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The Warren Court and Criminal Justice: A Quarter-Century Retrospective

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THE WARREN COURT AND CRIMINAL JUSTICE: A QUARTER-CENTURY RETROSPECTIVE*

Yale Kamisar†

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Copyright THE WARREN COURT: A RETROSPECTIVE (Bernard Schwartz, ed. Oxford University Press, 1996) (forthcoming). This paper is a revised and expanded version of the talk I gave at the Warren Court conference at the University of Tulsa College of Law on October 10, 1994. At several places I have drawn freely on papers I contributed to two collections of essays on the Burger Court — THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62 (Vincent Blasi ed. 1983) and THE BURGER YEARS 141 (Herman Schwartz ed. 1987).


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Many commentators have observed that when we speak of "the Warren Court," we mean the Warren Court that lasted from 1962 (when Arthur Goldberg replaced Felix Frankfurter) to 1969 (when Earl Warren retired). But when we speak of the Warren Court's "revolution" in American criminal procedure we mean the Warren Court that lasted from 1961 (when the landmark case of Mapp v.

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1. See, e.g., The Warren Court in Historical and Political Perspective 7 (Mark Tushnet ed., 1993).
Ohio\textsuperscript{2} was decided) to 1966 or 1967.\textsuperscript{3} In its final years, the Warren Court was not the same Court that had handed down \textit{Mapp} or \textit{Miranda v. Arizona}.\textsuperscript{4}

\textbf{The Closing Years of the Warren Court Era}

The last years of the Warren Court constituted a period of social upheaval marked by urban riots, disorders on college campuses, ever-soaring crime statistics, ever-spreading fears of the breakdown of public order, and assassinations and near-assassinations of public figures.\textsuperscript{5} Moreover, the strong criticism of the Court by many members of Congress and by presidential candidate Richard Nixon and the obviously retaliatory provisions of the Omnibus Crime Control and Safe Streets Act of 1968 contributed further to an atmosphere that was unfavorable to the continued vitality of the Warren Court's mission in criminal cases.\textsuperscript{6}

In its closing years the Warren Court: upheld the so-called informer's privilege (allowing the government to withhold the identity of its informant at a suppression hearing);\textsuperscript{7} rejected the general assumption that errors of constitutional magnitude were not subject to the harmless error rule;\textsuperscript{8} emphatically reaffirmed the doctrine that a

\begin{itemize}
\item \textsuperscript{2} 367 U.S. 643 (1961).
\item \textsuperscript{3} See, e.g., Stephen J. Schulhofer, \textit{The Constitution and the Police: Individual Rights and Law Enforcement}, 66 WASH. U. L.Q. 11, 12 (1988) (observing that in the field of criminal procedure “the 'real Warren Court’” emerged with the decision in \textit{Mapp v. Ohio}, 367 U.S. 643 (1961)). Some might argue that the Warren Court’s revolution in criminal procedure commenced with \textit{Griffin v. Illinois}, 351 U.S. 12 (1956) (establishing an indigent criminal defendant’s right to a free transcript on appeal, at least under certain circumstances). \textit{Griffin} did foreshadow some of the cases handed down by the later Warren Court, but “it was only some years after [this] decision that a majority of the Court consistently took positions now regarded as characteristic of the Warren Court.” Francis A. Allen, \textit{The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases}, 1975 U. ILL. L.F. 518, 519 n.4.
\item \textsuperscript{4} Miranda v. Arizona, 384 U.S. 436 (1966).
\item \textsuperscript{5} See Fred P. Graham, \textit{The Self-Inflicted Wound} 14-16 (1970); Allen, supra note 3, at 539.
\item \textsuperscript{6} See Graham supra note 5, at 12, 14; Allen supra note 3, at 539. See also Craig M. Bradley, \textit{The Failure of the Criminal Procedure Revolution} 29-30 (1993); Bernard Schwartz, \textit{Super Chief Earl Warren and His Supreme Court — A Judicial Biography} 762-63 (1983).
\item \textsuperscript{7} McCray v. Illinois, 386 U.S. 300 (1967). The Court allowed the government to withhold the identity of its informant even when, as in McCray, the police acted without a warrant. Where, apart from police testimony as to information supplied by an unidentified informer, there is insufficient evidence to establish probable cause, there is much to be said for utilizing an in camera hearing, thus protecting the government from any impairment of necessary secrecy, yet still protecting the defendant from what could have been serious police misconduct. But the McCray Court did not suggest such a procedure. See generally 1 Wayne R. LaFave, \textit{Search and Seizure: A Treatise on the Fourth Amendment} \S 3.3(g) (2d ed. 1987).
\end{itemize}
defendant lacked "standing" to challenge evidence seized in violation of a third party's constitutional rights\(^9\) (although such a requirement seemed inconsistent with the deterrence theory of the exclusionary rule, which had gained ascendancy, and most commentators had urged abolition of the "standing" requirement\(^10\)); and repudiated the "mere evidence" rule, the rule banning the seizure of objects of "evidentiary value" only,\(^11\) thus clearing the way for a system of court-ordered electronic surveillance that could satisfy Fourth Amendment standards.\(^12\) (The following year, 1968, Congress granted law enforcement authorities broad powers to conduct continuing electronic surveillance for up to thirty days, with extensions possible.\(^13\))

The Warren Court's performance in the field of criminal procedure does not fall into neat categories. The defense did win some victories in the late 1960s,\(^14\) but then it had lost some important cases earlier,\(^15\) when the revolution in criminal procedure was supposed to be at its peak. Nevertheless, I think that, in the main, the revolution ended a couple of years before Earl Warren stepped down as Chief Justice.\(^16\)


\(^12\) So long as Gouled remained on the books, once electronic surveillance was deemed Fourth Amendment activity, any proposal for law enforcement tapping and bugging, however carefully circumscribed, would have violated the rule articulated in Gouled, that objects of "evidentiary value only" (as opposed to the instrumentalities or the proceeds of crime) are beyond the reach of an otherwise valid warrant. Gouled v. United States, 255 U.S. 298, 310-11 (1921).


\(^14\) As Professor Bradley has stated, in the final year of Chief Justice Warren's tenure the Court did significantly limit the scope of searches incident to arrest, Chimel v. California, 395 U.S. 752 (1969), and did impose substantial restrictions on the issuance of search warrants, Spinelli v. United States, 393 U.S. 410 (1969). BRADLEY, supra note 6, at 32.

\(^15\) To take one notable example, the Warren Court found no constitutional restrictions on the government's power to utilize spies and undercover agents. It took the position, a viewpoint the Burger Court was to share in United States v. White, 401 U.S. 745 (1971), that one who speaks to another not only assumes the risk that his listener will later make public what he has heard but also takes the risk that his listener will electronically record or simultaneously transmit what he is hearing. See Lopez v. United States, 373 U.S. 427 (1963); Hoffa v. United States, 385 U.S. 293 (1968).

\(^16\) But see BRADLEY, supra note 6, at 32 (maintaining that "despite the existence of powerful societal pressures" to end its reformation of the law of criminal procedure, the Warren Court never lost its zeal to continue the reformation).
The Chief Justice's majority opinion in *Terry v. Ohio*, an important 1968 "stop and frisk" case, is a dramatic demonstration of the Warren Court's change in tone and attitude. Seven years earlier, of course, the Warren Court had imposed the Fourth Amendment exclusionary rule on the states as a matter of constitutional law. But the Court was a good deal less exuberant about the exclusionary rule in 1968, when it upheld the police practice of "stopping" and "frisking" persons on less than probable cause to believe they were engaged in criminal activity. It recognized, almost poignantly, that "[t]he exclusionary rule has its limitations . . . as a tool of judicial control."

I truly believe that if say, in 1971, the Burger Court had written the same opinion in the "stop and frisk" cases that the Warren Court wrote in 1968, the Burger Court would have caught heavy fire for leaving the lower courts without adequate guidance concerning a widespread police practice. Further, its opinion would have been considered solid evidence of the emerging counterrevolution in criminal procedure.

The Warren Court's approach in the 1968 "stop and frisk" cases contrasts sharply with the approach it had taken only two years earlier in *Miranda*. There, greatly troubled by the lower courts' persistence in utilizing the ambiguity of the "voluntariness"—"totality of the circumstances" test to uphold confessions of doubtful constitutionality, the Court sought to replace the unruly traditional test with a relatively concrete and easily administered rule. But the "stop and frisk" cases established such a spongy test, one that allowed the police so much room to maneuver and furnished the courts so little bases for meaningful review, that the opinion must have been cause for celebration in a goodly number of police stations. (At one point, for example, the Court said that an officer could frisk when he observes "unusual conduct" which leads him to conclude that "criminal activity may be afoot" and that the suspect may be armed and dangerous.)

