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ARTICLES

CONFESSIONS, SEARCH AND SEIZURE AND THE REHNQUIST COURT*

Yale Kamisar†

I. POLICE INTERROGATION AND CONFESSIONS

About the time William Rehnquist ascended to the Chief Justiceship of the United States, two events occurred that increased the likelihood that Miranda would enjoy a long life.

In Moran v. Burbine,¹ a 6-3 majority held that a confession preceded by an otherwise valid waiver of a suspect’s Miranda rights should not be excluded either (a) because the police misled an inquiring attorney when they told her they were not going to question the suspect she called about or (b) because the police failed to inform the suspect of the attorney’s efforts to reach him.

Although Burbine has been criticized by a number of commentators,² I think it is a plausible and defensible reading of Miranda.³ I find it hard to believe that the

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Miranda] Court would consider the now-familiar warnings inadequate when—even though a suspect has been warned of his Miranda rights and has effectively waived them—a lawyer whose services he has never requested and whose existence he is unaware of has contacted the police on his behalf.4

Whether or not I am right, more important than Burbine’s specific holding, I think, is the way the Court that decided Burbine looked back at and characterized Miranda. Justice O’Connor spoke for six Justices (including Chief Justice Burger and soon-to-be Chief Justice Rehnquist) when she told us that Miranda “as written” struck “the proper balance” between law enforcement interests and a defendant’s Fifth Amendment rights.5

Unlike most critics of the landmark case, the Burbine Court viewed Miranda as a case that “embodies a carefully crafted balance designed to fully protect both the defendant’s and society’s interests.”6 The Burbine Court also reminded us that Miranda had rejected “the more extreme position” advocated by the ACLU that nothing less than “the actual presence of a lawyer” (as opposed merely to police warnings to a suspect about his rights) is needed to dispel the coercion inherent in custodial interrogation.7 Instead, the Miranda Court had concluded, to quote the Burbine Court again, that “the suspect’s Fifth Amendment rights could be adequately protected by less intrusive means.”8

Up to this point, neither Justice O’Connor nor any of the Justices who joined her opinion in the Burbine case could be called friends or admirers of Miranda. Nevertheless, what they had to say about Miranda was what most of Miranda’s supporters had been saying about the case for the previous twenty years.

There is another noteworthy event that, I believe, provides a useful background for the Rehnquist Court’s treatment of Miranda. This event started out quite ominously for the famous case, but ultimately turned out well.

Some four months after Justice Rehnquist had become Chief Justice, a division of the Department of Justice released a 120-page report endorsed by Attorney General Edwin Meese III, a report that sharply attacked Miranda as an illegitimate decision.9 Shortly thereafter, “Meese’s minions,” as then Solicitor General Charles

3. To say that Miranda as originally written does not require the result sought by the defendant in Burbine is not to deny that it may be forcefully argued that a rule complementing the Miranda doctrine should bar the admissibility of a confession obtained in Burbine-like circumstances.
4. A footnote in the Miranda opinion, see 384 U.S. at 465 n.35, does seem to say that preventing an attorney from consulting with his client would constitute a violation of the Sixth Amendment right to counsel, but at this point the Miranda Court is discussing Escobedo v. Illinois, 378 U.S. 478 (1964), a case where the suspect had repeatedly asked to speak to his lawyer. See id. at 479-81. Moreover, Mr. Escobedo was aware of the fact that his lawyer was trying to talk to him and that the police were preventing him from doing so. See id. at 480-81. This realization may well have underscored the police domination of the situation and undermined Escobedo’s resolve.
5. Burbine, 475 U.S. at 424; see id. at 433 n.4 (emphasis in the original).
6. Id. at 433 n.4 (emphasis in the original).
7. Id. at 426 (emphasis added).
8. Id.
Fried called them, took up the cry and "proclaimed it a Department objective to get the Supreme Court to overrule Miranda."10

As Professor Stephen Schulhofer notes, the Meese-endorsed report on the law of pre-trial interrogation "triggered a spate of new articles confirming support for Miranda in the law enforcement community."11 As for Attorney General Meese's campaign inside the Department of Justice against Miranda, Solicitor General (now Harvard law professor) Fried resisted on various grounds. For one thing, "not a single Justice had indicated any interest in overruling Miranda, while the substantive law [confining the Miranda rule] was getting better and better."12 Moreover, Fried's impression was that "most professional law enforcement organizations had learned to live with Miranda, and even to love it, to the extent that it provided them with a safe harbor."13

After considering Solicitor General Fried's objections, the Attorney General backed off. For the rest of Fried's time in office, "the Miranda issue was laid to rest."14 I think it no exaggeration to say that the time to overrule Miranda had come and gone.

A. Miranda: Its Bases and Its Legitimacy

Have I spoken too quickly? What about the fact that starting with Justice Rehnquist's opinion for the Court in Michigan v. Tucker,15 the post-Warren Court has repeatedly distinguished between actual coercion by physical violence or threats of violence and inherent or irrebutably presumed coercion (the basis for the Miranda rules)? The post-Warren Court has also drawn a line between statements that are actually "coerced" or "compelled" and those obtained merely in violation of Miranda's "procedural safeguards" or "prophylactic rules."16

Thus, although a statement found to be "involuntary" under pre-Miranda standards is inadmissible for any purpose, a statement obtained in violation of Miranda may be used to impeach a defendant's testimony if he subsequently takes the stand in his own defense.17 Because a police officer may find the distinction somewhat mystifying, one witty commentator has suggested that the author of a police training manual might explain the situation as follows: "The Supreme Court has said that pre-Miranda voluntariness standards are part of the 'real' Constitution.

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11. Schulhofer, supra note 9, at 456 n.53.
12. Fried, supra note 10, at 47.
13. Id. at 45; see also SPECIAL COMMISSION ON CRIMINAL JUSTICE IN A FREE SOCIETY, CRIMINAL JUSTICE IN CRISIS 28-29 (1988). "A very strong majority of those surveyed—prosecutors, judges, and police officers—agree that compliance with Miranda does not present serious problems for law enforcement." Id.
14. Fried, supra note 10, at 47.
Miranda is part of the Court’s “just pretend” Constitution.”

Ironically, the language in the Miranda opinion that the post-Warren Court used in Tucker and other cases to deconstitutionalize Miranda is language Chief Justice Warren inserted at the suggestion of Justice Brennan. Commenting on an early draft of the Miranda opinion, Justice Brennan wrote Warren:

[W]e are justified in policing interrogation practices only to the extent required to prevent denial of the right against compelled self-incrimination as we defined that right in Malloy [v. Hogan]. I therefore do not think, as your draft seems to suggest, that there is only a single constitutional solution to the problems of testimonial compulsion inherent in custodial interrogation. I agree that, largely for the reasons you have stated, all four cases must be reversed for lack of any safeguards against denial of the right. I also agree that warnings and the help of counsel are appropriate. But should we not leave Congress and the States latitude to devise other means (if they can) which might also create an interrogation climate which has the similar effect of preventing the fettering of a person’s own will?

Chief Justice Warren reworked his draft opinion of Miranda to accommodate Justice Brennan’s suggestions. The new language caught William Rehnquist’s attention even before he ascended to the Supreme Court. And when he wrote the opinion of the Court in Michigan v. Tucker maintaining that the Miranda Court itself had “recognized” that the Miranda rules were “not themselves rights protected by the Constitution” but only “procedural safeguards” designed to “insure that the right against compulsory self-incrimination was protected,” Justice Rehnquist again relied on the language in Miranda that the author of the opinion had added at Justice Brennan’s request.

In addition to arguing that the post-Warren Court has ignored important

19. For a discussion of, and substantial extracts from, Justice Brennan’s lengthy memorandum to the Chief Justice (including the extract which appears in the text of this paper), see Charles D. Weisselberg, Saving Miranda, 84 CORNELL L. REV. 109, 123-25 (1998). In Malloy v. Hogan, 378 U.S. 1 (1964), the Court, per Brennan, J., told us that the Fifth Amendment privilege against self-incrimination applies to the states to its full extent and that the voluntariness of a confession “is controlled by [the self-incrimination] portion of the Fifth Amendment.” Id. at 7.
20. As noted in Lawrence Herman, The Supreme Court, the Attorney General, and the Good Old Days of Police Interrogation, 48 OHIO St. L.J. 733, 738-39 n.44 (1987), in June, 1969, the Department of Justice sent to the U.S. Attorneys a memorandum drafted in the Office of Legal Counsel—an office then headed by future Justice Rehnquist—characterizing the Miranda warnings as “not themselves constitutional absolutes,” but “a protective measure,” “a means, suggested by the Court, by which the accused’s Fifth Amendment privilege may be safeguarded.”
22. See Weisselberg, supra note 19, at 128-29. As Weisselberg points out, Justice Rehnquist’s statement is misleading. The Miranda Court did point out that the Constitution does not “require[] adherence to any particular solution for the inherent compulsions of the interrogation process,” 384 U.S. at 467 (emphasis added), but it made clear that “unless we are shown other procedures which are at least as effective in apprising accused persons of their [rights] and in assuring a continuous opportunity to exercise [them], the [Miranda warnings] must be observed.” Id. (emphasis added).
language in the *Miranda* opinion, defenders of *Miranda* would maintain more generally that the privilege against self-incrimination, along with other constitutional rights, needs "breathing space." What the *Miranda* Court did, they would maintain, was to try to assure that no confession actually compelled would be admitted into evidence by establishing conclusive presumptions and related forms of "prophylactic" rules to "implement" or to "reinforce" the privilege against self-incrimination—in order to guard against actual constitutional violations. Is this improper?

Yes, retorts a leading critic of the Warren Court, Joseph Grano. As the Court now characterizes what it did in *Miranda*, maintains Professor Grano, that case is an "illegitimate" decision. To permit federal courts to impose "prophylactic rules" on the states, i.e., rules that may be violated without directly violating the Constitution, contends Grano, is "to say in essence that federal courts have supervisory power over state courts." According to him, the Court lacks constitutional authority to overturn state convictions when the Constitution has not actually been violated.

A provision of the federal criminal code enacted in 1968, 18 U.S.C. § 3501, purports to "repeal" *Miranda* and reinstate the due process "totality of the circumstances" "voluntariness" test for the admissibility of confessions. The validity of § 3501 may turn on whether or not Professor Grano's characterization of *Miranda* is sound.

As Justice Scalia pointed out recently, § 3501 "has been studiously avoided by every Administration . . . since its enactment more than 25 years ago." Justice Scalia sharply criticized the Justice Department's "repeated refusal to invoke § 3501," a refusal that has "caused the federal judiciary to confront a host of 'Miranda' issues that might be entirely irrelevant under federal law." Scalia has

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23. *See supra* note 22.

