 (6th Cir. 1979), *revd.*, 447 U.S. 727 (1980).

tunity to formally instruct the arresting and investigating officers on the relationship between the conduct of the investigation and the decision to charge, which no doubt varies across individual prosecutors and individual situations, the officers likely learn something about investigative techniques and their effect on trial outcomes simply from the prosecutor's charging decision alone.

Moreover, in those cases in which charges are filed and in which motions to suppress evidence on constitutional grounds are litigated, police officers generally are "prepared" to testify by the prosecutor litigating the case. The officer already may have testified before the grand jury in the federal system or a state system that indicts by grand jury and also may testify again at the trial itself. These one-on-one sessions with the prosecutor are very likely to transmit both conduct norms (what behavior would be constitutional under the circumstances) and decision rules (what the likely outcome of the officer's testimony will be for trial). Whether or not the prosecutor clearly transmits this information, written opinions by judges granting or denying motions to suppress no doubt do so, and it seems extremely likely that police officers read opinions on the propriety and consequences of their own conduct with a great deal more attention and interest than most other sources of information regarding constitutional adjudication.[335]

In contrast, members of the public at large have much less access to the decision rules promulgated by courts than they have to the conduct rules imposed on police officers. These conduct rules, after all, are couched not in terms of commands to police officers but in terms of "rights" of individuals; and these "rights" do not require a great deal of legal sophistication to understand. The requirement that the police have either a judge's permission or some good reason (a warrant or probable cause) in order to make an arrest or conduct a search is not an arcane concept, nor is the requirement of warnings prior to interrogation or the requirement that counsel be provided once a crime is charged. Popular culture, particularly through television and movies, has pro-

335. In one of the few detailed surveys of police knowledge of constitutional criminal procedure, the vast majority of those officers surveyed reported that having their own evidence suppressed or seeing a fellow officer's evidence suppressed was the most significant way in which they learned about changes in the law of search and seizure. *See* Myron W. Orfield, Jr., Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. CHI. L. REV. 1016, 1036 (1987); *see also* RICHARD VAN DUIZEND ET AL., THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES 88 (1985) (receiving similar responses from police officers interviewed in a number of different cities).

vided a constant stream of "police dramas" since the 1950s,[336] and these dramas have widely disseminated some of the basic norms, constitutional and otherwise, of police conduct. Popular dramatizations of police work, however, generally are not able to and do not try to get into the details of decision rules. The distinction between the use of evidence in the "case-in-chief" and its use as "impeachment," the changing meaning of "standing" to challenge unconstitutional police conduct, or the varying standards for the review of "harmless error" on appeal require too much knowledge of arcane jargon and a too sophisticated understanding of the legal process to make good drama that is widely accessible.

Moreover, reports by the media run into much the same problem. Because judicial opinions dealing with decision rules often will take more time or space (depending on the medium) to explain,[337] and because journalists themselves often may not understand them,[338] such decisions may get reported less frequently and less accurately than decisions relating to conduct rules, which are easier both to understand and to convey. The problems attendant in reporting on complicated constitutional cases in general is exacerbated in reporting on the decisions of the Supreme Court. The Court's general opinion-writing style[339] and its

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336. Television, for example, has moved from *Dragnet* (NBC television broadcast 1951-59) to *The Untouchables* (ABC television broadcast, 1959-63) to *The Mod Squad* (ABC television broadcast, 1968-73) to *Starsky and Hutch* (ABC television broadcast, 1975-79) to *Hill Street Blues* (NBC television broadcast, 1981-87) to *Law & Order* (NBC television broadcast, 1990-present) and *NYPD Blue* (ABC television broadcast, 1993-present). First-year law students, who almost uniformly can recite the full text of the *Miranda* warnings prior to reading the case, generally credit their knowledge to the T.V. police drama, *Hawaii Five-O* (CBS television broadcast, 1968-80). *See generally* David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System,* 35 ARIZ. L. REV. 785, 786 (1993) (explaining how "popular culture virtually creates the picture people have of criminal justice"); Steven D. Stark, *Perry Mason Meets Sonny Crockett: The History of Lawyers and the Police as Television Heroes,* 42 U. MIAMI L. REV. 229, 230 (1987) (arguing that television crime dramas have shaped "the public's perceptions of lawyers, the police, and the legal system").

337. Linda Greenhouse, who has covered the Supreme Court for the *New York Times* for many years, recently has noted that "space is tight in newspapers and getting tighter all the time." Linda Greenhouse, *Telling the Court's Story: Justice and Journalism at the Supreme Court,* 105 YALE L.J. 1537, 1550 (1996).