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23. *Terry*, 392 U.S. at 30. At another point, the Court articulated an even vaguer standard and did so "negatively":
THE RELEVANCE OF THE STRUGGLE FOR CIVIL RIGHTS

As the late A. Kenneth Pye observed in the closing years of the Warren Court Era, "[t]he Court's concern with criminal procedure can be understood only in the context of the struggle for civil rights." 24 As Dean Pye explained:

It is hard to conceive of a Court that would accept the challenge of guaranteeing the rights of Negroes and other disadvantaged groups to equality before the law and at the same time do nothing to ameliorate the invidious discrimination between rich and poor which existed in the criminal process. It would have been equally anomalous for such a Court to ignore the clear evidence that members of disadvantaged groups generally bore the brunt of most unlawful police activity.

If the Court's espousal of equality before the law was to be credible, it required not only that the poor African-American be permitted to vote and to attend a school with whites, but also that he and other disadvantaged individuals be able to exercise, as well as possess, the same rights as the affluent white when suspected of crime. 25

Moreover, as another commentator, writing at a time when the African-Americans' struggle for civil rights and the response to that struggle by law enforcement officials were still vivid memories, observed:

What we have seen in the South is the perversion of the criminal process into an instrument of official oppression. The discretion which, we are reminded so often, is essential to the healthy operation of law enforcement agencies has been repeatedly abused in the South: by police, by prosecutors, by judges and juries. . . . We have had many reminders from abroad that law enforcement may be used for evil as well as for beneficent purposes; but the experience in the South during the last decade has driven home the lesson that law enforcement unchecked by law is tyrannous. 26

We cannot say [the officer's decision] to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from possible danger, and took limited steps to do so.

Id. at 28.

24. A. Kenneth Pye, The Warren Court and Criminal Procedure, 67 Mich. L. Rev. 249, 256 (1968). See also Allen, supra note 3, at 523 (stating that although charges of inequality have not been confined to the criminal law, but have encompassed nearly every aspect of society, such charges "possess an even sharper bite when they are hurled at a system that employs as its sanctions the deprivation of property, of liberty, and, on occasion, of life itself.").

25. Pye, supra note 24, at 256.

When one thinks of "equal justice," the famous case of Gideon v. Wainwright\textsuperscript{27} comes first to mind, but Miranda should not be overlooked. Especially when viewed against the background of Escobedo v. Illinois\textsuperscript{28} (decided two years earlier), Miranda, too, may be regarded as an "equal justice" case.

In Escobedo the Court extended the right to counsel to the pre-indictment stage, but it was unclear whether the right to counsel came into play "when the process shifts from investigatory to accusatory — when its focus is on the accused and its purpose is to elicit a confession"\textsuperscript{29} or when the process so shifts and one or more of the limiting facts in Escobedo are also present.\textsuperscript{30} Mr. Escobedo had hired a lawyer (indeed, the lawyer had arrived in the stationhouse and had tried unsuccessfully to meet with his client). Moreover, although not advised of his right to counsel, Mr. Escobedo had requested an opportunity to meet with his lawyer, but that request had been denied.

Although Escobedo grew out of a set of unusual facts, and arguably could be limited to these facts, the opinion had broad implications and at some places contained sweeping language. How grudgingly or expansively would the Court read this case? Would one who, unlike Mr. Escobedo, could not afford to hire a lawyer,\textsuperscript{31} get the benefit of Escobedo? Would the person who, unlike Mr. Escobedo, was not smart enough or alert enough to ask for a lawyer on his own initiative fall under the protection of Escobedo?

Unhappy with Escobedo and its potential for expansion, many in the "legal establishment" maintained that the case should be read narrowly or limited to its special facts. In short, on the eve of Miranda,

\begin{itemize}
\item \textsuperscript{27} 372 U.S. 335 (1963) (entitling indigent criminal defendants to free counsel, at least in serious cases). Whether the Burger Court "expanded" or "contracted" Gideon is debatable. Argersinger v. Hamlin, 407 U.S. 25 (1972), applied Gideon to instances where defendant is imprisoned for any offense, but Scott v. Illinois, 440 U.S. 367 (1979) held that the Sixth and Fourteenth Amendments require only that no indigent misdemeanant be incarcerated unless he is afforded the right to counsel. A fairly generous reading of Gideon, the day after it was decided, would have been that it applies to all crimes except "petty offenses." The Burger Court went beyond this generous reading of Gideon in one respect (Argersinger), but fell short in another (Scott).
\item \textsuperscript{28} 378 U.S. 478 (1964).
\item \textsuperscript{29} Id. at 492.
\item \textsuperscript{30} For a summary of the wide disagreement over the meaning of Escobedo — and over what it ought to mean — see Yale Kamisar, Police Interrogation and Confessions: Essays in Law and Policy 161-62 (1980) (hereinafter Kamisar Essays).
\item \textsuperscript{31} About half of all felony defendants are indigent; in some urban jurisdictions the indigency rate is in the 70-85% range. See Yale Kamisar, Wayne R. LaFave & Jerold H. Israel, Modern Criminal Procedure 27 (8th ed., 1994).
\end{itemize}
many were trying to use the inability to afford a lawyer and the ignorance of one’s rights as convenient valves to limit the impact of a precedent they did not like.\footnote{See Yale Kamisar, Has the Court Left the Attorney General Behind? — The Bazelon-Katzenbach Letters on Poverty, Equality and the Administration of Criminal Justice, 54 KY. L.J. 464, 480-84 (1966) (pre-Miranda). See also Richard H. Kuh, Panelists’ Comments, 54 KY. L.J. 499, 506-07 (1966) (responding to the Kamisar paper).}

As we all know, this attempt failed. As Judge Henry J. Friendly, perhaps the most formidable critic of the Warren Court’s criminal procedure cases, has noted, the equal protection argument is “a ground bass that resounds throughout the \textit{Miranda} opinion.”\footnote{Henry J. Friendly, The Fifth Amendment Tomorrow: The Case for Constitutional Change, 37 U. CHI. L. REV. 671, 711 (1968). See also Jesse H. Choper, On the Warren Court and Judicial Review, 17 CATH. U. L. REV. 20, 34-35 (1967).} To quote Judge Friendly, as the \textit{Miranda} Court saw it:

Equality [in the interrogation room] could be established only by advancing the point at which the privilege became applicable and surrounding the poor man with safeguards in the way of warning and counsel that would put him more nearly on a par with the rich man and the professional criminal.\footnote{Friendly, supra note 33, at 711.}

At her recent confirmation hearings, it is worth noting, Justice Ruth Bader Ginsburg defended \textit{Miranda} largely on “equal protection” grounds:

\begin{quote}
[The \textit{Miranda} warnings provide information about] constitutional rights that should be brought home to every defendant.
\end{quote}

Now, sophisticated defendants will know them without being told, but the unsophisticated won’t....

\begin{quote}
[The \textit{Miranda} rules provide] an assurance that people know their rights. It is an assurance that the law is going to be administered even-handedly because, as I said, sophisticated defendants who have counsel ordinarily will know about their rights ....\footnote{The Nomination of Ruth Bader Ginsberg to be Associate Justice of the Supreme Court of the United States, Hearings on S. 103-482 Before the Senate Comm. on the Judiciary, 103d Cong., 1st Sess. 327 (1993).}
\end{quote}

\textbf{CRITICISM OF \textit{MIRANDA} — FROM OPPOSITE DIRECTIONS}

In \textit{Gideon}, twenty-two state attorneys general filed an \textit{amicus} brief on behalf of the defendant. But in \textit{Miranda} and its companion cases twenty-six state attorneys general joined in an \textit{amicus} brief urging the Supreme Court to “go slow” and to allow changes in the police-interrogation-confessions area to develop in nonconstitutional
terms.\textsuperscript{36} Although this led one observer to say that “the states had made a U-turn since Gideon,”\textsuperscript{37} that was hardly the case.

The twenty-two attorneys general who sided with Mr. Gideon did so on the understanding, \textit{inter alia}, that the new constitutional right to appointed counsel in non-capital cases would not “attach” until the judicial process had begun.\textsuperscript{38} The \textit{amicus} brief concluded by urging the Court to “require that all persons \textit{tried} for a felony in state court” be afforded the right to counsel.\textsuperscript{39} In \textit{Miranda}, however, the attorneys general were afraid that the Court would carry the “equality principle” to the point where it really bites — the police station.