24. Cf. Weatherford v. Bursey, 429 U.S. 545, 565 (1977) (Marshall, J., joined by Brennan, J., dissenting). In *Bursey*, a co-defendant (actually an undercover agent) attended a pretrial meeting between defendant and his lawyer. Although a majority of the Court rejected the argument that such an intrusion into the attorney-client relationship constituted a *per se* violation of the defendant's right to effective counsel regardless of the agent's purpose in attending the meeting (the district court found that the agent accepted an invitation to attend the meeting to avoid raising suspicion that he was an informant) and regardless of whether the agent reported anything he learned at the meeting to his superiors or to the prosecution (the district court found that the agent had revealed nothing said or done at the meeting), *Bursey* sheds light as to when and why a prophylactic rule should be utilized. As dissenting Justice Marshall observed: [E]ven if we were to agree that unintended and undisclosed interceptions by government witness-employees affect neither the fairness of trials nor the effectiveness of defense counsel, I still could not join in upholding the practice [of having a government agent attend a meeting of the defense team at which defense plans are reviewed]. For in my view, the precious constitutional rights at stake here, like other constitutional rights, need "breathing space to survive," *NAACP v. Button*, 371 U.S. 415, 433 (1963), and a prophylactic prohibition on all intrusions of this sort is therefore essential. A rule that offers defendants relief only when they can prove "intent" or "disclosure" is, I fear, little better than no rule at all. Establishing that a desire to intercept confidential communications was a factor in a State's decision to keep an agent under cover will seldom be possible, since the State always can argue plausibly that its sole purpose was to continue to enjoy the legitimate services of the undercover agent. Proving that an informer reported to the prosecution on defense strategy will be equally difficult.

Id.


26. Id. at 191.


28. Id. at 465.
also maintained that because § 3501 "is a provision of law directed to the courts, reflecting the people's assessment of the proper balance to be struck [in this area], [w]e shirk our duty if we systematically disregard that statutory command simply because the Justice Department systematically declines to remind us of it." 29

The failure of the Justice Department to invoke § 3501 did not discourage two conservative legal groups, the Washington Legal Foundation and the Safe Streets Coalition. Led by the indefatigable Paul Cassell, a Utah Law School professor who has become the nation's leading critic of Miranda, 30 these groups repeatedly urged the federal courts to inject § 3501 into their cases.

Recently, after the Fourth Circuit upheld a district court's ruling suppressing defendant's confession on the ground that the confession had been obtained in violation of Miranda, 31 these organizations moved to proceed as amici curiae, maintaining that the confession should have been admitted, despite the Miranda violation, unless it failed to satisfy the more lenient standard for admissibility set forth in § 3501. To the surprise of many, the Fourth Circuit then issued an order directing the parties to consider the effect of § 3501 on the admissibility of defendant's confession.

Since the government had not pressed § 3501 before the district court or the court of appeals as a basis for a determination that defendant's confession was admissible, the Fourth Circuit declined to rehear the appeal. But the court voiced strong disagreement with the Justice Department's view that Miranda "remains binding on lower federal courts notwithstanding § 3501 unless or until it is modified by the Supreme Court."

A year and a half later, in United States v. Dickerson, 32 the Fourth Circuit gave the Washington Legal Foundation and the Safe Streets Coalition a stunning victory. Although the dissenting judge protested that the ruling was made "without the benefit of any briefing in opposition" and "against the express wishes of the Department of Justice," 33 a 2-1 majority held that the pre-Miranda voluntariness test set forth in § 3501, rather than the famous Miranda case, governs the admissibility of confessions in the federal courts. Therefore, the district court had erred when it had suppressed a voluntary confession simply because it was obtained in violation of Miranda.

The reasoning of the Fourth Circuit may be summarized quite briefly: Congress has the power to "overrule" rules of evidence and procedure that are not required by the Constitution. The Miranda rules are not constitutionally required; they are only

29. Id.
32. 166 F.3d 667 (4th Cir. 1999).
33. Id. at 695 (dissenting opinion).
"prophylactic" rules designed to implement or reinforce the underlying constitutional right. Therefore, § 3501 is a valid exercise of Congressional authority to override judicially created rules not part of the Constitution.

I must disagree with the reasoning of the Fourth Circuit panel. I do not believe that the Warren Court lacked constitutional authority to overturn state convictions resting on statements that were not shown to be "involuntary" or "coerced" in the pre-Miranda sense of these terms.

I share Stephen Schulhofer's view that the conclusive presumption of compulsion adopted by the Miranda Court was "a responsible reaction to the problems of the voluntariness test, to the rarity of cases in which compelling pressures are truly absent, and to the adjudicatory costs of case-by-case decisions in this area."34 And I agree with Schulhofer's colleague, David Strauss, that prophylactic rules are "a central and necessary feature of constitutional law."35

Suppose Miranda had established a rebuttable presumption that any incriminating statement obtained in a custodial setting without the Miranda safeguards (or equally effective procedures) is compelled, but that this presumption could be overcome if the suspect were a police officer, lawyer, law student or a person with a Ph.D. in criminology. Such a presumption would produce the same result a conclusive presumption would in the great bulk of cases. But so far as I know, everybody agrees that a court's responsibility to achieve accurate fact finding permits it to assign burdens of proof and to adopt rebuttable presumptions. As Professor Strauss argues, if it is legitimate for a court to decide that evidence of voluntariness is legally immaterial in some cases (where the evidence is insufficient to overcome a rebuttable presumption), why should it be improper for a court to extend this approach to all cases?36

A "prophylactic" rule is not a dirty word. Sometimes such rules are necessary and proper. The privilege against self-incrimination, no less than other constitutional rights, needs "breathing space." And prophylactic rules may be the best way to provide it.

Miranda is based on the realization that case-by-case determination of the "voluntariness" of a confession in light of the totality of the circumstances was severely testing the capacity of the judiciary and that institutional realities warranted a conclusive presumption that a confession obtained under certain conditions and in the absence of certain safeguards was compelled. The pre-Miranda "voluntariness" test was too mushy, subjective, and unruly to provide suspects with adequate protection.37 And it was too time-consuming to administer. As Justice Hugo Black expressed it during the oral arguments in Miranda: "If you are going to determine the admissibility of a confession each time on the circumstances . . . if the Court will

34. Schulhofer, supra note 9, at 453.
36. See id. at 193-94.
take them one by one . . . it is more than we are capable of doing.”

In 1966, after years of struggling with the “voluntariness” test, a majority of the Supreme Court had arrived at the same conclusion that this traditional test was woefully inadequate and simply unworkable. Something else was needed, something easier to administer. That “something else” turned out to be Miranda. Under any sensible approach to constitutional interpretation, the Supreme Court must be allowed to take into account its own fact-finding limitations.

Establishing presumptions and prophylactic rules is inherent in the art of judging—in the effort to make constitutional rights more meaningful. The Fourth Circuit panel that decided Dickerson did a lot more than try to deal Miranda a fatal blow. Its approach to constitutional decision-making restricts the ability of the Rehnquist Court—and every court—to interpret constitutional provisions in light of institutional realities.

A good example of how the Court promulgates a “prophylactic rule” in order to compensate for its fact-finding limitations is North Carolina v. Pearce. A number of defendants had successfully overturned their original convictions only to have the judge give them a heavier sentence for the same crime when they were retried and reconvicted. There was reason to think that in some of these cases, at least, sentencing judges were “punishing” defendants for having succeeded in getting their first convictions set aside. As the Court noted, however, “[t]he existence of a retaliatory motivation would . . . be extremely difficult to prove in any individual case.”

What did the Pearce Court do? It established what has “come to be called a ‘presumption of vindictiveness’”: “In order to assure the absence of [a retaliatory] motivation” it held that “whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons [for] doing so must affirmatively appear [and] must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding.” Absent such a showing, vindictiveness against the defendant for having successfully attacked his first conviction is to be presumed and the sentence he received on retrial struck down as a violation of due process.

The Court subsequently made plain that Pearce had created a “prophylactic rule” and that “prophylactic” was not a dirty word. Speaking for a 7-2 majority (one that included Chief Justice Burger and Justice Rehnquist), Justice White explained Pearce as a case where, “[p]ositing that a more severe penalty after reconviction would violate due process . . . imposed as purposeful punishment for having successfully appealed,” the Court concluded that “such untoward sentences occurred with sufficient frequency to warrant the imposition of a prophylactic rule.”

38. Id. at 75.
40. Id. at 725 n.20.
42. Pearce, 395 U.S. at 726.
A year later, again speaking for a 7-2 majority that included Burger and Rehnquist, Justice Powell (who has never been accused of being enthused about the Warren Court’s revolution in criminal procedure), explained and defended “the *Pearce* prophylactic rules” by analogizing them to the *Miranda* rules:

By eliminating the possibility that [improper considerations] might occasion enhanced sentences, the *Pearce* prophylactic rules assist in guaranteeing the propriety of the sentencing phase of the criminal process. In this protective role, *Pearce* is analogous to *Miranda*, . . . which the Court established rules to govern police practices during custodial interrogations in order to safeguard the rights of the accused and to assure the reliability of statements made during these interrogations. Thus, the prophylactic rules in *Pearce* and *Miranda* are similar in that each was designed to preserve the integrity of a phase of the criminal process.44

Justice Powell and the six Justices who joined him seemed untroubled by the fact that in many instances application of the *Pearce* rule would benefit defendants whose rights had not actually been violated—who had not actually been the victims of vindictiveness.45 This was a good reason for not applying *Pearce* retroactively to resentencing proceedings that took place prior to the *Pearce* decision46 (just as *Miranda* had not been applied retroactively),47 but it was not a valid reason for failing to apply the rule prospectively. It is “an inherent attribute of prophylactic constitutional rules” that their application will benefit “some defendants who have suffered no constitutional deprivation.”48

In still another case applying *Pearce*, even Chief Justice Burger seemed unperturbed by its “prophylactic” nature. Speaking for a majority of the Court that included Justice Rehnquist, the Chief Justice matter of factly recalled that in order “[t]o prevent actual vindictiveness from entering into a decision and allay any fear on the part of a defendant that an increased sentence is in fact the product of vindictiveness, the [Pearce] Court fashioned what in essence is a ‘prophylactic rule.’”49 But the Court did not say this disapprovingly.

Neither the Chief Justice nor any other member of the Court complained that the *Pearce* rule had enabled federal courts to exercise their “supervisory power over state courts.” Nobody seemed troubled that a defendant who had received an increased sentence on retrial could establish a due process violation without showing actual vindictiveness. Nor did anybody suggest that *Pearce* was an “illegitimate” decision.

*North Carolina v. Pearce* is usually classified as an “appeals” case or a “double jeopardy” case. But one need not stray from the field of confessions to find

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45. See id. at 53-54.
46. The Court held that *Pearce* would not apply retroactively in *Payne*. See id. at 57.
other examples of “prophylactic rules” whose legitimacy has been accepted or at least assumed. Indeed, one need go no further than Miranda’s own progeny.

Marking one of the few times the post-Warren Court has read Miranda rather broadly, Edwards v. Arizona50 held that when a suspect effectively asserts his right to a lawyer (as opposed to his right to remain silent)51 the suspect may not be subjected to further police questioning unless counsel has been made available to him until he himself initiates further conversation with the police.52 This means that the police cannot try to change the suspect’s mind—not even if they give him a fresh set of warnings at the outset of a new interrogation session. Rather, they must wait to see whether the suspect changes his mind on his own initiative.