338. The reporting on the Supreme Court's habeas corpus cases and on the legislative proposals, eventually successful, for habeas "reform" provides many good examples of how journalists themselves often fail to understand the complexities of constitutional criminal procedure.

339. Many have criticized the obscurity of most Supreme Court opinions. *See, e.g.,* RICHARD DAVIS, DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS 8 (1994) (arguing that the Court deliberately remains aloof and mysterious in order to maintain "public deference and compliance"); Ray Forrester, *Supreme Court*

lack of communication with and solicitude for the media[340] add to the difficulty that already inheres in attempting to transmit the substance of the more obscure of the Court's opinions to the public at large. The extent to which press coverage of the Supreme Court, which often mentions the names of the Justices in conjunction with their opinions, fails to make much of an impression on the public consciousness was distressingly revealed by a *Washington Post* poll that indicated that a much larger percentage of 1200 randomly selected adults (59%) could name all three of the Three Stooges than could name a single Supreme Court Justice (44%).[341]

Of course, some members of the public get information about the criminal justice process not only through popular culture or the media but directly as victims, witnesses, and defendants in criminal trials. These experiences, however, unlike those of police officers, are not likely to lead to a sophisticated understanding of decision rules. First of all, the vast majority of criminal cases are plea-bargained and never reach trial, so most victims of and witnesses to crimes never appear in court. Second, suppression hearings, from which police officers reported learning so much about the workings of constitutional criminal procedure, are not proceedings at which either victims or civilian witnesses generally testify, for the obvious reason that they are rarely present during or able to offer relevant testimony about police searches, seizures, and interrogations. Finally, victims, witnesses, and defendants are rarely (with the exception of a class of recidivist offenders) repeat players in the criminal justice system and therefore are unlikely to learn about it from the inside the way that police officers inevitably do.[342]

Thus, it seems inevitable that there will be much greater "acoustic separation" — that is, "selective transmission" of decision rules and conduct rules — between the Supreme Court (and courts in general)

Opinions — Style and Substance: An Appeal for Reform, 47 HASTINGS L.J. 167, 173 (1995) (making concrete suggestions for simplification of Supreme Court opinions in light of the fact that most are currently "incomprehensible to the general public").

340. *See* Greenhouse, *supra* note 337, at 1558 (describing the "substantial obstacles to conveying the work of the Court accurately to the public," such as the Court's habit of issuing a large number of important opinions at the same time at the end of the Term and the impediments to obtaining transcripts of oral arguments in a timely fashion).

341. *Id.* at 1539 (citing Richard Morin, *Unconventional Wisdom*, WASH. POST, Oct. 8, 1995, at C5). Lest readers get distracted from my argument here, the Three Stooges are Larry, Moe, and Curly.

342. *Cf.* Cheryl Russell, *True Crime*, AMERICAN DEMOGRAPHICS, Aug. 1995, at 22, 24 (citing a 1994 *L.A. Times* poll revealing that most Americans who responded reported that their feelings about crime were based on what they read or saw in the media rather than on what they personally experienced).

and the general public than can plausibly exist between the courts and the police. If this second descriptive claim is true in addition to the first claim about the nature of the Court's "counter-revolution" in criminal procedure, it tends to suggest that the police have a much more nuanced and sophisticated — *and less constrained* — view of what conduct is likely to lead to judicial penalty than does the public at large. Should this divergence — this "acoustic separation" between the police and the public — be a cause for concern?

V. CONCLUSION: CONCERNS?

Before addressing the concerns raised by the "acoustic separation" that I have identified, it seems necessary to ask *why* the Supreme Court has established a pattern of change in constitutional criminal procedure that has created such separation. After all, if the relative constancy of conduct rules and the relative explosion of decision rules are just the products of random happenstance, then the "pattern" created could change at any time and we need not worry about its necessarily temporary effects. I do not believe that the pattern that I have identified is a random one. First, the pattern has been too consistent over a period of too many years. Second, the pattern has been too unexpected and counterintuitive. Almost all the legal pundits expected the Warren Court's innovations in constitutional criminal procedure to be abandoned by the post-Warren Court; indeed, this is just what President Nixon promised that his appointees would do. And yet the Warren Court's conduct rules — the most visible symbols of its "revolution" — remained intact in the era of expected "counter-revolution."