That is why \textit{Gideon} was a case that received much applause, but \textit{Miranda} was the case that galvanized opposition to the Warren Court into a potent political force.\textsuperscript{40} It cannot be denied that \textit{Miranda} is a much-maligned case,\textsuperscript{41} but it is also a much misunderstood one.

One source of confusion may have been that the \textit{Miranda} Court led a goodly number to believe that it was “building on” and expanding \textit{Escobedo} when it was actually making a “fresh start.”\textsuperscript{42} As already indicated, at some places the majority opinion in \textit{Escobedo} launched such a broad attack on the government’s reliance on confessions that it threatened (or promised) to eliminate virtually all police interrogation of suspects. At one point, for example, in the course of rejecting the argument that if a suspect were entitled to a lawyer prior

\begin{itemize}
\item \textsuperscript{36} See \textit{Liva Baker, Miranda: Crime, Law and Politics} 109 (1983).
\item \textsuperscript{37} Id.
\item \textsuperscript{38} See Brief for the State Governments, Amici Curiae at 2-3, 16, 21-23, Gideon v. Wainwright, 372 U.S. 335 (1963).
\item \textsuperscript{39} Id. at 24-25 (emphasis added).
\item \textsuperscript{40} \textit{Miranda} “plunge[d] the Court into an ocean of abuse” and made it “one of the leading issues of the 1968 Presidential campaign.” \textit{Jethro K. Lieberman, Milestones — 200 Years of American Law} 326 (1976).
\item \textsuperscript{41} \textit{Miranda}, one commentator has observed, “must rank as the most bitterly criticized, most contentious, and most diversely analyzed criminal procedure decision by the Warren Court.” \textit{Henry J. Abraham, Freedom and the Court} 125 (4th ed. 1982).
\item \textsuperscript{42} At one point for example, 384 U.S. at 444, after defining “custodial interrogation” — “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way” — the Court dropped an obfuscating footnote [fn. 4]: “This is what we meant in Escobedo when we spoke of an investigation which has focused on an accused.” This footnote suggested that “custody” and “focus” were alternative grounds for requiring the warnings, but these are very different events and they have very different consequences. See Kenneth W. Graham, Jr., \textit{What is “Custodial Interrogation”?}, 14 UCLA L. Rev. 59, 114 (1966); Yale Kamisar, “Custodial Interrogation” Within the Meaning of \textit{Miranda}, \textit{in Criminal Law and the Constitution} 335, 338-51 (1968); Geoffrey R. Stone, \textit{The Miranda Doctrine in the Burger Court}, 1977 Sup. Ct. Rev. 99, 149. The likely explanation for footnote 4 was the \textit{Miranda} Court’s effort to maintain some continuity with a much-publicized and much-discussed recent precedent.
\end{itemize}
to indictment or formal charge, the number of confessions obtained by
the police would be greatly reduced, the Escobedo Court retorted:

The fact that many confessions are obtained during this period
points up its critical nature as a “stage when legal aid and advice”
are surely needed. The right to counsel would indeed be hollow if it
began at a period when few confessions were obtained.43

At another point, the Court observed:

We have learned the lesson of history . . . that a system of criminal
law enforcement which comes to depend on the “confession” will, in
the long run, be less reliable and more subject to abuses than a sys-
tem which depends on extrinsic evidence independently secured
through skillful investigation. . . .

. . . No system worth preserving should have to fear that if an ac-
cused is permitted to consult with a lawyer, he will become aware
of, and exercise these rights. If the exercise of constitutional rights
will thwart the effectiveness of a system of law enforcement, then
there is something very wrong with that system.44

The sweeping language and broad implications of Escobedo
greatly troubled, one might even say alarmed, most law enforcement
officials and many members of the bench and bar. Thus, on the eve of
Miranda, a case that was to reexamine Escobedo and to clarify its
meaning and scope, the nation’s most respected lower-court judges
(Charles Breitel, Henry Friendly, Walter Schaefer and Roger Traynor)
spoke publicly in anticipation of the Court’s ruling and urged the
Court to turn back or at least to reconsider where it was going.45 Jus-
tice Schaefer, for example, voiced fear that “the doctrines converging
upon the institution of police interrogation are threatening to push on
to their logical conclusion — to the point where no questioning of
suspects will be permitted.”46 And Judge Friendly warned that “condi-
tion[ing] questioning on the presence of counsel is . . . really saying

43. Escobedo, 378 U.S. 478, 488 (Goldberg, J.).
44. Id. at 488-89 (emphasis added).
45. See Charles D. Breitel, Criminal Law and Equal Justice, 1966 Utah L. Rev. 1; Henry J.
Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Cal. L. Rev. 929 (1965); Wal-
ter V. Schaefer, The Suspect and Society (1967) (based on lectures delivered two months
before Miranda); Roger J. Traynor, The Devils of Due Process in Criminal Detection, Detention,
and Trial, 33 U. Chi. L. Rev. 657 (1966). See also Forty-Third Annual Meeting of the American
46. Schaefer, supra note 45, at 9. See also Symposium, 54 Ky. L.J. 464, 521, 523 (1966)
(pre-Miranda), where Justice Schaefer expressed the view that effective enforcement of the crim-
nal law “is not compatible with a prohibition of station house interrogation or with the presence
of a lawyer during station house interrogation.”
that there may be no effective, immediate questioning by the police” and “that is not a rule that society will long endure.”

The Warren Court did not turn back, but neither did it hand down a ruling that these distinguished judges had anticipated and feared. The Court did not flatly prohibit police questioning of suspects. Nor did it condition such questioning on the presence of counsel. Nor did it require that a suspect be advised of his rights by a defense lawyer or by a disinterested magistrate.

The Court continued to move in the same general direction as it had in Escobedo, but it “switched tracks” — it switched from a right to counsel rationale (which threatened to culminate in a right not to confess except with the tactical assistance of counsel) to a self-incrimination rationale (which gave the police more room to maneuver). A right to counsel rationale had almost no stopping point, but a self-incrimination rationale did — it required governmental compulsion.

But many members of the media and the public did not realize this. To them the important point was that the Court had not turned back.

At the time of the decision, many overlooked what has become increasingly clear in recent years — Miranda was very much a “compromise” between the old “totality-of-circumstances” test for admitting confessions and extreme proposals that — as the fear (or hope) was expressed at the time — would, in effect, have eliminated police interrogation of suspects. As the Court, per O’Connor, J., pointed out twenty years after the Miranda case, Miranda “attempted to reconcile” two “competing concerns” — the need for police questioning as an effective law enforcement tool and the need to protect custodial suspects from impermissible coercion.

Miranda left the police free to conduct general-on-the-scene questioning even though the person being questioned was neither informed nor aware of his rights. And even when the suspect was in the stationhouse and police interrogators were bent on eliciting confessions, it allowed them to obtain waivers of the right to remain silent and the right to the assistance of counsel: (a) without the advice or presence of counsel, (b) without the advice or presence of a judicial

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47. 1966 A.L.I. Proc., supra note 45, at 250 (emphasis added).
48. See Moran v. Burbine, 475 U.S. 412, 426 (1986). “Declining to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation,” continued Justice O’Connor, “the [Miranda] Court found that the suspect’s Fifth Amendment rights could be adequately protected by less intrusive means.” Id.
officer, and (c) without any objective recording of the waiver transaction or the subsequent interrogation. 49

At first *Miranda* was criticized for going too far. To a considerable extent, this was a result of the confusion over what the Court actually did. Many thought that because it had not read *Escobedo* narrowly, because it had not turned back, the Court had put additional restraints on the police. In short, to a considerable extent the Warren Court was criticized for what its critics had anticipated it would do (but what, it turned out, the Court did not really do).

In recent years, ironically, *Miranda* has been increasingly criticized for *not* going far enough — for example, for *not* requiring the advice of counsel before a suspect can effectively waive his rights or *not* requiring a tape recording of how the warnings are delivered and how the suspect responds and, if the suspect does effectively waive his rights, for *not* tape recording the police questioning that follows. 50

There is a good deal to be said for this criticism, but these commentators do not seem to appreciate the fact that in 1966 the Court was barely able to go as far as it did — that at the time it was probably not possible to persuade a majority of the Court to go one inch further than it did. 51 Moreover, the liberal critics of *Miranda* do not seem to realize that if, for example, the Court had explicitly required the police to make a tape recording or even a verbatim stenographic recording, of the crucial events it would have added much fuel to the criticism that it was exercising undue control over police practices — that it was "legislating."