Edwards held, in effect (in a forceful opinion by Justice White, and a surprising one considering his angry dissent in Miranda), that when a custodial suspect invokes his right to counsel, there is a conclusive presumption that any subsequent waiver of rights that comes at police instigation, not at the suspect’s own behest, is compelled. To put it somewhat differently, Edwards in effect established a new “prophylactic rule” that built on and reinforced Miranda’s “prophylactic rules.”

It will not do to say that the Edwards rule was required by the Miranda decision. Six years prior to Edwards, the Court had held that if a suspect asserts his “right to silence” (as opposed to his right to counsel) the police may, if they cease questioning on the spot, “try again”—and succeed at a subsequent interrogation.53 The Court could have plausibly held that invocation of the right to counsel should be treated no differently than assertion of the right to silence. Indeed, as I have maintained elsewhere, I do not think it makes much sense to draw a distinction based on which Miranda right a suspect happens to trigger.54

Why, then, did the Burger Court establish, and the Rehnquist Court reaffirm and expand, what the Court has recently called “the bright-line, prophylactic Edwards rule”?55 In Minnich v. Mississippi,56 a 7-2 majority of the Rehnquist Court (only Justice Scalia, joined by Chief Justice Rehnquist, dissented) told us the following:

The [Edwards] rule ensures that any statement made [by a suspect who has previously asserted his right to counsel] is not the result of coercive pressures. Edwards conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness.57

Is this not an explanation and defense of Miranda itself as well as Edwards?

52. See Edwards, 451 U.S. at 484-85.
53. See Mosley, 423 U.S. at 96.
57. Id. at 151.
To be sure, as Professor Grano once said to me in a debate about Miranda’s legitimacy, the fact that the Rehnquist Court has reaffirmed and expanded the Edwards rule does not conclusively refute the argument that Miranda is an “illegitimate” or extra-constitutional decision—that the Rehnquist Court may also have transgressed proper boundaries does not change the fact that the Court lacks constitutional authority to overturn state convictions when the Constitution has not actually been violated. That may be so, but it sure makes it unlikely that the Rehnquist Court will overrule Miranda on this ground. It also makes it unlikely that the Rehnquist Court will uphold § 3501 on this ground.

Further evidence that prophylactic constitutional rules are not to be demeaned is provided by Withrow v. Williams.58 When the Court held that a state prisoner afforded a full and fair opportunity to litigate a Fourth Amendment claim could not obtain federal habeas relief on the ground that illegally seized evidence was used against him in the state prosecution,59 many assumed that a similar restriction on the exercise of federal habeas jurisdiction would apply to a state prisoner’s claim that his conviction rested on statements obtained in violation of Miranda. For there was little reason to think that the post-Warren Court had a warmer spot in its heart for Miranda than it did for the search and seizure exclusionary rule. But the Withrow Court confounded the prognosticators.

The government argued in Withrow that since the Miranda rules “are not constitutional in character, but merely ‘prophylactic,’” federal habeas review should not extend to claims based on violations of these rules.60 A majority of the Court was not impressed; it accepted the government’s characterization of the Miranda safeguards, for purposes of the case, but not the government’s conclusion.

Justice Souter, who wrote the opinion of the Court in Withrow, did not deny that “we have sometimes called the Miranda safeguards ‘prophylactic’ in nature”61 (because, explained Souter, violation of these safeguards might lead to the exclusion of statements that would not be found “involuntary” under pre-Miranda standards). But this, he noted, is a “far cry” from putting Miranda in the same category as the search and seizure exclusionary rule or from rendering Miranda subject to the same restrictions on the exercise of federal habeas jurisdiction that apply to search and seizure cases.62

The Fourth Amendment exclusionary rule, observed the Court, cannot “be thought to enhance the soundness of the criminal process by improving the reliability of evidence introduced at trial,”63 but Miranda differs in this respect: “‘Prophylactic’ though it may be, in protecting a defendant’s Fifth Amendment privilege against self-incrimination, Miranda safeguards ‘a fundamental trial right.’”64 It “brace[s] against

60. Withrow, 507 U.S. at 690.
61. Id.
62. Id. at 691.
63. Id.
64. Id.
'the possibility of unreliable statements in every instance of in-custody interrogation," and thereby "serves to guard against 'the use of unreliable statements at trial.'"\(^{65}\)

B. Other Threats to Miranda

Assuming arguendo that I am right—that the Court will reject the argument that § 3501 "overrules" Miranda—that famous case is not out of danger. The Rehnquist Court may still deal Miranda some heavy blows.

For one thing, the Court may uphold the use for impeachment purposes of statements obtained in violation of Miranda even when the police deliberately violate a suspect’s rights for the very purpose of obtaining evidence for impeachment purposes. For another thing, the Court may permit the government to use all the clues and physical evidence obtained as a result of a Miranda violation. Still worse, the Court may allow the government to do so even when the police deliberately commit a Miranda violation for the very purpose of obtaining clues and other derivative evidence.

As Professor Carol Steiker has pointed out, in discussing the Warren Court and its successor Courts it is helpful to distinguish between "conduct" rules (those addressed to law enforcement officials) and "decision" rules (those addressed to courts regarding the consequences of unconstitutional conduct).\(^{66}\) Although they have left the Warren Court’s "conduct" rules relatively intact, the Burger and Rehnquist Courts have "wag[ed] counter-revolutionary war" against the Warren Court’s "decision" rules.\(^{67}\) And they have done so by developing a number of what Professor Steiker calls "‘inclusionary rules’—rules that permit the use at trial of admittedly unconstitutionally obtained evidence or that let stand criminal convictions based on such evidence."\(^{68}\)

These "inclusionary" rules, Steiker persuasively argues, "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."\(^{69}\) Good examples of "inclusionary" rules are the post-Warren Court doctrines regarding the use of statements obtained in violation of Miranda for impeachment purposes and the use of evidence derived from statements obtained in violation of Miranda, i.e., the admissibility of the "fruit of the poisonous tree."

The first blow the post-Warren Court struck Miranda was Harris v. New York,\(^{70}\) which held that statements preceded by defective warnings, and thus

\(^{65}\) Id. at 692.


\(^{67}\) Id. at 2470.

\(^{68}\) Id. at 2469.

\(^{69}\) Id. at 2504.

\(^{70}\) 401 U.S. 222 (1971).
inadmissible in the government’s case-in-chief, could still be used to impeach the defendant’s credibility if he chose to take the witness stand. Four years later, in Oregon v. Hass, 71 the Court went a considerable step further. In this case, after being advised of his rights, the suspect had asserted his right to counsel. But the police had continued to question him. The Court ruled that in this situation, too, the resulting statements could be used for impeachment cases. However, there is, I think, an important distinction between the facts in Harris and those in Hass.

Many suspects make incriminating statements even after being given a full set of warnings. Therefore, Harris might have been explained (and contained) on the ground that permitting impeachment use of statements obtained without complete warnings would not significantly encourage the police to violate Miranda. However, now that Hass is on the books, when a suspect asserts his right to counsel, the police seem to have virtually nothing to lose and something to gain by continuing to question the suspect in violation of Miranda.

The Hass Court took notice of this argument, but dismissed it as a “speculative possibility.” 72 It’s not easy to establish, but if and when it can be established that the police deliberately ignored a suspect’s assertion of his rights for the very purpose of obtaining impeachment evidence, are we still in the realm of speculation?

The Hass Court saw no need to bar the impeachment use of statements obtained in violation of Miranda because “there is sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief.” 73 (Now that’s speculation.) But how can a court maintain that position when it is clear that the fact that the statements could not be used in the government’s case in chief failed to deter the officer? When the officer deliberately violated Miranda in order to secure impeachment evidence?

This is why it was so discouraging when last year the California Supreme Court rejected the argument that Hass was based on the assumption that a purposeful or deliberate violation of Miranda and Edwards would not occur. 74 I can only hope that the U.S. Supreme Court rejects the California court’s remarkable conclusion that evidence of “a purpose to violate the suspect’s rights in order to secure [impeachment] evidence” only “call[s] into question” the accuracy of the U.S. Supreme Court’s assumption in the impeachment cases that “police misconduct will be deterred adequately by excluding improperly obtained evidence from the prosecution’s case-in-chief, but such evidence does not render the [impeachment exception] inapplicable.” 75

Why not? What does it take to demolish the unexamined and unsupported assumption that “sufficient deterrence” is provided so long as statements obtained in violation of Miranda are inadmissible in the prosecution’s case-in-chief?

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72. Id. at 723.
73. Id. at 722.
74. See People v. Peevy, 73 Cal. Rptr. 2d 865, 867 (Cal. 1998).
75. Id. at 875-76.
Oregon v. Elstad\textsuperscript{76} represents an even more serious threat to Miranda than do the impeachment cases. Indeed, short of flatly overruling Miranda or upholding the federal statute purporting to “repeal” it, Elstad poses the greatest danger of all.

In that case, in the course of ruling that the fact that the police had obtained a statement from the defendant in violation of Miranda when they questioned him earlier at his home did not bar the admissibility of a second statement, made at the station house, when this time the police had complied with Miranda, the Court indicated that the “fruit of the poisonous tree” doctrine does not apply to Miranda at all.\textsuperscript{77} If so, all the “fruits” of, or evidence derived from, a Miranda violation would be admissible, whether they are a second confession, a prosecution witness or physical evidence.

Elstad can plausibly be read very narrowly. For one thing, the failure to advise Mr. Elstad of his Miranda rights seemed to be inadvertent. If, for example, Elstad had invoked his right to counsel at the first meeting and the police had refused to honor that right, the result might have been different.\textsuperscript{78} Moreover, as dissenting Justice Brennan pointed out in Elstad, the majority “relies heavily on individual ‘volition’ as an insulating factor in successive-confession cases”—a factor “altogether missing in the context of inanimate evidence.”\textsuperscript{79}

However, at several places in her majority opinion, Justice O’Connor tells us that the poisonous tree doctrine assumes the existence of an underlying constitutional violation—for example, a violation of the Fourth Amendment or “police infringement of the Fifth Amendment itself.”\textsuperscript{80} And it is plain that the Elstad majority did not believe that a Miranda violation qualifies as a “constitutional violation.”\textsuperscript{81}

The Court has never explicitly addressed the question whether physical or nontestimonial evidence derived from a Miranda violation is admissible. However, I have to say that there is a good chance that it will answer that question in the affirmative. In the meantime, ever since Elstad was decided, “federal and state courts have almost uniformly ruled that the prosecution can introduce nontestimonial fruits of a Miranda violation in a criminal trial.”\textsuperscript{82}

“It has been said,” observed Judge Henry Friendly some thirty years ago, “that ‘what data there are’ suggest that the obtaining of leads with which to obtain real or demonstrative evidence or prosecution witnesses is more important than getting statements for use in court.”\textsuperscript{83} A good deal more recently, another commentator similarly noted that “[e]xpert interrogators have long recognized, and continue to

\textsuperscript{76} 470 U.S. 298 (1985).
\textsuperscript{77} See id. at 307-08.
\textsuperscript{78} At one point in her majority opinion, Justice O’Connor distinguished cases such as Elstad, where the police failed to advise a suspect of his Miranda rights at their first meeting, from cases “concerning suspects whose invocation of their rights . . . were flatly ignored while police subjected them to continued interrogation.” Id. at 313 n.3.
\textsuperscript{79} Id. at 347 n.29.
\textsuperscript{80} Id. at 309; see also id. at 304-05, 308.
instruct, that a confession is a primary source for determining the existence and whereabouts of the fruits of a crime, such as documents or weapons.\(^8^4\)

Therefore, a ruling that all types of evidence derived from a *Miranda* violation are admissible would strike the landmark case a grievous blow. How could we possibly expect the police to comply with *Miranda* if the courts barred only the use of incriminating statements obtained in violation of that doctrine, but none of the leads or clues or evidence these statements brought to light?