The most obvious possible answer to the "why" question is a purposive one: the Supreme Court radically altered decision rules while keeping conduct rules intact *because* the Court understood and intended the consequences of "acoustic separation" that I have identified. According to such a purposive account, the Court affirmatively sought the opportunity to speak *sotto voce* to the police without the public overhearing. Perhaps the Court thought that open elimination of constitutional protections would convey to the general public the appearance of permitting the police to "run[] roughshod over the personal liberties of members of the American community" and thus retained "*symbolic* gestures" in its doctrine to avoid that appearance.[343] Or perhaps the

343. JOHN F. DECKER, REVOLUTION TO THE RIGHT: CRIMINAL PROCEDURE JURISPRUDENCE DURING THE BURGER-REHNQUIST COURT ERA 7 (1992). Professor Decker comes the closest to making this purposive argument, albeit without explicit reference to the idea of "acoustic separation."

Court realized that *defendants* convicted of crimes and punished need to be convinced of the legitimacy of their punishment in order to prevent a downward spiral of violence and repression,[344] and in order to promote such a belief, the Court consciously retained conduct rules as symbols of solicitude for the rights of criminal defendants, while simultaneously freeing the police from the consequences of violating these rights by altering decision rules.

Although this purposive theory is perhaps implicit in the parallel I seek to draw to Professor Dan-Cohen's own argument about "acoustic separation," it is not one that I necessarily endorse. I say "perhaps implicit" because Dan-Cohen refers to the effect of acoustic separation in substantive criminal law as a "strateg[y]" or "technique[]" that legal systems "avail themselves of"[345] as a form of "bluffing."[346] One might think, then, that I mean to contend that the Supreme Court's pattern of changing decision rules while maintaining conduct rules is similarly a strategy to achieve the "selective transmission" of information about the consequences of unlawful conduct by law enforcement agents. Although it is not impossible that the effect of acoustic separation was noticed and perhaps even intended by individual Justices in individual cases, I see no evidence for and, indeed, find implausible the claim that consciousness of this effect was the primary motivating force driving the several-decade-long pattern in the Court's decisionmaking in constitutional criminal procedure. It seems unlikely that any Justice would openly advocate, even in the relative privacy of the Court's conference room, the use of acoustic separation as a strategy for "bluffing" the public while essentially winking at the police. Even couched in less pejorative terms, no description of the use of acoustic separation as a tool of "selective transmission" fits very well with any of the Justices' publicly articulated conception of his or her judicial role. And without such open discussion of the possible desirability of the effect of acoustic separation, it seems unlikely that a belief in such desirability could have played a large role in motivating the ever-shifting majorities that are responsible for the long-term pattern that I have identified.

A more satisfying answer to the "why" question seems to lie in a more modest or "weak" purposive account. Under the "strong" purposive account, a Court hostile to the Warren Court's innovations in con-

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344. *See* Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315 (1984) (arguing that criminal defendants need to be convinced of the legitimacy of their punishment in order to prevent massive social disorder and a downward spiral of violence and repression).

345. Dan-Cohen, *supra* note 17, at 635.

346. *Id.* at 677.

straining police power realizes that it can substantially lift those constraints by changing decisions rules while simultaneously misleading the public in general (and criminal defendants in particular) about the extent of the changes. A weaker purposive account acknowledges the post-Warren Court's hostility to the criminal procedure decisions of the Warren Court,[347] but portrays the Court as constrained either by its own view of its appropriate judicial role, or by sheer pragmatism, from moving too quickly or too decisively to overturn those decisions. Under this account, the Court chooses to modify decision rules rather than conduct rules *not* because it knows that by doing so it can communicate "selectively" with the police and the public, but rather because changes in decision rules, perhaps because of their lack of visibility to the public, feel less dramatic and "political" than, say, overturning *Miranda* outright. An appeal to judicial moderation and restraint, couched in terms of *stare decisis,* or a more pragmatic concern about public perceptions of the Court's separation from the world of politics, are likely the kinds of arguments that would arise in conference room discussion.[348]

There is much more to be said about the "why" of Supreme Court decisionmaking — from analyses of the perspectives and influences of individual Justices[349] to characterizations of the ideology of different Courts over time[350] to explorations of the particular negotiations and

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347. This is where the literature on ideological change between the Warren and post-Warren Courts is particularly helpful. For example, Peter Arenella's reconstruction of Herbert Packer's two "models" of the criminal justice system to explain the different ideological commitments of the Warren and Burger Courts presents a nuanced view of how different conceptions of the nature and purpose of criminal justice play out in particular doctrinal arenas. *See* Arenella, *supra* note 5, at 209-47 (citing HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968)).