49. See Kamisar Essays, supra note 30, at 88-89.


51. At the March, 1966, conference on *Miranda* and related cases, Chief Justice Warren emphasized that FBI agents regularly informed suspects of their rights (although the FBI warnings were not as extensive as the *Miranda* warnings) and that the FBI practice had not imposed a substantial burden on law enforcement. See Schwartz, supra note 6, at 589. According to one Justice who attended this conference, "the statement that the FBI did it . . . was a swing factor. . . . a tremendously important factor, perhaps the critical factor in the *Miranda* vote." Id.
How Did *Miranda* Fare in the Post-Warren Court Era?

Because *Miranda* was the centerpiece of the Warren Court's "revolution" in American criminal procedure and the prime target of those who thought the courts had become "soft" on criminals, almost all Court watchers expected the so-called Burger Court to treat *Miranda* unkindly. They did not have to wait very long.

**The Impeachment Cases**

The first blows the Burger Court struck *Miranda* were the rulings in two impeachment cases, *Harris v. New York*52 and *Oregon v. Hass*.53 The *Harris* case held that statements preceded by defective warnings, and thus inadmissible to establish the government's case-in-chief, could nevertheless be used to impeach the defendant's credibility if he chose to take the stand in his own defense.54 The Court noted, but seemed unperturbed by the fact, that some language in the *Miranda* opinion could be read as barring the use of statements obtained in violation of *Miranda* for any purpose.

The Court went a step beyond *Harris* in the second impeachment case, *Hass*. In this case, after being advised of his rights, the suspect asserted his right to counsel. Nevertheless, the police refused to honor the request for a lawyer and continued to question the suspect. The Court ruled that here, too, the resulting incriminating statements could be used for impeachment purposes. Since many suspects make incriminating statements even after the receipt of complete *Miranda* warnings, *Harris* might have been explained — and contained — on the ground that permitting impeachment use of statements required without complete warnings would not greatly encourage the police to violate *Miranda*. But in light of the *Hass* ruling, when a suspect asserts his rights the police seem to have very little to lose and much to gain by *continuing* to question him in violation of *Miranda*.55

52. 401 U.S. 222 (1971). The case is severely criticized in Dershowitz & Ely, supra note 20.
54. However, as indicated in *Harris*, 401 U.S. 222 (1971), and subsequently made clear in *Mincey v. Arizona*, 437 U.S. 385 (1978), "involuntary" or "coerced statements," as opposed to those obtained only in violation of *Miranda*, cannot be used for impeachment purposes.
55. The Court subsequently held that a defendant's pre-arrest silence could be used to impeach him when he testified in his own defense, *Jenkins v. Anderson*, 447 U.S. 231, 240-41 (1980), and then, so long as he was not given the *Miranda* warnings, that even a defendant's post-arrest silence could be used for impeachment purposes, *Fletcher v. Weir*, 455 U.S. 603, 607 (1983). Both *Jenkins* and *Weir* distinguished *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), which deemed it a violation of due process to use a defendant's silence for impeachment purposes when the defendant remained silent after being given the *Miranda* warnings.
The police need not advise a suspect of his rights unless they are about to subject him to "custodial interrogation." The Burger Court construed the key concepts "custody" and "custodial interrogation" rather narrowly. If a suspect goes to the police station on his own after an officer requests that he meet him there at a convenient time or even if a suspect "voluntarily" agrees to accompany the police to that site, police station questioning might not be "custodial interrogation" within the meaning of Miranda.56

What is "Interrogation" Within the Meaning of Miranda?

Another frequently litigated issue is what constitutes "interrogation" within the meaning of Miranda? Considering the alternatives, the Burger Court gave this key term a fairly generous reading in Rhode Island v. Innis.57 The Court might have taken a mechanical approach to Miranda and limited "interrogation," as some lower courts had, to instances where the police directly question a suspect. Or it might have limited interrogation to situations where the record establishes that the police intended to elicit a response, a difficult test for the defense to satisfy. The Court did neither. Instead, it held that Miranda's safeguards are triggered whenever a person in custody is subjected either to express questioning or its "functional equivalent" — "interrogation" includes "any words or actions on the part of the police [other than those normally attendant to arrest and custody] that the police should know are reasonably likely to elicit an incriminating response from the suspect."58

The meaning of "interrogation" arose in an interesting setting in Illinois v. Perkins:59 Suppose a secret government agent, posing as a fellow-prisoner, is placed in the same cell or cellblock with an incarcerated suspect and the secret agent induces the suspect to discuss the


58. Innis, 446 U.S. at 300-01. Although Innis involved police “speech,” the Court's definition embraces police interrogation techniques that do not. Thus, the Court seems to have repudiated the position taken by a number of lower courts that confronting a suspect with physical evidence or with an accomplice who has confessed is not interrogation because it does not entail verbal conduct on the part of the police.

crime for which he has been arrested. Does this constitute "custodial interrogation" within the meaning of Miranda? No, answered the Perkins Court; "Miranda warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement."

Although Perkins has been sharply criticized for giving Miranda an unduly narrow reading and encouraging the police to use deception in order to obtain "uninformed confessions," I think the case was correctly decided. It is the impact on the suspect's mind of the interplay between police interrogation and police custody — each condition reinforcing the pressures and anxieties produced by the other — that makes custodial police interrogation inherently coercive. But in the "jail plant" situation, there is no interplay between the two conditions where it counts — in the mind of the suspect.

Miranda was designed to counter the inherent coercion generated by a police-dominated environment. But how can it be said that a suspect is enveloped in a police-dominated atmosphere when he has no idea that the person with whom he is talking is a police officer or an agent of the police? That is why, I believe, the Court reached the right result when it concluded that if it is not custodial police interrogation in the mind of the suspect, it is not such an interrogation within the meaning of Miranda.

The Edwards Case: A Victory for Miranda in the Post-Warren Court Era

Although in the main the Burger Court interpreted and applied Miranda begrudgingly, the 1981 case of Edwards v. Arizona is a notable exception. Unlike most Miranda cases, which deal with the need

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60. Id. at 294 (emphasis added).
62. One can, however, deliberately elicit incriminating statements from a person without having him realize it, which is what happened in Massiah v. United States, 377 U.S. 201 (1964). The Massiah doctrine does prevent the government from "eliciting" or "inducing" incriminating statements from a suspect whether or not he is aware that he is dealing with a government agent (indeed, whether or not he is in custody), but only when "adversary criminal proceedings" have commenced against that person (e.g., he has been indicted or has appeared before a judicial officer). To the surprise of many, the Burger Court invigorated the Massiah doctrine in several respects. See Brewer v. Williams, 430 U.S. 387, 400-01 (1977) (often called the "Christian Burial Speech" case); United States v. Henry, 447 U.S. 264, 273 (1980). But cf. Kuhlmann v. Wilson, 477 U.S. 436, 456 (1986).
63. For a pre-Perkins discussion of "surreptitious interrogation" and the "jail plant" situation, see Kamisar Essays supra note 30, at 195-96.
for, or the adequacy of, the warnings or the effectiveness of the suspect’s alleged waiver of rights in immediate response to the warnings, Edwards involved what have been called “second level” Miranda safeguards — those procedures Miranda tells us should be followed when a suspect does assert his rights.\(^{65}\)

In Edwards, the Burger Court gladdened the hearts of Miranda supporters by invigorating that case in an important respect. It held that when a suspect effectively asserts his right to a lawyer (as opposed to his right to remain silent)\(^{66}\) he may not be subjected to further police interrogation “until counsel has been made available to him, unless [he] himself initiates further communication, exchanges, or conversations with the police.”\(^{67}\) In other words, once a suspect effectively exercises his right to counsel, the police cannot try to change the suspect’s mind; they must wait to see whether he changes his mind on his own initiative. A valid waiver of the right to counsel cannot be established by showing only that the suspect responded further to police-initiated custodial interrogation even though he was given a fresh set of Miranda warnings at a subsequent interrogation session.

Edwards has been called “the Burger Court’s first clear-cut victory for Miranda.”\(^{68}\) Indeed, Edwards (and its progeny) may be called the only clear-cut victory for Miranda since the Warren Court disbanded. It is a formidable rule, one that must worry even the most experienced interrogator, and in recent years it has become still more formidable — in some respects.

The rule applies even when the police want to question a suspect about a crime unrelated to the subject of their initial interrogation.\(^{69}\) Moreover, as the Court recently held in Minnick v. Mississippi,\(^{70}\) once a suspect invokes his right to counsel the police may not reinitiate

\(^{65}\) See People v. Grant, 380 N.E.2d 257, 259-60 (N.Y. 1978).