A decade ago, in order to underscore the potential cumulative effect of the various exceptions to *Miranda* that the post-Warren Court had carved out, Professor Albert Alschuler discussed the various ways to get around *Miranda* that a hypotheti-
cal unscrupulous police training instructor might teach young officers.\(^8^5\) However, it is now clear that we are no longer dealing with hypothetical police instructors or imaginary police training materials.

Last year we learned that lawyers seeking to prohibit officers in two California police departments from questioning custodial suspects after they have asserted their *Miranda* rights, had come upon police training materials that instruct officers to "go outside *Miranda," "i.e., to continue to question someone who has invoked his rights, (e.g., clearly asserted his right to counsel) so that the police may learn the where-
abouts of physical evidence the prosecution may use, or so that the police may acquire the names of other witnesses the prosecution may call, or so that the police may obtain statements the prosecution can use if the defendant takes the stand in his own defense.\(^8^6\)

The deputy district attorney who made the training videotape is not unaware that some police officers may feel a bit uncomfortable deliberately violating *Miranda*. He reassures these fastidious officers as follows:

When you violate *Miranda*, you’re not violating the Constitution... [There’s] no law says you can’t question people "outside *Miranda".

... .

[When we question someone who has invoked his *Miranda* rights] [a]ll we lose is the statement taken in violation of *Miranda*. We do not lose physical evidence that resulted from that. We do not lose the testimony of other witnesses that we learned about only by violating his *Miranda* invocation.\(^8^7\)

Unfortunately, the deputy district attorney is right about the testimony of other witnesses whose whereabouts are learned only by violating *Miranda*. He may be

\(^8^4\) Wollin, *supra* note 82, at 845.

\(^8^5\) See Alschuler, *supra* note 18, at 1442-43.

\(^8^6\) The full transcript of the California police training videotape discussed in this text is reprinted in the appendix to Weisselberg, *supra* note 19. Substantial extracts from the training tape appear in KAMISAR ET AL., *supra* note 31, at 93.

\(^8^7\) Weisselberg, *supra* note 19, at 191-92.
right about the use of physical evidence as well. But the Court has not yet made it clear that physical evidence discovered as a result of a Miranda violation may also be used by the prosecution. However, there is a distinct possibility that the Court will so hold in the near future. If it does, we can be sure that police training instructors would call it to the attention of their students. Indeed, if the recently discovered California police training videotape is any indication, police officers are already being instructed that if a custodial suspect invokes his Miranda rights, what the officers can "legally do" is continue to question him because "[a]ll we lose is the statement taken in violation of Miranda. We do not lose physical evidence that resulted from that." 88

I am painfully aware that a number of Justices view Miranda as occupying a lowly position in the hierarchy of rights. Nevertheless, I cannot believe this Court would admit the fruits of a Miranda violation obtained pursuant to a police department policy of violating Miranda for the very purpose of obtaining derivative evidence. If it turns out I am wrong about this, we should simply give Miranda a "respectful burial." 89

C. Coerced Confessions and the "Rule of Automatic Reversal"

As Professor Steiker has noted, not only has the post-Warren Court "promulga[ted] 'inclusionary rules' that make possible the admission of evidence that has been obtained through unconstitutional conduct of law enforcement agents," by changing rules governing the standard of review on appeal and on federal habeas corpus it has made it harder for the erroneous admission of unconstitutionally obtained evidence at trial to lead to the overturning of convictions. 90 To be sure, it was the Warren Court that first recognized a doctrine of harmless constitutional error. 91 (Prior to the 1960s, it was generally assumed that constitutional error could never be regarded "harmless error.") But the Court was careful to note that some constitutional rights—it specifically mentioned the right against admission of a coerced confession—are "so basic to a fair trial that their infraction can never be treated as harmless error." 92

However, as Judge Harry Edwards recently observed, the post-Warren Court has "dramatically expanded the list of constitutional violations that are subject to harmlessness analysis" and has "subtract[ed] one" from the list of those errors

88. Weisselberg, supra note 19; text accompanying notes 19, 86.
91. There may be some constitutional errors, concluded the Warren Court in Chapman v. California, 386 U.S. 18, 22 (1967), "which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." But the Court went on to say that the error in Chapman (permitting the prosecutor to comment on the defendant's failure to take the stand) was not "harmless." Because of its repeated references to defendant's failure to take the stand, the state could not possibly demonstrate that the error was "harmless beyond a reasonable doubt," i.e., prove beyond a reasonable doubt that the error did not contribute to the conviction.
92. Chapman, 386 U.S. at 23 & n.8.
thought to be “per se reversible.”93 In Arizona v. Fulminante,94 (a case about which another participant in the University of Tulsa Conference, Justice Stanley Mosk, had some understandably harsh things to say),95 a 5-4 majority of the Rehnquist Court overruled a long line of cases96 and held that the improper admission of a coerced confession was subject to “harmless error” analysis.97

The Fulminante majority, per Chief Justice Rehnquist, drew—and relied heavily on—a distinction between (a) “trial errors,” which may be “quantitatively assessed” in the context of other evidence presented and (b) “structural defects in the constitution of the trial mechanism” which pervade the entire conduct of the trial and thus “defy analysis by ‘harmless-error’ standards.” (The Chief Justice viewed the other two constitutional violations referred to in Chapman as reversible per se—total deprivation of the right to counsel at trial and trial before a judge who is not impartial—as “structural defects.”)98

Two decades earlier, a 5-4 majority of the Burger Court had held that even though a post-indictment confession made to a police officer posing as defendant’s “cellmate” should have been excluded on Sixth Amendment-Massiah grounds, any error was harmless.99 Moreover, during the 1970s and 1980s, the great majority of lower courts had applied the “harmless error” rule to the erroneous admission of statements obtained in violation of Miranda.100

This led Chief Justice Rehnquist to say in Fulminante that “[t]he evidentiary impact of an involuntary confession, and its effect upon the composition of the record, is indistinguishable from that of a confession obtained in violation of the Sixth

97. However, a 5-3 majority of the Court concluded that, under the circumstances, the admission of Fulminante's confession was not harmless beyond a reasonable doubt. Chapman maintained that a constitutional error could be viewed as harmless only if the prosecution “prove[d] beyond a reasonable doubt that the error . . . did not contribute to the verdict obtained.” Chapman, 386 U.S. at 24. But Harrington v. California, 393 U.S. 250 (1969), seemed to say that the error could be deemed harmless if the remaining untainted evidence of guilt was “overwhelming.” Id. at 254; see also Milton v. Wainwright, 407 U.S. 371 (1972); Schneckle v. Florida, 405 U.S. 427 (1972). As Judge Edwards has noted, “the Harrington approach to harmless-error analysis—one of looking at whether the record evidence adequately demonstrates the appellant’s guilt, rather than whether the error contributed to the verdict—has become standard practice for many appellate panels considering both constitutional and nonconstitutional error.” Edwards, supra note 93, at 1186-87. But Arizona v. Fulminante, discussed immediately below, seems to mark a return to the Chapman approach and to be “far removed from the guilt-based version of harmless error found in Harrington.” Id. at 1190.
98. See Fulminante, 499 U.S. at 307-10. For powerful criticism of the distinction between “trial errors” and "structural defects," see Ogletree, supra note 96, at 162-64.
100. See Steiker, supra note 66, at 2527-28.
Amendment"—or one inadmissible for any other reason. The Chief Justice would have us believe that for "harmless error" purposes an inadmissible confession is an inadmissible confession. But this is not so.

The magnitude of the police illegality in a case like Oregon v. Elstad, where the police briefly questioned a suspect in his own living room without first giving him the Miranda warnings is not of the same order as the magnitude of the police misconduct in cases like Malinski (where police interrogation stripped off defendant’s clothes and kept him naked for several hours) and Payne (where the chief of police threatened to turn a young black over to a mob waiting outside the jailhouse unless he confessed) and Rogers (where, in order to get the defendant to confess, the police threatened to “bring in” his wife for questioning). It was in Malinski, Payne and Rogers and cases like them that the Court firmly established the “rule of automatic reversal”—and it was driven to do so, I think it fair to say, by the felt need to condemn police methods that violated fundamental values and offended a civilized system of justice.

That they coerced a confession out of a suspect is about as bad a thing one can say of the police. When such a confession is erroneously admitted at trial it casts a dark shadow on the integrity of the criminal process that led to a conviction. That is why I think when the Court adopted and first applied the “rule of automatic reversal” in such cases it said in effect: Regardless of other evidence of guilt, a coerced confession deeply stains the criminal process. This is not an occasion for speculation about the impact of the confession on the trier of fact. Do it over again—without the confession.

To be sure, the police misconduct in Fulminante was not as egregious as it had been in many of the earlier coerced confession cases. While in prison, the defendant had been befriendied by another inmate, Sarivola, who, unknown to the defendant, was a paid informant for the FBI masquerading as an organized crime figure. On hearing a rumor that defendant had killed his stepdaughter, Sarivola told the defendant that he was receiving and would continue to receive “tough treatment” from other inmates because of the rumor but that he, Sarivola, would protect him from the other prisoners if defendant told him the truth about the murder. At that point, defendant

101. Fulminante, 499 U.S. at 310 (emphasis added).
102. See supra notes 76-79 and accompanying text.
106. As Justice O’Connor observed for a majority in Miller v. Fenton, 474 U.S. 104 (1985), the Court has “long held that certain interrogation techniques . . . are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause . . . .” Id. at 109.
107. Dissenting in Chapman, the case that first recognized that some constitutional errors could be harmless, Justice Harlan observed that one reason that some constitutional errors fall into the “automatic-reversal” category is that they are so contrary to fundamental values or so undermine public respect for the integrity of the criminal process that our society cannot (or should not) “tolerate” acceptance of a judgment tainted by such an error. See Chapman, 388 U.S. at 53 n.7. I share the view that this is why for so many years the Court applied a “rule of automatic reversal” to coerced confessions. See also WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 26.6(d) (1984); WHITMER & SLOBOGIN, supra note 41, at 776-79.
confessed to Sarivola that he had committed the murder.

In overturning the "rule of automatic reversal" for improperly admitted coerced confessions, Chief Justice noted that "there are no allegations of physical violence on behalf of the police." But what exactly is his point?