348. This account of why the Court changed decision rules rather than conduct rules also explains why Mapp v. Ohio, 367 U.S. 643 (1961) — the Court's most notorious decision-rule case — survived in the post-Warren Court era. According to my model of change in decision rules and constancy in conduct rules, *Mapp* should have been overruled. But if the reason for the change in decision rules and the constancy in conduct rules was the relative invisibility and the incremental and nonpolitical "feel" of decision rules as compared to conduct rules, it becomes easy to see why *Mapp* was an exception. Given the degree of controversy that *Mapp* generated in the political arena, overruling *Mapp* would have been highly visible and would have opened up the Court to exactly the charge of engaging in "politics" that it sought to avoid.

349. *See, e.g.,* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE (Mark Tushnet ed., 1993) (offering individual chapters on Warren, Frankfurter, Douglas, Black, Harlan, Brennan, White, and Fortas).

350. *See, e.g.,* Arenella, *supra* note 5 (comparing and contrasting the ideologies of the Warren and Burger Courts); ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970) (characterizing and criticizing the Warren Court's conception of its judicial role); Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court,* 100 HARV. L. REV. 1436 (1987) (same for the Burger Court).

compromises that comprise the Court's day-to-day politics.[351] These issues are not my primary focus here, and I do not pretend that my account of why the pattern that I have identified has appeared is either complete or even completely right as far as it goes. Rather, my analysis is important for only two fairly modest points — one a claim and one a disclaimer. The claim is that the pattern that I have identified is not random (like the pattern of tea leaves at the bottom of a cup); rather, it is the product of some purposeful action on behalf of the Court's shifting majorities over a long period of time. The "weak" purposive account that I have sketched seems to me the most persuasive explanation for this consistent action, but there are no doubt other theories that could plausibly supplement or supplant the account that I offer. The important claim, however, is merely that the pattern is too unusual to have been achieved and maintained for long in a random fashion. The disclaimer is that nothing about the concerns that I raise below depends on the "strong" purposive account being true. That is, whether or not any member of the Court ever observed or intended the effect of acoustic separation, we still ought to worry about the implications of acoustic separation that I identify, as long as those implications are the by-product of some other consistent set of choices made by the Court.

There are at least two significant implications of acoustic separation that ought to concern us. Each implication relates to one of the two principal audiences of the Court's constitutional criminal procedure — the police and the public. As for the police, the implication of acoustic separation that ought to concern us is the likelihood that, in conditions of low acoustic separation, decision rules will, in effect, *become* conduct rules. Where the police "hear" the Court's decision rules and thus are able to predict the likely legal consequences of their unconstitutional behavior, they may see little reason to continue to obey conduct rules that are consistently unenforced in criminal prosecutions. If the consequences imposed by the Court's decision rules play a significant role in motivating compliance with conduct rules, then changes in decision rules will necessarily change compliance with conduct rules.

Of course, there are other reasons that police officers might obey constitutional conduct rules, regardless of constitutional decision rules. They might fear civil or even criminal liability, departmental discipline, or independent administrative sanctions, such as those imposed by citizen complaint review boards. Or they might simply wish to obey the law as interpreted by the courts regardless of what the sanctions might

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351. *See, e.g.*, JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT (1995).

be.[352] Thus, changes in the Court's decision rules will not influence the behavior of all police officers in all situations. Nonetheless, there is much good reason to think that the Supreme Court's constitutional decision rules *do* play an important role in motivating compliance with the law, even relative to other potential sanctions.

First, the other potential sanctions for unconstitutional police conduct have been notoriously ineffective in deterring such misconduct. Indeed, the Supreme Court offered the ineffectiveness of alternative remedies as a primary reason for adopting its most controversial decision rule — the Fourth Amendment exclusionary rule. The *Mapp* Court noted that, as of 1961, it was apparent that remedies other than evidentiary exclusion for unconstitutional police conduct had proved "worthless and futile."[353] And since *Mapp* was decided, there has been "overwhelming consensus" among those who have studied the problem that alternative remedies remain "sadly inadequate."[354] Thus, there seems little reason to believe that police officers who, through low acoustic separation, realize that there will be no sanction within the criminal process for violating constitutional rights, will nonetheless refrain from such violations as a result of such alternative sanctions.