\(^{66}\) Six years earlier, the Court held in Michigan v. Mosley, 423 U.S. 96, 103-04 (1975), that if a suspect asserts his “right to silence” (as opposed to his right to counsel), under certain circumstances the police may, if they cease questioning on the spot, “try again” and succeed at a later interrogation session. Although the Edwards Court tried hard to distinguish Mosley, I do not think the two cases can be satisfactorily reconciled. See Jesse H. Choper, Yale Kamisar & Laurence H. Tribe, The Supreme Court: Trends and Developments 1982-83 at 153-58 (1984) (remarks of Kamisar). The average person has no idea that different procedural safeguards are triggered by saying “I don’t want to say anything until I see a lawyer” rather than “I don’t want to say anything” or “I don’t want to talk to the police.”

\(^{67}\) Edwards, 451 U.S. at 484-85 (emphasis added).


interrogation in the absence of counsel \textit{even if the suspect has been allowed to consult with an attorney in the interim}.\textsuperscript{71}

\textit{The Weaknesses in the Edwards Rule}

The post-Warren Supreme Court gave us Edwards, but the Court giveth and the Court taketh away. The Court has created two significant weaknesses in the Edwards rule (or, if one prefers to state it another way, allowed two good-sized weaknesses in the rule to develop).

The Court has told us that even though a suspect had earlier invoked his right to counsel and at no time had explicitly "invited" or "initiated" conversation about the subject matter of the case, he may furnish the police an opportunity to recommence interrogation simply by asking an officer, "What's going to happen to me now?" or presumably, "What comes next?"\textsuperscript{72} Such comments strike me as expressions of concern, anxiety or confusion \textit{normally attendant} to arrest, removal from the scene of arrest, or transportation to the stationhouse — not evidence of a generalized desire or willingness to discuss the subject matter of the investigation. Nevertheless, according to the Court, these simple and understandable questions dismantle the safeguards established by Edwards.

The other substantial gap in the Edwards rule created by the Court (or at least not filled by it) is the very recent decision in Davis v. United States.\textsuperscript{73} In this case the Court drew a sharp line between those suspects who "clearly" assert their right to counsel (thereby triggering Edwards) and those who only make an ambiguous or equivocal reference to an attorney that might or might not be an assertion of the right to counsel. (E.g., "Maybe I should talk to a lawyer" or "Do you think I need an attorney here?") In the latter situation the police may immediately begin interrogating the suspect without asking any questions designed to clarify whether the suspect really meant to invoke his right to counsel.

I believe the approach adopted by the Davis Court is unsound. An ambiguous reference to counsel should not be totally ignored because it fails to satisfy a certain level of clarity. The police should be

\textsuperscript{71} The Burger and Rehnquist Courts' reinvigoration of Miranda's right to counsel prong in general and the Minnick decision in particular have been explained on the ground that while other features of Miranda "are for the benefit of the social underclass," the right to counsel before and during custodial interrogation is "a safeguard that benefits a far broader segment of society." Rosenberg & Rosenberg, supra note 68, at 33.


\textsuperscript{73} 114 S. Ct. 2350 (1994).
required to respond to such references by asking narrow clarifying questions designed to ascertain whether the suspect actually wishes to assert his right to a lawyer. Otherwise, the right to counsel turns not on the suspect’s choice, but on the clarity with which he expresses that choice. 74

Sociolinguistic research indicates that certain discrete segments of the population, such as women and a number of minority racial and ethnic groups, are far more likely than other groups to avoid strong, assertive means of expression and to use indirect and hedged speech patterns that give the impression of uncertainty or equivocality. 75 Moreover, since the custodial police interrogation setting involves an imbalance of power between the suspect and his interrogator(s), such a setting increases the likelihood that a suspect will adopt an indirect or hedged — and thus ambiguous — means of expression. Even within speech communities whose members do not ordinarily use indirect modes of expression, one who is situationally powerless, i.e., aware of the dominant power of the person he is addressing, may also adopt a hedging speech register. To borrow a phrase from Justice Souter’s concurring opinion in Davis (really a dissent on this issue), a custodial suspect, one who will usually be experiencing considerable stress and anxiety, should not be expected or required to “speak with the discrimination of an Oxford don.” 76

Edwards is a formidable rule — if a suspect is lucky enough not to ask an officer what is going to happen to him next or careful enough to assert his right to counsel with sufficient precision and directness. The trouble with the rule is that its application turns on very fine, subtle distinctions — too fine and too subtle for the real world. Those suspects who fall under the rule of Edwards will be well protected by its thick armor. But many similarly situated suspects will fall outside the rule because it has a soft underbelly.

74. At this point, I am relying heavily on the Federal Government’s brief in the Davis case. See Brief for the United States at 14, 19-20, 32-35, Davis v. United States, 114 S. Ct. 2350 (1994) (No. 92-1949). Since the agents of the Naval Investigative Service had asked Mr. Davis, a member of the U.S. Navy, clarifying questions when he made an ambiguous reference to counsel, and Davis had then made it plain that he did not want a lawyer, all the government needed to win its case, and all it sought, was for the Court to adopt a middle-of-the-road approach, under which the police have to respond to a suspect’s ambiguous references to counsel by asking follow-up clarifying questions. One of the most troubling features of the Davis case is that the Court reached out to adopt a rule that the government explicitly and forcefully rejected — a police-oriented rule that an interrogator may completely disregard a suspect’s ambiguous references to a lawyer.

75. See Ainsworth, supra note 50, at 315-22.

76. 114 S. Ct. at 2364.
I am fairly confident that the Court that decided *Miranda* would have rejected the exceptions to the *Edwards* rule that have developed in recent years. On the other hand, I have to say (and I never thought I would say this about a *Miranda* case in the post-Warren Court era), that I think *Minnick* may go too far in favor of the defense. To put it another way, I believe at least some members of the *Miranda* majority would have balked at the application of the *Edwards* rule to the *Minnick* fact situation.

If a suspect requests a lawyer and, unlike the situation in *Edwards* and other cases, the police do as he asks — actually permit or bring about a meeting between the suspect and his lawyer — why can’t the police approach the suspect a second time and give him a fresh set of warnings? Under these circumstances a suspect has more reason to believe than most suspects do that if he asserts his right to counsel at the second session the police will honor that right. They already did so once before. Why would they not do so again?

*What Does it Mean to Say That the Miranda Rules Are Merely “Prophylactic”?*

Although supporters of *Miranda* were troubled by the “impeachment” cases and by decisions giving “custody” and “custodial interrogation” a narrow reading, they were troubled still more by Justice Rehnquist’s opinion for the Court in *Michigan v. Tucker*. *Tucker* was a mild case of police misconduct — a very attractive case from the prosecution’s point of view. First of all, the police questioning occurred before *Miranda* was decided, although the defendant’s trial took place afterward. Thus, *Miranda* was just barely applicable. Second, *Tucker* dealt with the admissibility not of the defendant’s own statements — they had been excluded — but only with the testimony of a witness whose identity had been discovered by questioning the suspect without giving him a complete set of *Miranda* warnings.

Under the circumstances, the Court held that the witness’s testimony was admissible. *Tucker* can be read very narrowly, but the majority opinion contains a good deal of mischievous broad language.

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77. But see Rosenberg & Rosenberg, supra note 68, at 21-22, 31-34.
79. The Court held, a week after *Miranda*, that *Miranda* affected only those cases in which the trial began after that decision. Johnson v. New Jersey, 384 U.S. 719, 732 (1966). The Court probably should have held that *Miranda* affected only those confessions obtained after the date of the decision.
The Tucker majority seemed to equate the "compulsion" barred by the privilege against self-incrimination with "coercion" or "involuntariness" under the pre-Miranda "totality of circumstances" test.\(^\text{80}\) This is quite misleading. Much harsher police methods were needed to render a confession "coerced" or "involuntary" under the pre-Miranda test than are necessary to make a confession "compelled" within the meaning of the self-incrimination clause.\(^\text{81}\) That, at least, is the premise of Miranda.

That was why the old "voluntariness" test for the admissibility of confessions was abandoned in favor of Miranda. That is why law enforcement officials so fiercely resisted the application of the self-incrimination clause to custodial police interrogation. And that is why, although his questioning had been mild compared to the oppressive and offensive police methods that had rendered statements inadmissible in the older confession, Ernesto Miranda's confession was held inadmissible.\(^\text{82}\)

By lumping together self-incrimination "compulsion" and pre-Miranda "involuntariness" or "coercion" and then declaring that a Miranda violation is not necessarily a violation of the self-incrimination clause — it only is if the confession was "involuntary" under traditional standards\(^\text{83}\) — the Tucker majority rejected the core premise of Miranda.\(^\text{84}\) If this view of Miranda were correct, then it is hard to see what that landmark case would have accomplished by applying the privilege against self-incrimination to the proceedings in the police station.