Some forty years ago, the Court pointed out that "coercion can be mental as well as physical and that the blood of the accused is not the only hallmark" of a coerced confession. Having found it "impossible to create a meaningful distinction" for harmless error analysis—those are Chief Justice Rehnquist's words—between coerced confessions and confessions inadmissible on other grounds—surely the Chief Justice is not prepared to create a meaningful distinction, for harmless error purposes, between coerced confessions marked by physical violence and those not so marked—between barely or mildly coerced confessions and egregiously coerced ones.

If all inadmissible confessions are to be treated alike for harmless error purposes, and that is the best reading of Fulminante, then surely all coerced confessions are to be treated alike. In this context, at least, a coerced confession is a coerced confession. Henceforth, all coerced confessions, even those beaten out of a suspect, will be subject to harmless-error analysis.

 Constitutional violations not subject to harmless error now include not only a total deprivation of the right to counsel at trial and a biased judge, but racial discrimination in the selection of a grand jury. However, if a defendant has been found guilty beyond a reasonable doubt by a properly constituted petit jury at a trial on the merits free of any other error, how can the error that occurred in the selection of the grand jury be classified, as the Chief Justice does in Fulminante, as a "structural defect affecting the framework within which the trial proceeds?"

A grand jury proceeding merely decides whether there is a prima facie case against a defendant. Thus, "any possible prejudice to the defendant" resulting from racial discrimination in the selection of a grand jury "disappears" when a constitutionally valid trial jury later finds him guilty beyond a reasonable doubt. It hardly follows, therefore, as the Fulminante majority would have us believe, that whenever racial discrimination takes place in selecting a grand jury the reliability of the determination of guilt is suspect.

108. Fulminante, 499 U.S. at 311. There are three parts to the Court's decision in this case: (1) a 5-4 majority, per White, J., agreed with the state supreme court that the confession was coerced; (2) a 5-4 majority, per Rehnquist, C.J., held that the erroneous admission of a coerced confession was subject to "harmless error" analysis; and (3) still another 5-3 majority, per White, J., concluded that the admission of Fulminante's confession was not harmless beyond a reasonable doubt. See id. at 280-81.
110. See Fulminante, 499 U.S. at 312.
111. I must say I do not understand why the Chief Justice finds it "impossible" to distinguish between coerced confessions and other inadmissible confessions for harmless error purposes. The Court has had little difficulty in making this very distinction in other contexts. For a discussion of the use of confessions obtained in violation of Miranda for impeachment purposes and, in order to acquire derivative evidence, see notes 70-80 and accompanying text.
113. Fulminante, 499 U.S. at 310.
115. See Fulminante, 499 U.S. at 309-10.
The best explanation for automatic reversal when there has been racial discrimination in the selection of grand jurors is not that a structural error has occurred whose effects are inherently indeterminate, but that a constitutional error of large magnitude has taken place—one that "strikes at the fundamental values of our judicial system and our society as a whole." The same, I think, can be said when the police extract a confession from a person and that confession is then used against him at his trial. The use of a coerced confession at one's trial, no less than discrimination in the selection of a grand jury, "destroys the appearance of justice and thereby casts doubt on the integrity of the judicial process."

I believe there is a good deal to be said for Judge Harry Edwards' view:

We have come a long way from the brutal beating with whips and leather straps used to extract a confession in Brown v. Mississippi, or the thirty-six uninterrupted hours of questioning under bright lights employed in Ashcraft v. Tennessee, but we have done so only because the reversal of a conviction was the sure penalty for these actions.

In rejecting the argument that harmless-error analysis should govern instances of racial discrimination in the selection of grand jurors, the Court, per Justice Marshall, called such discrimination "a grave constitutional trespass" and noted that if it "becomes a thing of the past, no conviction will ever again be lost on account of it." Again, the same may be said for the erroneous admission of coerced confessions.

More than sixty years after the Wickersham Commission exposed the ugly facts of the "third degree" and more than thirty years after the Court decided Miranda, are there still so many confessions being coerced and so many being improperly admitted into evidence that we need a "harmless-error" doctrine to excuse some of them?

II. SEARCH AND SEIZURE

As Justice Stewart pointed out in lectures he delivered shortly after stepping down from the High Court, there are two principal ways to reduce the impact of the search and seizure exclusionary rule: by narrowing the thrust of the exclusionary rule and by shrinking the scope of the Fourth Amendment itself, thereby giving the

117. Rose v. Mitchell, 443 U.S. 545, 555-56 (1979) (explaining why racial discrimination is "especially pernicious in the administration of justice").
118. Edwards, supra note 93, at 1197. The references are to Brown v. Mississippi, 297 U.S. 278 (1936) and Ashcraft v. Tennessee, 322 U.S. 143 (1944). Judge Edwards continues: "While I do not expect to see a resurrection of such tactics in the law-enforcement community, I do fear that unbridled judicial infatuation with harmless error could lead to more subtle, but equally dangerous, adverse effects on the integrity of our system of justice." See id.
119. Vasquez, 474 U.S. at 262.
police more leeway to investigate crime. Although not all post-Warren Court search and seizure rulings have been in favor of the government, in the main the Court has significantly reduced the impact of the exclusionary rule in both respects.

A. Narrowing the Thrust of the Exclusionary Rule

Although one would gain little inkling of this from the majority opinions of the Burger and Rehnquist Courts, originally and for much of its life the federal exclusionary rule, first promulgated in the famous 1914 Weeks case,121 rested on what might be called a “principled basis.”122 The reasons for excluding evidence obtained in violation of the Fourth Amendment were to avoid “sanctioning” or “ratifying” the police misconduct that produced the evidence, to keep the courts from being contaminated by partnership in police misconduct, to prevent the government whose agents had violated the Constitution from being in a better position than the government whose officers had obeyed the Constitution, and—ultimately—to assure the police and the public alike that courts take constitutional rights seriously.123

I believe this is the dominant theme of Mapp v. Ohio,124 the case that touched off the Warren Court’s revolution in American criminal procedure by imposing the federal exclusionary rule on the states as a matter of Fourteenth Amendment Due Process.125

Evidently Justice Clark, author of the majority opinion in Mapp, felt obligated to refute all the arguments critics of the exclusionary rule had made over the years—one of which was that the rule was not an effective deterrent or not markedly superior to “other methods” in this regard.126 Thus, at one point Justice Clark did discuss whether or not exclusion of the illegally obtained evidence is a more effective deterrent than “other means of protection” (Clark thought it was).127 But when one considers the totality of Justice Clark’s opinion the dominant message of Mapp is fairly clear: Although not explicitly provided for in the text of the Fourth Amendment, the exclusionary rule is a command of the Constitution.

Part I of the Mapp opinion emphasizes that the exclusionary rule is not “a mere rule of evidence” or an exercise of the Court’s “supervisory powers,” but a “constitutionally required” doctrine.128 In Part III, the Court “hold[s] that all evidence

123. See id.
125. As a close student of the Warren Court has observed, although some may argue that the Warren Court’s revolution began with Griffin v. Illinois, 351 U.S. 12 (1956) (a case that dealt with the appellate rights of indigent defendants), “it was perhaps not until 1961 and the Mapp decision that a majority of the bench began consistently to reflect those positions that one today considers distinctive of the Warren Court.” Francis A. Allen, The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases, 1975 U. I.L.L. R. 518, 519.
126. This was a major premise of Wolf, 338 U.S. 25, the case Mapp, 367 U.S. 643, overruled.
127. See Mapp, 367 U.S. at 651-53.
128. See id. at 645-50.
obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court."  

Part IV concludes with the assurance that "no man is to be convicted on unconstitutional evidence."  

And the fifth and last part of the opinion refers to "our holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments" and observes that the constitutional prohibition against unreasonable searches and seizures "is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause."  

In short, the majority opinion in Mapp reaffirms what I have called the "original understanding" of the exclusionary rule, as explained in Weeks and its progeny: The rule is constitutionally required. Its survival does not depend on proof that it significantly affects police conduct (although Justice Clark was convinced that it does, as am I). Nor does its application to various fact situations turn on such proof.

However, ways of thinking about the exclusionary rule soon changed. In the post-Warren Court era, the "deterrence" rationale and "cost-benefit" analysis gained ascendancy. This approach bloomed in United States v. Calandra,"  

the most important exclusionary rule case of the 1970s. The Calandra majority, per Justice Powell, characterized the exclusionary rule—one might say disparaged it—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."  

Thus, whether the exclusionary rule should be applied "presents a question, not of rights, but of remedies"—a question to be answered by weighing the "likely 'costs'" of the rule against its "likely 'benefits.'"  

The post-Mapp way of thinking about the exclusionary rule enabled critics of the rule to gain some important victories. This is hardly surprising. The "costs" of the exclusionary rule are immediately apparent—the "freeing" of a "plainly guilty" drug dealer—but the "benefits" of the rule are hard to grasp. One could say that the benefits "involve safeguarding a zone of dignity and privacy for every citizen, controlling abuses of power [and] preserving checks and balances."  

And one could regard these goals as "pretty weighty benefits, perhaps even invaluable ones." But the Court has not done so. Instead, it has viewed the benefits of the rule "as abstract

129. Id. at 655 (emphasis added).
130. Id. at 657.
131. Id.
132. Id. at 660.
133. 414 U.S. 338 (1974) (ruling that grand jury witnesses may not refuse to answer questions on the ground that the questions are based on the fruits of an unlawful search).
134. Id. at 348.
135. Id. at 354, 348, 349.
136. However, are the costs any different than those that would be exacted by any equally effective alternative remedy? Doesn't a society whose police comply with the Fourth Amendment in the first place "pay the same price" as the society whose law enforcement officials cannot use the evidence they obtained because they violated the Fourth Amendment? Don't both societies convict fewer criminals?
138. Id.
[and] speculative.139

On the other hand, the Court has underscored what it thinks are the severe costs of the rule. Thus, it has called the rule a "drastic measure,"140 an "extreme sanction,"141 a rule that "exacts a costly toll upon the ability of courts to ascertain the truth in a criminal case,"142 and one whose application is "contrary to the idea of proportionality that is essential to the concept of justice."143

Given the Court's characterization of the "costs" and "benefits" to be balanced, the outcome is quite predictable. Indeed, although cost-benefit analysis sounds objective, even scientific, it is hard to avoid the conclusion that in search and seizure cases, at least, it simply gives back the values and assumptions the Court feeds into it.