Second, while there may be some police officers who will attempt to obey the law as they understand it, regardless of any sanction that may be imposed,[355] there are no doubt other officers who will purposefully violate the law in the absence of sanctions, usually because they believe they can achieve law enforcement objectives by doing so. Indeed, the same study that indicated the existence of officers who had "unequivocal respect for the law" also indicated that those officers with

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352. *See* William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance With the Law*, 24 U. MICH. J.L. REF. 311, 351 (1991) (identifying a substantial group of officers in an empirical study who demonstrated "unequivocal respect for the law" in their answers to hypothetical questions "by never indicating that they would intrude in a setting where they believed it illegal to do so").

353. Mapp v. Ohio, 367 U.S. 643, 652 (1961).

354. Yale Kamisar, *Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REF. 537, 562 & n.82 (1990) (citing, in chronological order, William Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and Its Alternatives*, 1975 WASH. U. L.Q. 621; Project, *Suing the Police in Federal Court*, 88 YALE L.J. 781 (1979); William A. Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 GEO. L.J. 1361 (1981); Pierre J. Schlag, *Assaults on the Exclusionary Rule: Good Faith Limitations and Damage Remedies*, 73 J. CRIM. L. & CRIMINOLOGY 875, 907-13 (1982); Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 284-86 (1988)).

355. *See supra* note 352.

only "equivocal" respect for the law became *more* willing to deliberately violate the law with more training.[356] Although the study did not offer any reason for this correlation between increases in the knowing violation rate and increases in police officer training, one explanation might be that more training reveals the gaps between conduct rules and decision rules and thus permits "equivocal" police officers to exploit such gaps by recognizing which violations will not lead to sanctions within the criminal justice system.

Indeed, one study of police attitudes regarding the Fourth Amendment exclusionary rule revealed that police officers generally did not regard conduct rules as binding *unless* they were enforced by decision rules. In a study based on interviews of a variety of police officers and commanders, Professor Milton Loewenthal found that "most police officers interpret the *Wolf* case [which declined to extend the federal Fourth Amendment exclusionary rule to the states in 1949] as not having imposed any legal obligation on the police since, under that decision, the evidence would still be admissible no matter how it was obtained."[357] He found that there was "strong evidence" that "regardless of the effectiveness of direct sanctions, police officers could neither understand nor respect a Court which purported to impose constitutional standards on the police without excluding evidence obtained in violation of those standards."[358] Loewenthal's findings, which he used to oppose replacement of the Fourth Amendment exclusionary rule with alternative remedies, also support my claim that we should worry about the increasing gap between conduct rules and decision rules in constitutional criminal procedure generally, because such a gap will lead at least some police officers to view the decision rules, not the conduct rules, as the "real" law.

This fear is illustrated by cases such as *Payner* in which federal law enforcement agents deliberately exploited Payner's lack of standing to object to their blatantly illegal behavior in the "briefcase caper" case.[359] A more recent example can be found in *Simpson v. United States*,[360] in which a homicide detective questioned a defendant charged with the murder of his two disabled children. The defendant had stabbed his sons to death and then attempted to kill himself while in a

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356. *See* Heffernan & Lovely, *supra* note 352, at 367.

357. Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24, 29 (1980) (discussing police officers' reaction to Wolf v. Colorado, 338 U.S. 25 (1949)).

358. *Id.*

359. *See supra* text accompanying notes 211-12.

360. 632 A.2d 374 (D.C. 1993).

desperate emotional state. Although the defendant had been indicted and appointed counsel, the detective nonetheless interviewed him at the hospital where he was being treated for his serious wounds and obtained an oral statement without counsel present and without any waiver of the right to counsel, in clear violation of the *Massiah* rule.[361] At a hearing on the defendant's motion to suppress his statement, the detective testified, with surprising frankness, that he knew that the defendant was represented by counsel and that he knew that any statements obtained through interrogation were inadmissible at trial, but that he also knew that under prevailing law in the District of Columbia such statements would be admissible to impeach the defendant should he testify at trial.[362] The motions court reacted to this testimony as follows:

> I guess I'm worried here because Detective Schwartz could have been going through the following mental processes and, if not he himself, any other police officer in any other case at any time: "I know I'm not going to be permitted to talk to this defendant. He's got a lawyer. I'm going to do it anyway, and maybe I can get a confession or admission out of him; and maybe we can't use it, but man, oh man, we'll sure have him locked in if he gets on the stand and starts to lie like a rug. So I'm going to do it anyway, even though I know it's contrary to the rules, to the Constitution."[363]

These concerns by the motions court are exactly those that arise whenever there is significant divergence between conduct rules and decision rules in constitutional criminal procedure.