There is another troubling aspect to Tucker. In the course of holding that under the circumstances of the case the witness's testimony was admissible, the Court "recognized" that the Miranda warnings "were not themselves rights protected by the Constitution," but only "prophylactic standards" designed to "safeguard" or to "provide practical reinforcement" for the privilege against self-incrimination.\(^\text{85}\) This is not quite accurate.

\(^{80}\) See 417 U.S. at 444-46.


\(^{82}\) Miranda, 384 U.S. at 457-58.

\(^{83}\) See 417 U.S. at 444-45.


\(^{85}\) See 417 U.S. at 444.
The *Miranda* Court did observe that the Constitution does not "require adherence to *any particular solution* for the inherent compulsions of the interrogation process as it is presently conducted," but it quickly added: "However, 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 following safeguards [the *Miranda* warnings] must be observed." Moreover, later in the opinion, the *Miranda* Court reiterated: "The warnings required and the waiver necessary in accordance with our opinion today are, *in the absence of a fully effective equivalent*, prerequisites to the admissibility of any statements made by a defendant."

A decade after *Tucker* was decided, first in *New York v. Quarles* and then in *Oregon v. Elstad*, the Court reiterated *Tucker*'s way of looking at, and thinking about, *Miranda*. In both *Quarles* and *Elstad* the Court underscored the distinction between *actual* coercion by physical violence or threats of violence and *inherent* or *irrebuttable presumed* coercion (the basis for the *Miranda* rules) and between statements that are *actually* "coerced" or "compelled" and those obtained merely in violation of *Miranda*’s "procedural safeguards" or "prophylactic rules."

But is it not proper for the Court to assure that any confession is *not actually* compelled in violation of the privilege against self-incrimination by establishing conclusive presumptions and related forms of prophylactic rules to "implement" or to "reinforce" constitutional protections — in order to guard against *actual* constitutional violations?

No, maintains Joseph Grano; *Miranda*, as the Court now characterizes what it did in that case, is an "illegitimate" decision. "To permit federal courts to impose prophylactic rules [rules that may be violated without violating the Constitution] on the states," he contends, is "to say in essence that federal courts have supervisory power over state courts." According to Grano, the Court lacks constitutional authority to overturn state convictions when the Constitution has not actually been violated.

86. 384 U.S. at 467 (emphasis added).
87. Id. (emphasis added).
88. Id. at 476 (emphasis added).
91. See JOSEPH D. GRANO, CONFESSIONS, TRUTH, AND THE LAW 174, 185-98 (1993) (drawing upon and elaborating arguments he has made in a number of earlier articles).
92. Id. at 191.
Stephen Schulhofer and David Strauss strongly disagree. "A conclusive presumption of compulsion," maintains Schulhofer, "is in fact 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."

Supporting Schulhofer, Professor Strauss maintains that prophylactic rules are "a central and necessary feature of constitutional law." "Under any plausible approach to constitutional interpretation," continues Strauss, "the courts must be authorized — indeed, required — to consider their own and the other branches' limitations and propensities when they construct doctrines to govern future cases." According to Strauss, "it makes much more sense to read into the Constitution a general requirement that its various provisions be interpreted in light of institutional realities than to insist that these realities be ignored."

I agree with Professors Schulhofer and Strauss that it is not inherently improper for a court to use conclusive presumptions or other kinds of prophylactic rules. I agree, too, that such rules are a pervasive form of constitutional decision making.

Suppose Miranda had established a rebuttable presumption that any incriminating statement obtained in a custodial setting in the absence of Miranda safeguards (or equally effective procedures) is compelled, but that this presumption could be overcome if the suspect were a police officer, lawyer or law student. Such a presumption would produce the same result a conclusive presumption would in at least 95 percent of the 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 — how can it be — improper for a court to extend that approach to all cases?

Miranda is based on the realization that case-by-case determination and review of the "voluntariness" of a confession, in light of the

95. Id. at 208.
96. Id.
97. See id. at 194.
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. As Schulhofer and Strauss maintain, under any plausible approach to constitutional interpretation, the courts must be allowed to take into account their fact-finding limitations.

Another word about "prophylactic rules." Two years ago, in Withrow v. Williams, it is worth recalling, the Court rejected the government’s argument that since Miranda's safeguards “are not constitutional in character, but merely ‘prophylactic,’” federal habeas review should not extend to claims based on violations of these safeguards. The Court, per Souter, J., accepted the government’s characterization of the Miranda safeguards, for purposes of the case, but not its conclusion.

As I read the opinion of the Court in Withrow, it said in effect: Yes, we have sometimes called the Miranda rules “prophylactic” (because, explained the Court, violation of these rules might lead to exclusion of a confession “that we would not condemn as ‘involuntary in traditional terms’,” but so what? The Court went on to say that “[p]rophylactic though it may be, ... Miranda safeguards ‘a fundamental trial right’” — “[b]y bracing against ‘the possibility of unreliable statements in every instance of in-custody interrogation,’ ... [it] serves to guard against ‘the use of unreliable statements at trial.”

A final word about establishing conclusive presumptions and promulgating other kinds of prophylactic rules. If, as has been charged, the Warren Court exceeded its constitutional authority in Miranda, then so did the Burger Court (in Edwards) and the Rehnquist Court (in Roberson and Minnick).

Edwards held, in effect, that when a custodial suspect invokes his right to counsel, thereby expressing his belief that he is incapable of undergoing police questioning without legal assistance, 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. In

98. 113 S. Ct. 1745 (1993).
99. Id. at 1752.
100. Id.
101. Id. at 1753 (quoting United States v. Verdugo-Urquidez, 494 U.S. 259, 264 (1990)) (emphasis added).
102. See supra text accompanying notes 61-65.
Roberson, which reaffirmed and extended the Edwards rule,\textsuperscript{103} the Court spoke approvingly of "the bright-line, prophylactic Edwards rule,"\textsuperscript{104} pointing out that "[w]e have repeatedly emphasized the virtues of a bright-line rule in cases following Edwards as well as Miranda."\textsuperscript{105}

Minnick made the Edwards rule more formidable still.\textsuperscript{106} In the course of his majority opinion in Minnick, Justice Kennedy made a comment about the Edwards rule that applies to Miranda as well:

The rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures. Edwards conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness . . . .\textsuperscript{107}

Dissenting in Minnick, Justice Scalia (joined by the Chief Justice) protested that the Court's ruling "is the latest stage of prophylaxis built on prophylaxis."\textsuperscript{108} As Justice Scalia described the Miranda-Edwards line of cases: Minnick was a prophylactic rule needed to protect Edwards which was a prophylactic rule needed to protect Miranda which was a prophylactic rule "needed to protect the right against compelled self-incrimination found (at last!) in the Constitution."\textsuperscript{109}

Even though Justice Scalia left no doubt that he was unhappy about the Court building prophylaxis upon prophylaxis, I think his description of what the Court did in Edwards, Roberson and Minnick is accurate. If the Warren Court went wrong in Miranda by establishing "prophylactic rules," the Courts which succeeded it have been repeat offenders.

\textit{Why the Initial Hostility to Miranda Has Dissipated}

Overruling Miranda seems to be an idea whose time has come and gone. Why is this?

A major reason Miranda evoked much anger and caused much concern \textit{at first} is that many feared — as the Miranda dissenters led us to believe — that the landmark decision would strike law enforcement a grievous blow. Few press accounts of the case failed to quote from Justice White's bitter dissent, in the course of which he asserted that

\textsuperscript{103} See supra text accompanying note 69.
\textsuperscript{104} Roberson, 486 U.S. at 682.
\textsuperscript{105} Id. at 681.
\textsuperscript{106} See supra text accompanying notes 70-71.
\textsuperscript{107} 498 U.S. at 151.
\textsuperscript{108} Id. at 166 (Scalia, J., dissenting).
\textsuperscript{109} Id.
"[t]he rule announced today will measurably weaken the ability of the criminal law to perform [its] tasks" and result in "a good many criminal defendants . . . either not [being] tried at all or [being] acquitted if the State's evidence, minus the confession, is put to the test of litigation."\textsuperscript{110}

Moreover, by giving \textit{Miranda} limited retroactive effect, by applying the new doctrine to all cases \textit{tried} after the date of the decision — even though the police interrogation had taken place and the confessions had been obtained \textit{before Miranda} had been decided\textsuperscript{111} — the Court "gave the impression that \textit{Miranda} had affected police interrogation far more than it actually had."\textsuperscript{112} In the weeks immediately following \textit{Miranda}, a number of self-confessed killers walked free. Although these cases were widely publicized,\textsuperscript{113} "[w]hat was . . . rarely made clear to the public was that [the] confessions [being tossed] out were only a relatively tiny, special group that were reached retroactively by the \textit{Miranda} decision."\textsuperscript{114}

By the early 1970s, "the view that \textit{Miranda} posed no barrier to effective law enforcement had become widely accepted, not only by academics but also [by] prominent law officials."\textsuperscript{115} More recently, a special committee of the American Bar Association's Criminal Justice Section reached the same conclusion. It reported that "[a] very strong majority of those surveyed — prosecutors, judges, and police officers — agree that compliance with \textit{Miranda} does not present serious problems for law enforcement."\textsuperscript{116} Still more recently, the Court, per Souter, J., observed:

\begin{quote}
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\end{quote}

\textsuperscript{110} \textit{Miranda}, 384 U.S. at 542 (White, J., joined by Harlan and Stewart, JJ., dissenting). Justice Harlan (joined by Stewart and White, JJ.) and Justice Clark also wrote separate dissents.