During the cost-benefit analysis era, the exclusionary rule lost numerous times, e.g., in United States v. Calandra (declining to apply the rule in grand jury proceedings),144 Stone v. Powell (greatly limiting the circumstances under which Fourth Amendment claims can be raised in federal habeas corpus proceedings),145 United States v. Janis (rule inapplicable in federal civil tax proceedings),146 and INS v. Lopez-Mendoza (rule inapplicable in civil deportation proceedings).147

The "cost-benefit" approach to the search and seizure exclusionary rule culminated in United States v. Leon,148 the case that adopted a so-called "good faith" exception (actually a "reasonable mistake" exception) to the exclusionary rule. According to the Leon majority, the "marginal or nonexistent benefits" produced by the exclusionary rule when the police reasonably but mistakenly rely on a search warrant that turns out to be invalid "cannot justify the costs of exclusion."149

The earlier cases utilizing the "cost-benefit" approach had assumed that the exclusionary rule was fully applicable in a criminal prosecution against the direct victim of a Fourth Amendment violation and had maintained that the rule need not also be applied in certain "collateral" or "peripheral" settings because "no significant additional increment of deterrence [was] deemed likely."150 But Leon, for the first time, utilized cost-benefit analysis to narrow the scope of the exclusionary rule in the prosecution's case-in-chief against those whose rights have been violated.

In Leon, the officers relied on a search warrant. Is the "reasonable good faith" exception limited to the warrant setting? Some language in Leon supports such a limitation; other language indicates that Leon should apply whenever the police are acting in objective good faith.

139. Id.
144. See supra notes 133-35 and accompanying text.
149. Id. at 922.
I must say that at the time *Leon* was decided, I did not believe it would be limited to the warrant setting. For one thing, the Court, and individual Justices in separate opinions, had voiced serious doubts "the extreme sanction of exclusion," as the Court called it in *Leon*,\(^\text{151}\) could "pay its way" in *any* setting, let alone one where the Fourth Amendment violations were neither deliberate nor substantial. For another thing, I found it hard to believe that after many years of talk about a "good faith" or "reasonable mistake" exception to the exclusionary rule, the Court would finally adopt such an exception only to limit it to the tiny percentage of police searches conducted pursuant to warrants.

The Rehnquist Court is yet to say that the same cost-benefit analysis that led to the result in *Leon* supports a "good faith" exception across the board. But the Rehnquist Court has extended *Leon* to other fact situations.

Thus it has upheld the admissibility of evidence (1) where the police act in reasonable reliance on a statute authorizing the search in question even though the statute turns out to be in violation of the Fourth Amendment\(^\text{152}\) and (2) where the police make an invalid arrest, but one attributable to negligent record keeping by a court clerk.\(^\text{153}\)

As illustrated by the very recent case of *Pennsylvania Board of Probation v. Scott*,\(^\text{154}\) the Rehnquist Court has also continued to decline to apply the exclusionary rule to proceedings other than criminal prosecutions. But the reasoning of the Court leaves a good deal to be desired.

In *Scott*, the officers who conducted the warrantless and apparently suspicionless search of Scott’s home because they thought he might be keeping firearms there, a violation of one of the conditions of his parole as well as a crime, knew that Scott was a parolee. They themselves were parole officers. If Scott did turn out to possess firearms (and he did), the officers probably contemplated a revocation proceeding rather than a criminal prosecution. For, as the Supreme Court observed a quarter-century ago,\(^\text{155}\) a parole revocation "is often preferred to a new prosecution because of the procedural ease of recommitting the individual on the basis of a lesser showing by the State."

The Pennsylvania Supreme Court had drawn a distinction between situations like *Scott* and cases where the searching officers are unaware of the suspect’s status as a parolee. In the latter situation, the Pennsylvania Court saw no reason to apply the exclusionary rule in a parole revocation hearing because the officers probably had a criminal prosecution in mind and knew that the exclusionary rule applied in such a proceedings. Thus, reasoned the state court, in such a situation applying the exclusionary rule in a revocation proceeding is unlikely to act as a significant additional deterrent to illegal government behavior.\(^\text{156}\)

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151. *See supra* note 141 and accompanying text.
However, maintained the state court, “a different balance exists” when the officer knows or has reason to believe that the suspect is a probationer or parolee. In this situation, because the officer probably only has a revocation hearing in mind, there is a need to apply the exclusionary rule in the revocation proceeding. Otherwise, there will often be nothing else to deter the officer from conducting an illegal search.  

I happen to think that the Pennsylvania Supreme Court was right. But I don’t have any votes. Justice Clarence Thomas does. On this occasion he had five—five who disagreed with the state court.

The Scott majority begged the question, I venture to say, by claiming that application of the exclusionary rule in the revocation hearing would only provide “marginal deterrence.” As Justice Souter pointed out for the dissenters, when the searching officers know that the subject of their search is a parolee (or probationer), there is nothing “marginal” or “incremental” about application of the exclusionary rule. For the officers probably assume that the revocation hearing will be the only proceeding in which the evidence will be offered.

According to the Scott majority, the relationship of parole officers to their parolees is “more supervisory than adversarial” and “the failure of the parolee is in a sense a failure for his supervising officer.” (At this point, I guess, we are supposed to picture parole officers who look like Pat O’Brien or Barry Fitzgerald.) This relationship, continued the majority, means that “the harsh deterrent of exclusion is unwarranted, given such other deterrents as departmental training and discipline and the threat of damage actions.”

As the dissenters responded, however, while parole officers sometimes serve as counselors for parolees, they “often serve as both prosecutors and law enforcement officials” in their relationships with them. As for “departmental training and discipline” being a sufficient deterrent, observed the dissenters, the very same thing could be said about the police generally—but that argument was rejected in Mapp v. Ohio (as it had been three decades earlier in the Weeks case).

Moreover, added the dissenters, the majority did not refer to any specific departmental training regulation. Nor did it cite a single instance of discipline imposed on a Pennsylvania parole officer for conducting an illegal search of a parolee’s home. Nor did it mention a single lawsuit brought by a parolee for an illegal search.

The Scott decision is hardly surprising—given the many uncomplimentary things the Court had said about the exclusionary rule in the 1970s and ‘80s—most of which Justice Thomas repeated in his majority opinion. Scott may be viewed as

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157. See id.
159. See id. at 2025 (Souter, J., with whom Ginsberg & Breyer, JJ., join dissenting).
160. Id. at 2022.
161. Id.
162. Id. at 2025.
another case in a long list of cases declining to apply the exclusionary rule to proceedings other than criminal prosecutions. The only thing really surprising about Scott is that as many as four Justices dissented. Justice Stevens reiterated his view that the Fourth Amendment required the exclusion of illegally seized evidence. And, in a separate dissent, Justice Souter, joined by Justices Ginsburg and Breyer, challenged the way the majority had worked out its cost-benefit analysis.

The costs of applying the exclusionary rule in the revocation hearings, maintained Souter, are surely no greater than the costs of applying the rule in a criminal prosecution. Nor are the benefits any less. For in a case like Scott a parole revocation hearing usually takes the place of a criminal trial, making it the only proceeding in which illegally obtained evidence will be used against a parolee.

B. Taking a Grudging View of What Constitutes a Search or Seizure

Police practices need not be based on individualized suspicion or conducted pursuant to search warrants—indeed, they are not covered by the Fourth Amendment at all if they do not constitute “searches” or “seizures” within the meaning of the Amendment. Thus, another way to diminish the protection against unreasonable search and seizure—and a way the post-Warren Court has made considerable use of—is to take a narrow, stingy view of what amounts to a “search” or “seizure.”

The Burger Court took a grudging view of the key terms “searches” and “seizures” in a number of cases. Recall, for example, United States v. Miller (because bank depositor “takes the risk” that information revealed to the bank will be conveyed to the government, transfer of information to the government is not a “search” or “seizure”), Smith v. Maryland (because one who uses the phone “assumes the risk” the phone company will tell the government the number she dialed, the government’s use of a pen register, a device that records all numbers dialed from a given phone and the time they were dialed, is not a “search” or “seizure”), Oliver v. United States (although one takes sufficient precautions to render entry on his private land, situated beyond the curtilage, a criminal trespass under state law, police entry on and examination of that land not a “search”), and California v. Ciraolo (police aerial surveillance of fenced-in backyard not a “search”; evidently defendant should have placed an opaque dome over his backyard).

The Rehnquist Court has continued the trend. A trash bag is a common repository for personal effects and a search of such bags can reveal intimate details about one’s business dealings; political activities, associations and beliefs; consumption of alcohol; sexual practices, health and personal hygiene. Nevertheless,

164. See Scott, 118 S. Ct. at 2022-23.
165. See id. at 2026-27.
166. See id. at 2025, 2027.
the Rehnquist Court held that the police may tear open the sealed opaque trash bags one leaves at the curb for garbage pick-up and examine their contents for evidence of crime without engaging in a "search."\(^{171}\)

The police had some information that Mr. Greenwood might have been engaged in drug trafficking. But the way the opinion is written, this does not matter. The Court would have reached the same result if the police had no reason whatever to believe that Mr. Greenwood was violating the drug laws.

This is what it means to say, as the Greenwood Court did, that the examination of a person's sealed garbage is not a "search" or a "seizure" and thus not restricted in any way by the Fourth Amendment.

To say that the use of a police investigatory technique, e.g., police aerial surveillance, police use of a pen register, or police examination of one's garbage, is not a "search," is a drastic move. For it means the police investigatory technique is completely uncontrolled by the Fourth Amendment. However, to conclude that a particular investigatory technique is a "search" is not a drastic move. For such a conclusion does not ban the investigative technique at issue altogether.

The expectation of privacy with respect to one's trash is considerably less intense and consistent than the expectation of privacy or to one's home. Thus, one could classify the examination of the contents of sealed trash bags as a "search," yet plausibly conclude that it is not bounded by the same limitations applicable to a search of one's dwelling. One might conclude, for example, that, although a "search," police examination of sealed trash requires neither a search warrant nor traditional probable cause.

Unfortunately, when deciding whether a particular police investigatory practice is a "search" or "seizure" the Rehnquist Court (as well as its immediate predecessor) has failed to heed the advice of our two greatest commentators on the law of search and seizure, Professors Anthony Amsterdam and Wayne LaFave. According to them, the fundamental inquiry in a case such as Greenwood ought to be whether, if the particular police investigatory practice at issue is allowed to go "unregulated by constitutional restraints," our privacy "would be diminished to a compass inconsistent with the aims of an open and free society."\(^{172}\)

I, for one, think the answer to that question is yes. A society in which law enforcement officials have carte blanche to rummage through people's trash for evidence of crime, and inevitably come upon information pertaining to intimate aspects of their personal lives, is a society whose privacy has been diminished to a degree inconsistent with the aims of a free and open society.

The Rehnquist Court has not only taken a cramped view of what constitutes a "search," it has also given the crucial term "seizure" a narrow reading. In Florida

\(^{171}\) California v. Greenwood, 486 U.S. 35 (1988). It is unclear to what extent the decision in Greenwood is grounded on the notion that one has no legitimate expectation of privacy in materials one voluntarily turns over to a third person or to what extent the decision turns on the fact that Mr. Greenwood left his garbage bags for collection on the curb—outside the curtilage of his home.

\(^{172}\) Anthony Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 403 (1974), quoted with approval in LaFave, supra note 107, at 393.
v. Bostick, the Court told us that if armed police board an interstate bus at a scheduled intermediate stop, announce their mission is to detect drug traffickers, randomly approach a passenger, ask to see his bus ticket and driver’s license, and then ask the passenger to let them search his luggage, no “seizure” has taken place. Under these circumstances, with one or two husky officers towering over him and one officer “in his face,” we are supposed to believe that a reasonable person would feel free to terminate the encounter or to ignore the police presence and continue to do what he was doing—return to the crossword puzzle he was doing or just go to sleep.