Payner and *Simpson* are good illustrations of the consequences of low acoustic separation when police officers view the Court's constitutional criminal procedure through the lens of Holmes's famous "bad man" who "cares only for the material consequences which such knowledge [of the law] enables him to predict."[364] Such consequences are prevalent enough that two scholars have penned satirical versions of

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361. 632 A.2d at 381-82.

362. 632 A.2d at 378. The D.C. Court of Appeals previously had held that statements obtained in violation of *Massiah* could be used to impeach the defendant's testimony. *See* Martinez v. United States, 566 A.2d 1049 (D.C. 1989), *cert. denied*, 498 U.S. 1030 (1991). This issue has been only partially resolved by the Supreme Court. *See* Michigan v. Harvey, 494 U.S. 344 (1990) (holding that statements obtained in violation of *Michigan v. Jackson*, 475 U.S. 625 (1986), may be used for impeachment purposes, but leaving open the question whether other *Massiah* violations may be so used); *supra* text accompanying notes 287-92 (discussing *Harvey* and its implications).

363. *Simpson*, 632 A.2d at 382 n.16.

364. *See* Holmes, *supra* note 15, at 459. This is not to suggest that police officers are generally "bad men" (or women) in a pejorative sense. No doubt many officers who choose to exploit the gaps between conduct rules and decision rules do so for what they see as moral reasons — the belief the greater good is served by such crime-fighting techniques. Holmes's "bad man" is simply a construct of legal positivism that

police training manuals authored by and for the Holmesian "bad man." Professor Albert Alschuler suggests that advice to police about the *Miranda* requirements could take, in part, the following form:

> Upon arresting a suspect, do not give him the *Miranda* warnings. . . .
>
> After an hour or two (during which your suspect will have provided either a statement or a potentially useful period of silence), you should advise him of his rights. If the suspect waives these rights, his statement will be admissible. If he indicates that he wishes to remain silent or to consult a lawyer, however, continue to interrogate him without a lawyer. Although the prosecutor will be unable to introduce as part of the state's case-in-chief any statement that the suspect makes, the suspect's statement will become admissible to impeach his testimony if he later takes the witness stand to say something different from what he told you. . . . Do not place too much pressure on the suspect, however. If a court holds his confession involuntary under pre-*Miranda* standards, it will be inadmissible for any purpose. The Supreme Court has said that pre-*Miranda* voluntariness standards are part of the "real" Constitution. *Miranda* is part of the Court's "just pretend" Constitution.[365]

Professor Craig Bradley has added further advice regarding the Fourth Amendment to Alschuler's hypothetical officer, including the following:

> If you have no prospect of obtaining probable cause, go ahead and search anyway. If you don't find anything, there's no evidence to suppress. . . . If you do find something, the evidence can be used to impeach, and that's better than nothing.[366]

It is true that standing and impeachment are areas where the gaps between conduct rules and decision rules create clear and obvious incentives for the Holmesian police officer to violate the Constitution.[367] Some other changes in decision rules that I have identified translate less directly into incentives for law enforcement agents. Most particularly,

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seeks to define law by reference to the sanctions that follow from it, as becomes evident when he is quoted in full context:

> If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.

Id.

365. Alschuler, *supra* note 350, at 1442-43 (footnotes omitted).

366. CRAIG M. BRADLEY, THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION 54 (1993). Bradley's advice includes ways of exploiting the limits of conduct rules as well as the gaps between conduct and decision rules.

367. I have noted above how other decision rules also create clear incentives for police misconduct. *See supra* text accompanying notes 218-58 (discussing incentives created by the "good-faith" exception to the warrant requirement, the "independent-source" doctrine, and the "fruit-of-the-poisonous-tree" doctrine).

changes in standards of review on appeal and cutbacks on post-conviction remedies are hard to convert into "advice" for the Holmesian officer. These decisions create only general and atmospheric incentives for unlawful conduct; the hypothetical advice manual might read:

> Even if you violate the Constitution and decision rules call for an exclusionary sanction, the trial court might decide to admit the evidence anyway, given how unpopular it is to suppress reliable evidence of criminal wrongdoing and how unlikely it is that such a decision will be reversed on appeal, given the rules about harmless error. And if the appellate court does not reverse, it is very unlikely that a federal habeas court will even hear the case, much less grant relief.

Thus, the shift in the decision rules regarding the review and reversal of convictions, though they may not have created direct incentives for police misconduct, nonetheless may play a symbolic role by reinforcing the impression that the courts are seeking to loosen constitutional constraints on police investigative practices.