\textsuperscript{112} \textit{Graham}, supra note 5, at 184.

\textsuperscript{113} \textit{See} \textit{Graham}, supra note 5, at 184-85.

\textsuperscript{114} \textit{Graham}, supra note 5, at 185. A year later, when the Court applied the right to counsel to lineups and other pretrial identifications, it did not make the same mistake. It held that the new ruling would apply only to identifications conducted in the absence of counsel after the date of the \textit{Wade} decision. United States \textit{v. Wade}, 388 U.S. 218 (1967).


\textsuperscript{116} Special Comm. on Crim. Justice in a Free Soc'y, \textit{Criminal Justice in Crisis}, ABA CRIM. JUST. SEC. 27, 28 (1988). However, as the article was going to press I learned that Professor Paul Cassell had written an article maintaining that despite the "conventional academic wisdom" to the contrary, \textit{Miranda} had "significantly harmed law enforcement efforts." See Paul G. Cassell,
[In the 27 years since Miranda was decided] law enforcement has grown in constitutional as well as technological sophistication, and there is little reason to believe that the police today are unable, or even generally unwilling, to satisfy Miranda’s requirements.\(^{117}\)

The initial hostility to Miranda has faded away for another reason. In its early years, the case generated a considerable amount of confusion and uncertainty. For example, did it extend to questioning “on the street”?\(^{118}\) Did it apply to a person interviewed in his own home by an IRS agent?\(^{119}\) Two years after Miranda, Judge Friendly voiced concern that “the Court may be moving toward a position that compulsion exists whenever an officer makes an inquiry, so that warnings must always be given.”\(^{120}\)

A quarter-century after Miranda, however, much of the uncertainty it once generated has largely been dispelled. It is now fairly clear that absent special circumstances (such as arresting a suspect at gunpoint or forcibly subduing him) police questioning “on the street” or in a person’s home or office is not “custodial.” Nor is “roadside questioning” of a motorist detained pursuant to a traffic stop. As a general matter, the Miranda doctrine has been limited, as Judge Friendly hoped it would be, to the police station or an equivalent setting.\(^{121}\)

Some of Miranda’s harshest critics make no secret of the fact that they are determined to topple the decision because of its “symbolic status as the epitome of Warren Court activism in the criminal law area.”\(^{122}\) The Miranda case is a symbol. But which way does that cut?

As Stephen Schulhofer has pointed out, symbols are important, especially “the symbolic effects of criminal procedural guarantees,” for they “underscore our societal commitment to restraint in an area


\(^{120}\) Id. at 713 (emphasis added).

\(^{121}\) See generally, 1 WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE §§ 6.6(e)–(f) (1984 & Supp. 1991). See also supra text accompanying note 56.

in which emotions easily run uncontrolled." Even Gerald Caplan, one of Miranda's strongest critics, recognizes that the case may be seen as "a gesture of government's willingness to treat the lowliest antagonist as worthy of respect and consideration."

Should the “Fruits” of Miranda Violations Be Admissible?

Although it is highly unlikely that Miranda will be overruled, the Rehnquist Court may yet strike Miranda a heavy blow — by ruling that all the clues and physical evidence obtained as a result of a Miranda violation are admissible. The Court has not quite said this yet, but it came close to doing so in Oregon v. Elstad. In that case, in the course of ruling that the fact that the police had earlier obtained a statement from the defendant in violation of his Miranda rights did not bar the use of a second confession obtained when the police did comply with Miranda, the Court indicated that the "fruits" of Miranda violations should be admissible whether they are a second confession, a witness or "an article of evidence."

Nietzsche once observed that the commonest stupidity consists in forgetting what one is trying to do. What was the Miranda Court trying to do? It was trying to take away the police’s incentive to exploit a suspect's anxiety and confusion by implying that they have a right to an answer and that it will be worse for the suspect if she does not. How could we expect the police to comply with Miranda if we

123. Schulhofer, supra note 93, at 460; see also Tracey Maclin, Seeing the Constitution from the Backseat of a Police Squad Car, 70 B.U. L. REV. 543, 588-99 (1990); White, supra note 115, at 21-22.
126. Id. at 308. As to whether, in considering the admissibility of evidence derived from wrongfully obtained confessions, a bright line should be drawn between Miranda violations and coerced or "involuntary" confessions, compare Akhil R. Amar & Renée B. Lettow, Fifth Amendment First Principles: The Self-Incrimination Clause, 93 MICH. L. REV. 857 (1995) with Yale Kamisar, On the "Fruits" of Miranda Violations, Coerced Confessions, and Compelled Testimony, 93 MICH. L. REV. 929 (1995).
127. See Lon J. Fuller, The Law in Quest of Itself 41 (1940).
128. The Miranda Court was also trying to provide the police with clear guidelines about lawful interrogation procedures and to reduce the judicial burden of making time-consuming and frequently unreliable determinations about the "voluntariness" of challenged confessions. See David H. Wollin, Policing the Police: Should Miranda Violations Bear Fruit?, 53 OHIO ST. L.J. 805, 841-43 (1992); The Supreme Court, 1984 Term — Leading Cases, 99 HARV. L. REV. 120, 145-47 (1985). These objectives, too, would seem to require barring the use of the physical fruits of Miranda violations.
were to prohibit only confessions obtained in violation of that doctrine, but allow the use of everything these confessions brought to light?  

As one commentator recently noted: “Expert interrogators have long recognized, and continue to 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.”

THE LINEUP CASES: THE WARREN COURT DECISIONS THAT SUFFERED THE CRUELEST FATE

Unlike the Warren Court’s most publicized criminal procedure rulings, Mapp and Miranda, the lineup cases were explicitly designed to protect the innocent from wrongful conviction. Ironically, these were the Warren Court decisions that suffered the worst treatment at the hands of the Burger Court.

Although mistaken identification has probably been the single greatest cause of conviction of the innocent, surprisingly the Supreme Court did not come to grips with this problem until the closing years of the Warren tenure. Then the Court seemed to make up for lost time. In a 1967 trilogy of cases, United States v. Wade, Gilbert v. California, and Stovall v. Denno, the Court leapfrogged case-by-case analysis of various pretrial identification situations and applied the right to counsel to identification in one dramatic move. “Since it appears that there is grave potential for prejudice in the pretrial lineup, which [absent counsel’s presence] may not be capable of reconstruction at trial,” the Court deemed counsel’s presence essential to “avert prejudice and assure a meaningful confrontation at trial.”


133. Wade, 388 U.S. at 236.
Although the pretrial identification in Wade and Gilbert occurred after the defendants had been indicted, nothing in the Court's reasoning suggested that an identification that takes place before a defendant is formally charged is less riddled with dangers or less difficult for a suspect to reconstruct without the presence of counsel than one occurring after that point. Nevertheless, in Kirby v. Illinois the Burger Court announced a "post-indictment" rule, one that enables law enforcement officials to avoid the impact of the Wade-Gilbert rule by conducting identification procedures before formal charges are filed.

Nor is that all. A year after Kirby, the Burger Court struck the Wade-Gilbert rule another heavy blow. Although the defendant made a forceful argument that the availability of the photographs at trial furnished no protection against the suggestive manner in which they may have been originally shown to the witness or the comments or gestures that may have accompanied the display, the Court held in United States v. Ash that the Wade-Gilbert right to counsel did not apply to a pretrial photo-identification procedure — even though the procedure was conducted after the suspect had been indicted and even though the suspect could have appeared in person at a lineup.