Does anybody really believe this? I can think of a few, a very few, people who might react this way—but I would not call any of them “reasonable persons.”

C. Insulating Arbitrary Police Action

New York Times columnist William Safire may have exaggerated a bit, but not by very much, when he maintained that “a strong reason must exist for commuters to go into hock to buy a car, to sweat out traffic jams [and] to groan over repair bills” and that that reason is “the blessed orneriness called privacy.” Evidently the post-Warren Supreme Court does not agree. For the privacy the Fourth Amendment affords motorists diminished a good deal in the 1970s and 1980s and it diminished still further during the era of the Rehnquist Court.

First, some background. Two major exceptions to the search warrant requirement arise in an automobile setting: (1) the search incident to a lawful arrest and (2) the Carroll doctrine, once called the “moving vehicle” exception.

In New York v. Belton, the Burger Court adopted a “bright line” rule that greatly broadens the “search incident” exception; at least in automobile settings. Belton holds that whether or not there is probable cause to believe a car contains evidence of crime, so long as there are adequate grounds to make a lawful custodial arrest of the car’s occupants, even though the occupants are handcuffed and standing outside the car, the police may conduct a warrantless search of the entire interior or passenger compartment of the car. (This search includes closed containers found within that zone.) Thus, warned Justice Stevens, an arresting officer may find reason to take a minor traffic offender into custody “whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation.”

In a typical automobile search, the “search incident to arrest” exception and the Carroll doctrine overlap. The two exceptions to the warrant clause are conceptually

175. The Carroll doctrine gets its name from Carroll v. United States, 267 U.S. 132 (1925).
distinct, however. As it was originally understood and for most of its life, the Carroll doctrine permitted the police to search a car without the warrant only when there were both (1) probable cause to believe that the car contained evidence of crime and (2) “exigent circumstances” making it impractical to obtain a warrant. However, the Burger Court significantly expanded the doctrine by virtually eliminating the exigent circumstances requirement.

Thus, in essence, the Carroll doctrine became simply a “probable cause” exception to the warrant requirement for automobiles. Even cars that had been removed to a police station could be subjected to warrantless searches. The Burger Court implicitly recognized that it had extended, or transformed, the Carroll doctrine by offering new rationales for the doctrine—once called the “moving vehicle exception”—such as the lesser expectation of privacy in a car.

In the 1982 Ross case, the Burger Court further extended the Carroll doctrine utilizing it to sustain the warrantless search of a “moveable container” found in a locked car trunk. The Burger Court drew a distinction between cases like Ross, where the police had probable cause to search the entire vehicle for drugs, not just a particular container inside the vehicle, and cases where the police had focused on a particular package or suitcase even before it was placed in the vehicle and whose presence in the car was merely coincidental or purely fortuitous. The police could dispense with a search warrant in the former case—that was an “automobile search” case—but not in the latter—that was only a “suitcase search” case.

Dissenting in Ross, Justice Marshall, joined by Justice Brennan, protested that even though the police encounter a closed container when they have probable cause to search the entire vehicle, that closed container is no less private than the container the police came upon when they are specifically searching for it—when probable cause is focused exclusively on it and not on the vehicle generally. A closed container, the Ross dissenters said in effect, is a closed container; therefore, whether the police have probable cause to search the entire vehicle or probable cause to search a specific container only, they should have to obtain a warrant to search the container in either case.

A decade later, in the Acevedo case, the Rehnquist Court agreed with much of the Ross dissenters’ reasoning—but not their conclusion. The Acevedo Court agreed that a closed container is a container is a container. Therefore what? Therefore, concluded Acevedo, whether the probable cause has focused exclusively on a particular container that just happens to be in a vehicle or whether the police have probable cause to search the entire vehicle and come upon the container, the police should not have to bother with a warrant in either case.

Acevedo may be read as a case which simply tidied up, or sought to tidy up, the law governing searches of closed containers in vehicles. I think this would be an

180. See Ross, 456 U.S. at 839-42.
182. See id. at 579-80.
unduly narrow reading of the case.

If the Acevedo Court eliminated one anomaly (the different Fourth Amendment treatment of closed containers in a vehicle), it preserved another—the different Fourth Amendment treatment of closed containers depending on whether they are inside or outside vehicles. That suitcases, briefcases and other closed containers should receive the protection of the warrant requirement when found outside an automobile, but lose that protection when placed inside seems bizarre. Surely a person demonstrates a stronger expectation of privacy (at least one unfamiliar with the Carroll doctrine) when he locks a suitcase or briefcase in the trunk of his car than when he does not.

I fear that someday the reasoning of Acevedo will apply (or extend) to closed containers outside a vehicle. Indeed, in Acevedo, Justice Scalia concurred in the result on the ground that a “probable cause” search of a closed container anywhere, so long as it is “outside a privately owned building,” is “not one of those searches whose Fourth Amendment reasonableness depends upon a warrant.”\textsuperscript{183} It would not be the first time that a Scalia concurring opinion presaged a major development in criminal procedure.

Three years ago, when the Rehnquist Court handed down its decision in Whren v. United States,\textsuperscript{184} one’s privacy in one’s car diminished further. In Whren a surprisingly unanimous Court, per Justice Scalia, held that a traffic stop or arrest is permissible so long as an officer in the same circumstances could have made the stop or arrest (because the officer had observed a traffic violation) regardless of whether a reasonable officer would have made the stop or arrest had there not been some reason or motivation beyond the traffic offense (such as a hunch that the driver had drugs or guns in his possession).

The defendants in Whren did not deny that they had violated certain provisions of the local traffic code. But they argued that, given the great multitude of traffic and vehicular equipment regulations and the ease with which the police may find anybody violating one or more of them, allowing mere observation of a minor traffic offense automatically to justify a stop or arrest gives the police the kind of arbitrary power that the Fourth Amendment is supposed to prohibit.

Since the use of vehicles is so heavily and minutely regulated, total compliance is virtually impossible.\textsuperscript{185} This situation, maintained the defense, creates the great temptation to use traffic enforcement as a means of investigating other, more serious, violations, as to which no individualized suspicion exists. Probable cause as to a

\textsuperscript{183} Id. at 584-85.
\textsuperscript{184} 517 U.S. 806 (1996).
\textsuperscript{185} As Professor David A. Harris has observed, supra note 174, at 559-60: ["Moving violations"] only begin the catalog of possible offenses. There are traffic infractions for almost every conceivable aspect of vehicle operation, from the distance drivers must signal before turning, to the times of day and weather conditions that require drivers to turn on their lights. Some of these offenses are not even clearly defined, giving officers the discretion to stop drivers who are operating vehicles in ways and under conditions that are not "reasonable and prudent." And if regulation of driving is pervasive, legal requirements concerning vehicle equipment may be even more so.
minor traffic violation can be so easily come by that its existence provides no effective protection against arbitrary police action.

Moreover, there is reason to think that the police use the pretext of traffic enforcement to harass motorists because of the length of their hair, the style of their clothing, or the color of their skin.\footnote{186}

In one recent case, United States v. Roberson,\footnote{187} the defense’s contention that the traffic stop was a mere pretext to search for drugs was supported by this particular trooper’s remarkable record—in the past five years he had arrested 250 people on drug charges—all after traffic stops or arrests. (How many motorists were stopped and induced to consent to searches of their cars in order to produce that remarkable record? And who were the people stopped?)

I think the Whren Court should have adopted the “would have” test, under which a traffic stop or arrest satisfies the Fourth Amendment only if a reasonable police officer would have been motivated to stop the car or arrest the motorist by a desire to enforce the traffic laws or—to put it another way—police action violates the Fourth Amendment if a reasonable officer would not have taken the action she did, but for an underlying purpose or motivation that, standing alone, could not provide a lawful basis for the police action.

Applying this test to the facts of the Whren case would have been easy. The arresting officers were plainclothes vice squad officers in unmarked cars, patrolling what they call a “high drug area” of Washington, D.C.\footnote{188} District of Columbia police regulations permit plainclothes officers in unmarked cars to enforce traffic laws only when the violation is “so grave as to pose an immediate threat to the safety of others”\footnote{189}—and that is a far cry from the minor violations that occurred in Whren.

But the Court rejected this approach. It held that a traffic stop supported by adequate grounds to believe that a violation occurred satisfies the Fourth Amendment whatever the motives of the police, whatever internal police regulations may have to say about enforcing the traffic laws and whatever the usual or routine practice of the police department. In short, Whren tells us that there is no such thing as a pretext traffic stop.

A year after Whren, the Rehnquist Court handed down two more decisions that expand police powers when dealing with motorists and car passengers: Ohio v. Robinette\footnote{190} and Maryland v. Wilson.\footnote{191}

The Robinette case featured Deputy Sheriff Newsome. He testified that it was


\footnote{187} 6 F.3d 1088 (5th Cir. 1993).

\footnote{188} Whren, 517 U.S. at 806.

\footnote{189} Id. at 815.

\footnote{190} 519 U.S. 33 (1996).

\footnote{191} 519 U.S. 408 (1997).
his routine practice to ask permission to search a motorist’s car during a traffic stop. When asked in another case why, he replied: “I need the practice.”192 He had a lot of practice. In one year alone he requested, and obtained consent to, a search incident to a traffic stop more than 750 times.193

The Robinette case arose as follows: After stopping the defendant for speeding in a construction zone, issuing a verbal warning, and returning his license, Deputy Newsome added: “One question before you get gone. Are you carrying any illegal contraband in your car? Any weapon of any kind, drugs, anything like that?”194

When the defendant replied in the negative, the deputy asked whether he could search the car. The defendant consented. The search turned up a small amount of drugs. The Ohio Supreme Court held that the evidence should have been excluded because the defendant’s consent to the search was obtained during an illegal detention (after every aspect of the traffic stop had been brought to a conclusion) and the drugs found were a product of that unlawful detention.195

The Ohio court ruled that unless the situation were clarified by the officer, most motorists in Robinette’s situation would believe when asked to consent to a search of their cars that they were still validly in police custody. This being so, in order to prevent the police from turning a routine traffic stop “into a fishing expedition for unrelated criminal activity,” and in order to assure that the encounter immediately following the completion of the business relating to the traffic stop is truly consensual, when the police have completed the business of the traffic stop, any attempt to search a vehicle about an unrelated crime must be preceded by a police warning: “At this time you are legally free to go” (or words to this effect).196

The State of Ohio and the attorney generals of thirty-six other states warned the U.S. Supreme Court that the prophylactic rule promulgated by the Ohio Supreme Court would “hamstring efforts to ferret out illegal drug trafficking and use.”197 The U.S. Solicitor General’s office, which filed an amicus brief on behalf of Ohio, assured the Supreme Court that “a reasonable person in [Mr. Robinette’s] situation would have understood that he was free to leave.”198

If this is so, I cannot help asking: If a motorist knows, or a reasonable person in his shoes would know, that he is “free to leave,” how or why is requiring the police to tell him this—to tell him what he already knows (or what every reasonable person in his shoes would know)—going to “hamstring efforts” to combat drug traffic? I may be missing something, but it strikes me that warning a motorist in Robinette’s situation that he is “free to leave” would only have an adverse effect on law enforcement if and when it informs a motorist who does not think he is free to leave the scene that he is.