Of course, if one thinks that the constitutional conduct rules that currently exist are too restrictive and that they *should* be loosened, one probably would not object to the fact that changes in decision rules are likely to result in changes in conduct rules. One would likely view the changing of decision rules as an indirect but nonetheless effective way of achieving an important goal — the readjustment of the baseline of constitutionally acceptable police behavior. But even if one believes that conduct rules should be readjusted, there remains an independent objection to effecting such change through decision rules — a concern about public misperception of the nature and scope of constitutional constraints on police behavior.

The public is the second principal audience of the Court's constitutional procedure. The Court's definitions of the constitutional scope of the power to search, seize, and interrogate individuals speak directly to the police by establishing limits on police investigative power, but they also speak directly to the public by establishing the contours of individual rights. Given the much higher degree of acoustic separation that exists between the public and the courts than exists between the police and the courts, however, the public is likely to believe that the Court's conduct rules are more inviolable than they really are; the public is likely to be fooled or, in Dan-Cohen's language, "bluffed" into thinking that the conduct rules are the "real" law, not the conduct rules as modified by the decision rules that only the police can hear.[368]

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368. In essence, my claim here is that acoustic separation serves to "legitimate" the exercise of police power in the United States in the sense of "inducing a *false or exaggerated* belief in the normative justifiability of something in the social world —

Available evidence is consistent with this "bluffing" hypothesis. For example, the public routinely indicates that it believes that the police are over-constrained by the constitutional conduct rules imposed by the courts.[369] Moreover, public opinion polls also indicate that the public has enormous faith in law enforcement as an institution[370] and relatively little fear of police over-reaching.[371] Of course, these public estimations of the constraints on police behavior, the trustworthiness of the police as an institution, and the threat to civil liberties from police over-reaching could all be completely accurate; there is no "objective" way to evaluate the accuracy of this opinion data as fact. But the existence of acoustic separation between the public and the courts should make us see these extremely sanguine views of law enforcement as perhaps *overly* sanguine. We should worry that these views reflect a misguided belief that the Supreme Court regulates — indeed, *over*-regulates — police conduct to such a degree that we have little to fear from out-of-control officers and much more to fear from overly constrained officers, when police-conduct rules are in fact undercut by more invisible decision-rules.[372]

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that is, of inducing belief in the absence of or in contradiction to evidence of what the phenomenon is 'really' like." Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 429-30 (1995) (exploring the "legitimation" effects of the Supreme Court's regulation of capital punishment).

369. *See, e.g.*, E.J. Dionne Jr., *A.C.L.U. Studies Its Image and Finds It Intact*, N.Y. TIMES, May 14, 1989, § 1, at 23 (reporting that 78% of those polled by the American Civil Liberties Union agreed with the statement, "Protecting the constitutional rights of criminals makes law enforcement more difficult," and that 62% thought that the country had "gone too far in protecting the rights of persons accused of committing crimes").

370. In Gallup polls conducted in 1993, 1994, and 1995, more than 50% of those polled reported "a great deal" or "quite a lot" of confidence in the police — more than any other institution except the military and as much as "Church or organized religion." *See* BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1994, at 145 (Kathleen Maguire & Ann L. Pastore eds., 1995).

371. A 1994 Gallup poll indicated that only 26% of those polled viewed "police over-reaction to crime" as a "very serious threat" to "Americans' rights and freedoms" as compared to 83% for "crime," 41% for "government regulations," and 47% for "lack of economic opportunity." Only "military threat from a foreign country" was viewed as less threatening, and not by much (23%). *Id.* at 144.

372. Indeed, a perverse effect of "acoustic separation" is that criminals, too, may overestimate the degree to which the police are constrained in investigating crime and thus underestimate the likelihood of arrest and conviction, resulting in under-deterrence of criminal activity. As a public defender, I represented more than one defendant who was convinced that the failure of the police to advise him of his *Miranda* warnings precluded not only the admissibility of any statements, but also the initiation of criminal proceedings altogether.

This skewing of public opinion regarding the constraints on police behavior should worry us because of its implications for the policy choices made by popularly elected branches of government. A parallel concern was reflected by the "truth-in-sentencing" movement, which sought to bring into line the criminal sentences announced by judges and the amount of time convicted criminals actually served because the granting of parole often led the latter to be much shorter than the former. Of course, the judges imposing sentence knew that their sentences would not actually be served in full, and they generally knew how the parole system worked and thus what their sentences "really" meant. But the *public,* who saw the sentences imposed in the courtroom or learned about them from the media, was mislead into thinking that the announced sentence was the "real" sentence. "Truth-in-sentencing" reform was a way to close the gap between public perception and reality and thus to lead to better public policy by the popularly elected branches who generally set the penalties for particular crimes.