193. See id. at 503 n.3.
194. Robinette, 519 U.S. at 35-36.
196. Id. at 696, quoted in Robinette, 519 U.S. at 36.
197. Brief of Amicus Curiae States of Alabama, California, Colorado, at 8, Robinette (No. 95-891).
198. Brief for the United States as Amicus Curiae Supporting Petitioner, at 24, Robinette (No. 95-891).
To almost no one’s surprise, the U.S. Supreme Court reversed. Chief Justice Rehnquist, who wrote the majority opinion, thought it would be “unrealistic” to require police officers to tell motorists detained for traffic violations that they are “free to go” before asking them whether they would consent to a search of their cars.\(^199\)

Why would it be impractical? Keep in mind that Deputy Newsome, and many other officers as well, routinely ask motorists who have been stopped for a traffic violation and are about to leave whether they are carrying drugs or weapons and (after receiving the usual negative answers) whether they will consent to a search of their cars. This is sometimes called the “oh-by-the-way” routine. It is hard to see why advising a once-detained motorist that he is free to leave is any more time-consuming or any more burdensome than the technique Newsome and other officers use in working their way up to asking a motorist to consent to a search.

In rejecting the position taken by the Ohio court, Chief Justice Rehnquist noted that the Court has consistently eschewed “bright-line rules.”\(^200\) In fact, however, the post-Warren Court has promulgated a number of bright-line rules expanding police power.

For example, *New York v. Class*\(^201\) permits an officer to reach into the passenger compartment of a vehicle to move papers obscuring the Vehicle Identification Number after its driver has been stopped for a traffic violation and has left the vehicle even though there is no reason to think the driver has committed any offense other than the traffic violation. *New York v. Belton*\(^202\) holds that even though there is no basis for believing that a car contains contraband or any evidence of crime, so long as there are adequate grounds for making a custodial arrest of the car’s driver, the police may conduct a warrantless search of the entire interior or passenger compartment of the car, including closed containers found within that zone.

Moreover, *Pennsylvania v. Mimms*\(^203\) allows an officer to order a driver out of a validly stopped vehicle absent any particularized suspicion that the driver is armed or dangerous. Indeed, only a short three months after telling us that it had consistently avoided bright-line rules in the search and seizure area, the Court adopted still another bright-line rule in *Maryland v. Wilson*,\(^204\) holding that the aforementioned *Mimms* rule applies to the passenger in a lawfully stopped vehicle as well as to the driver.

Taken together, *Whren, Wilson* and *Robinette* give the police a great deal of discretionary power. If they follow him or her long enough, the police can stop almost any driver for a traffic violation. Once stopped, drivers can be intimidated or misled or “sweet talked” into consenting to searches of their cars. (Some experienced officers report that they have never failed to get a motorist to consent to a search of

\(^{199}\) See Robinette, 519 U.S. at 40.

\(^{200}\) Id. at 39.

\(^{201}\) 475 U.S. 106 (1986).

\(^{202}\) See supra notes 176-77 and accompanying text.


\(^{204}\) 519 U.S. 408 (1997).
his or her car.)

Robinette demonstrates that the Rehnquist Court seems unwilling or uninterested in requiring the police to clarify the situation in which a person finds herself when the police seek her consent to a search of her car. And Maryland v. Wilson enables the police to order passengers out of the car as a matter of course.

As Professor David A. Harris has observed, as a result of Whren, Robinette, and Wilson:

for all practical purposes, the venerable Fourth Amendment principle that the police need a reason—call it probable cause, reasonable suspicion, or whatever—to interfere with a citizen in his or her daily activity has all but vanished for anyone who drives or rides in a car. Traffic stops have become both the occasion and the legal justification for a new kind of criminal investigation: one that features suspicionless investigation on an individual level, without any special governmental need beyond ordinary law enforcement.205

As already mentioned, surprisingly no Justice dissented in Whren. But Justice Kennedy may be having second thoughts about the case. Dissenting in Wilson, he pointed out:

The practical effect of our holding in Whren, of course, is to allow the police to stop vehicles in almost countless circumstances. When Whren is coupled with today’s holding, the Court puts tens of millions of passengers at risk of arbitrary control by the police. If the command to exit were to become commonplace, the Constitution would be diminished in a most Public way.206

III. SOME FINAL THOUGHTS

The reasoning used by the Burger and Rehnquist Courts in the criminal procedure cases outruns the results these Courts have reached to date. (But the Rehnquist Court may yet achieve these results before its era ends.)

If, as the Court has repeatedly told us, a mere violation of Miranda is not a violation of the Constitution, then didn’t the Supreme Court go awry in the Miranda case itself when it imposed the new confession doctrine on the states? For if a confession obtained without giving a suspect the Miranda warnings does not infringe on the self-incrimination clause unless it is accompanied by actual coercion, why are the state courts not free to admit all confessions that are not the product of actual coercion?

By disparaging the Miranda warnings, by viewing them as only “second-class” prophylactic safeguards and Miranda violations as only “second-class” wrongs,

205. Harris, supra note 174, at 565.
206. Wilson, 519 U.S. at 423.
language in various Burger Court cases see to have prepared the way for the overruling of Miranda itself—or at least prepared the way to uphold the constitutionality of § 3501, which purports to "repeal" Miranda. But the Rehnquist Court has yet to take that next step. Instead it has reaffirmed, reinvigorated, and spoke approvingly of the "bright-line prophylactic Edwards rule."208

On the search and seizure front, too, the post-Warren Court has not been led by the logic of its principles and assumptions to a conclusion one might have expected. If, as the Court told us a decade and a half ago in Leon, any rule that excludes reliable evidence must "pay its way" by deterring official lawlessness,209 and if, as it also told us more than two decades ago, the deterrent effect of the exclusionary rule has never been established,210 then why stop with a "good faith" modification of the exclusionary rule? Why not abolish the rule altogether?

One reason, ironically, is that a "shrunken" Fourth Amendment and a narrower exclusionary rule has made the rule a good deal more livable and defensible. After thirty years of the Burger and Rehnquist Courts, the scope of the Fourth Amendment and its exclusionary rule have been so down-sized, the need to act pursuant to a search warrant so reduced, the probable cause standard so softened, and the occasions on which the police may act on the basis of "reasonable suspicion," or no individualized suspicion at all, so increased that nowadays if the criminal goes free it is because the constable has flouted the Fourth Amendment, not because he has made an honest blunder.211

This may well be the price we have had to pay for the exclusionary rule. I think it is the price we would have had to pay for an effective tort remedy or any other Fourth Amendment remedy that actually worked. But that price has been paid.

When we talk about the Rehnquist Court, we are talking about a moving target. The Rehnquist Court era might extend another five or ten years. Depending upon the mood of the country and the views of future Justices, the Rehnquist Court may yet carry the post-Warren Court's characterization of Miranda and the search and seizure exclusionary rule to "the limits of its logic."212 Then again, it may not.

Whether or not the Rehnquist Court does sustain Congress's 1968 "repeal" of Miranda or does expand the so-called "good faith" exception to the Fourth Amendment exclusionary rule—or ultimately abolishes the exclusionary rule altogether—may well tell us more about the Rehnquist Court and criminal justice than any ruling this Court has handed down to date.

Much remains to be seen. At present, I think there are four Supreme Court Justices who are fairly sensitive to the rights of those accused or suspected of crime:

211. Cf. Judge (later Justice) Cardozo's oft-quoted criticism of the exclusionary rule in People v. Defore, 150 N.E. 585, 587 (1926): "The criminal is to go free because the constable has blundered."
212. See the observation of Justice Holmes in Hudson County Water Co. v. McGuire, 209 U.S. 349, 355 (1908).
Stevens, Souter, Ginsberg and Breyer. Sometimes this foursome will be joined by Justice O'Connor or Justice Kennedy. On rare occasions, such as Chandler v. Miller, this foursome will be joined by everybody except Chief Justice Rehnquist. A good deal may turn on whether this foursome grows or shrinks—on whether a new Justice replaces say, Scalia or say, Stevens—and on who makes the appointment.

In short, we will not be able to evaluate fully “The Rehnquist Court and Criminal Justice” until the Rehnquist Court era comes to an end. And we may not be able to do it even then. A complete evaluation may have to await a quarter-century retrospective—just as, in this very law journal, I did a quarter-century retrospective on “The Warren Court and Criminal Justice” four years ago.

However, if the University of Tulsa College of Law does hold a conference at which it invites someone to present a paper on a quarter-century retrospective on “The Rehnquist Court and Criminal Justice,” I’m afraid it will have to ask someone else.

213. 520 U.S. 305 (1997). In Chandler, an 8-1 majority, per Ginsburg, J., struck down a Georgia statute requiring candidates for various state offices (e.g., governor, attorney general, appellate judges, district attorneys and state legislators) to certify that they had tested negative for drug use within 30 days prior to qualifying for nomination or election. The state had relied on the U.S. Supreme Court’s three prior drug-testing cases, all of which had upheld the challenged drug-testing programs. See National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (sustaining drug tests for U.S. Customs Service employees seeking transfer or promotion to certain positions); Skinner v. Railway Labor Executives Ass’n, 488 U.S. 602 (1989) (sustaining drug and alcohol tests for railroad employees involved in train accidents or who violate certain safety rules); Vemonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) (upholding random drug testing of public school student athletes). These cases, especially Von Raab, can plausibly be read quite broadly or quite narrowly (limiting them to their special facts). In Chandler, the Court read its drug-testing precedents quite narrowly.

The state’s primary argument in Chandler was that unlawful drug use is incompatible with holding high office: drug use undermines public confidence and trust in elected officials, calls into question their judgment and integrity, and jeopardizes antidrug law enforcement efforts and other public functions. The Georgia statute, maintained the state, deters unlawful drug users from becoming candidates and thus stops them from attaining high state office.

It is possible to read Von Raab broadly as supporting the state’s argument in Chandler—as standing for the proposition that warrantless and suspicionless drug testing may be based on the government’s need to maintain the “integrity” and “public image” of its employees. But the Chandler Court emphatically rejected this rationale for random drug testing, 520 U.S. at 318, 321-22:

Our precedents establish that the proffered special need for drug testing must be substantial—important enough to override the individual’s acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment’s normal requirement of individualized suspicion. Georgia has failed to show ... a special need of that kind.

... Georgia asserts no evidence of a drug problem among the state’s elected officials, these officials typically do not perform high-risk, safety-sensitive tasks, and the required certification immediately aids no interdiction effort. The need revealed, in short, is “symbolic,” not “special,” as that term draws meaning from our case law.

... However well meant, the candidate drug test Georgia has devised diminishes personal privacy for a symbol’s sake. The Fourth Amendment shields society against that state action.