There is good reason to fear that the public's over-estimation of the constraints on law enforcement induced by acoustic separation currently skews public policy. It seems to have become a distinctively American trait to see the police and the criminal justice process as the first line of defense against social decay. Recent transnational studies have revealed that the United States has one of the highest, if not the highest, incarceration rate in the world.[373] At a time when libertarian sentiment rejecting "big government" is in vogue, there is nonetheless strong bi-partisan support for increasing the amount of money invested in police officers and prisons.[374] Of course, many social and cultural factors play a role in determining public policy. But we should worry

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373. One study, reported in 1991, placed the United States first in the world. *See* Sharon LaFraniere, *U.S. Has Most Prisoners Per Capita in the World,* WASH. POST, Jan. 5, 1991, at A3 (reporting study placing South Africa second and the former Soviet Union third in per capita incarceration rates). Another study, reported in 1994, placed the United States second, after Russia. *See* Steven A. Holmes, *Ranks of Inmates Reach One Million in a 2-Decade Rise,* N.Y. TIMES, Oct. 28, 1994, at A1 (reporting study indicating that the United States' rate of incarceration is more than four times that of Canada, more than five times that of England and Wales, and fourteen times that of Japan). Russell Baker recently has satirized this tendency toward increased incarceration in a column aptly titled, "Hooked on Jail." Russell Baker, *Hooked on Jail (Whatever the Problem, the Solution is Jail),* N.Y. TIMES, Apr. 18, 1995, at A25.

374. Sociologist Mark Warr observes:

> Americans have long believed that too little money is spent to control crime. . . . Such sentiment may explain the enormous levels of public spending on crime control in the United States in recent years, including massive prison construction programs in states like Texas and California, and the sorts of measures (e.g., one hundred thousand new police officers) envisioned in President Clinton's recent crime bill.

about the impact of the public's misperceptions about constitutional constraints on law enforcement. Professor Michael Seidman made exactly this point in his contribution to a symposium on "Constitutional Stupidities":

> Although [criminal procedure protections] do little to make the prosecutor's job harder, people commonly believe that they obstruct the prosecution of dangerous criminals. Some doubt and ambivalence that might otherwise accompany the use of violent and coercive sanctions is thereby dissipated.[375]

"Doubt and ambivalence" about the use of policing and imprisonment as our primary means of dealing with everything from drug addiction to "deadbeat dads" who fail to pay child support might well be appropriate. But acoustic separation may prevent people from hearing messages that might sow the seeds of doubt.

Much has been written about the *symbolic* importance of constitutional procedural protections for criminal defendants, whether or not such protections actually perform any other useful function, such as deterring unlawful police conduct. The most dramatic exposition of this point is Anthony Amsterdam's:

> I do not mean to suggest that Supreme Court decisions respecting suspects' and defendants' rights are unimportant. Like the Pythia's cries, they have vast mystical significance. They state our aspirations. They give a few good priests something to work with. They give some of the faithful the courage to carry on and reason to improve the priesthood instead of tearing down the temple.[376]

But this point, while important, has a dark underside. The existence of acoustic separation prevents the public from knowing what the police know — that the Supreme Court's conduct rules "symbolize" a commitment that is seriously undermined by the Court's decision rules. To use Amsterdam's evocative metaphor, when the Court's constitutional criminal protections appear to be more protective of individual liberties than they really are, the "faithful" (the public) are led to blind adherence to a "priesthood" (the police) that may not be able to offer the miracle cures that all pious pilgrims seek.

Mark Warr, *Poll Trends: Public Opinion on Crime and Punishment*, 59 PUB. OPINION Q. 296, 300 (1995).

375. Louis Michael Seidman, *Criminal Procedure as the Servant of Politics*, 12 CONST. COMMENTARY 207, 210 (1995).

376. Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 793 (1970); *see also* Stephen J. Schulhofer, *Reconsidering* Miranda, 54 U. CHI. L. REV. 435, 460 (1987) ("For those concerned only with the 'bottom line,' *Miranda* may seem a mere symbol. But the symbolic effects of criminal procedural guarantees are important; they underscore our societal commitment to restraint in an area in which emotions easily run uncontrolled.").