Taken together, Kirby and Ash virtually demolished the original lineup decisions. Nevertheless, in theory abuses in photographic displays and in preindictment lineups are not beyond the reach of the Constitution. A defendant may still convince a court that the circumstances surrounding his identification present so "substantial [a] likelihood of irreparable misidentification" as to violate due process. But the Burger Court made this quite difficult to achieve.

Although it ought to suffice, an "unnecessarily suggestive" identification is not enough — the "totality of circumstances" may still permit the use of identification evidence if, despite the unnecessary "suggestive[ness]," "the out-of-court identification possesses certain features of reliability." This is an elusive, unpredictable case-by-case test that, as might be expected, has not turned out to be any more

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135. 413 U.S. 300 (1973).
manageable for the courts or any more illuminating for law enforce-
ment officers than the pre-Miranda "totality of the circumstances"-

The Burger Court's decisions concerning pretrial identification may well be the saddest chapter in modern American criminal proce-
dure. The Burger Court was "far more impressed than its predecessor with the importance of the defendant's guilt,"\footnote{139. CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 4 (2d ed. 1986). See also Stephen J. Schulhofer, The Constitution and the Police: Individual Rights and Law Enforcement, 66 WASH. U. L.Q. 11, 18 (1988).} but its harsh treatment of the 1967 lineup cases indicates its willingness to subordinate even the reliability of the guilt-determining process to the demands for speed and finality.

SEARCH AND SEIZURE IN THE POST-WARREN ERA: A PROLONGED CAMPAIGN OF "GUERILLA WARFARE"

When the Burger Court handed down the Kirby and Ash decisions it demonstrated how quickly and effectively it could cripple a disfavored Warren Court precedent without flatly overruling it, but this development constituted an exception to the Burger Court's general approach in criminal procedure. In the main, in place of the counterrevolution in criminal procedure that many expected, "the Burger Court waged a prolonged and rather bloody campaign of guer-
illa warfare."\footnote{140. Albert W. Alschuler, Failed Pragmatism: Reflections on the Burger Court, 100 HARV. L. REV. 1436, 1442 (1987).} This observation applies with special force to the law of search and seizure.

There are two principal ways to reduce the impact of Mapp v. Ohio: (a) by narrowing the thrust of the exclusionary rule, \textit{i.e.}, by restricting the circumstances in which evidence obtained in violation of the Fourth Amendment must be excluded, and (b) by shrinking the scope of the amendment itself (\textit{e.g.}, diluting what amounts to "prob-
able cause," making it easy for the police to establish "consent" to what would otherwise be an illegal search, and taking a grudging view of what constitutes a "search" or "seizure"), thereby giving the police more leeway to investigate crime and the defense fewer opportunities to invoke the exclusionary rule. On a few occasions the post-Miranda
Court did decide some search and seizure cases in favor of the defense, but in the main it substantially reduced the impact of the exclusionary rule both by cutting back on the application of the rule itself and by down-sizing the scope of the protection against unreasonable search and seizure.

The “Deterrence” Rationale Comes to the Fore

For much of its life the “federal” or “Fourth Amendment” exclusionary rule, first promulgated in the famous 1914 case of *Weeks v. United States*, rested not on the empirical proposition that it actually deterred illegal searches, but on what might be called a “principled basis.” That principle was to avoid “sanctioning” or “ratifying” the police lawlessness that produced the proffered evidence, to keep the judicial process from being contaminated by partnership in police misconduct and, ultimately, to remind the police and assure the public that the Court took constitutional rights seriously. That view — what might be called the “original understanding” of the exclusionary rule — is the dominant theme of *Mapp v. Ohio*.

But in the post-Warren Court Era, ways of thinking about the exclusionary rule changed. The “deterrence” rationale, and its concomitant “interest balancing,” bloomed. Thus, whether the exclusionary rule should be applied was said to present 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.” By “deconstitutionalizing” the rule — by shifting the nature of the debate from arguments about constitutional law and judicial integrity to arguments

141. See, e.g., *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975) (holding that the Fourth Amendment requires a prompt judicial determination of probable cause as a condition for any significant pretrial restraint on a suspect’s liberty); *Payton v. New York*, 445 U.S. 573, 601-03 (1980) (holding that the police must be armed with a warrant before entering a suspect’s home to make a routine arrest); *Tennessee v. Garner*, 471 U.S. 1, 11 (1985) (holding that the police slaying of an unarmed, nondangerous felon to prevent his escape constitutes an “unreasonable seizure” within the meaning of Fourth Amendment).

142. 232 U.S. 383 (1914).


144. See Kamisar, supra note 143, at 621-27.

about "deterrence" and empirical data — the critics of the exclusionary rule won some important victories. 146

...the critics of the exclusionary rule won some important victories. 146

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 much less concrete. As Professor Schulhofer has observed:

[The benefits of the exclusionary rule] involve safeguarding a zone of dignity and privacy for every citizen, controlling abuses of power, preserving checks and balances. One could view these as pretty weighty benefits, perhaps even invaluable ones. But the Court has viewed them as abstract, speculative. 147

It is difficult to read the post-Warren Court's search and seizure cases without coming away with the feeling that it did its "balancing" in an empirical fog and that its cost-benefit analysis — although it sounds objective, even scientific — simply gave back the values and assumptions the Court fed into it. Thus, if one takes the position that "no empirical researcher . . . has yet been able to establish with any assurance whether the [exclusionary] rule has a deterrent effect even in the situations in which it is now applied," 148 as the post-Warren Court does, and one characterizes the rule's social costs as "substantial," "well known" and "long-recognized," 149 as the post-Warren Court also did, 150 the outcome is quite predictable.

146. See Calandra, 414 U.S. 338, 348-52 (1974) (holding that a grand jury witness may not refuse to answer questions on ground that they are based on fruits of an unlawful search); Stone v. Powell, 428 U.S. 465, 494-95 (1976) (greatly limiting a state prisoner's ability to obtain federal habeas corpus relief on search-and-seizure grounds); United States v. Janis, 428 U.S. 433, 453-54, 459-60 (1976) (explaining that the rule's deterrent purpose would not be furthered by barring evidence obtained illegally by state police from federal civil tax proceedings). An even more important victory was won a decade later in United States v. Leon, 468 U.S. 897, 922 (1984) (adopting a "reasonable, good faith" modification of the exclusionary rule, at least in search warrant cases).

147. Schulhofer, supra note 139, at 19.

148. Janis, 428 U.S. at 452 n.22, quoted in Leon, 468 U.S. at 918. See also Stone, 428 U.S. at 492 & n.32.

149. Leon, 468 U.S. at 907; Stone, 428 U.S. at 490-91.

150. I think it fair to say that the "costs" of the exclusionary rule are "much lower . . . than is commonly assumed." 1 WAYNE R. LAFAYPE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 22 (2nd ed. 1987). According to probably the most comprehensive study of the available empirical data, the evidence "consistently indicates that the general level of the rule's effects on criminal prosecutions is marginal at most." Thomas Y. Davies, A Hard Look at What We Know (and Still Need to Learn) About the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests, 1983 AM. B. FOUND. RES. J. 611, 622. See also CHARLES H. WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 45-46 (3rd ed. 1993); Donald A. Dripps, Beyond the Warren Court and its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure, 23 U. MICH. J.L. REv. 591, 625, 634 (1990); Peter F. Nardulli, The Societal Cost of the Exclusionary Rule: An Empirical Assessment, 1983 AM. B. FOUND. RES. J. 585, 606; Craig D. Uchida &
Yet is not all the talk about the “substantial costs of the exclusionary rule” misleading? Is it not the Fourth Amendment itself, rather than the exclusionary rule, that imposes these costs? The “substantial costs” said to be exacted by the exclusionary rule would also be exacted by any other means of enforcing the Fourth Amendment that worked. A society whose police obey the Fourth Amendment in the first place “pays the same price” as the society whose police cannot use the evidence they obtained because they violated the Fourth Amendment: both societies convict fewer criminals.

If a society relies on the exclusionary rule to enforce the Fourth Amendment, some “guilty” defendants will not be convicted. If a society relies on a viable alternative means of enforcing the Fourth Amendment, however (and critics of the exclusionary rule have often assured us that the alternatives they have in mind would be at least equally effective), then “guilty” defendants will not be set free — but only because they will not be searched unlawfully in the first place.\(^{151}\) The only time the Fourth Amendment would not impose the “substantial societal costs” critics of the exclusionary rule complain about would be if the Amendment were converted into “an unenforced honor code that the police [could] follow in their discretion.”\(^{152}\)

**The Leon Case: The Court Adopts a So-Called “Good Faith” Exception to the Exclusionary Rule**

The “deterrence” rationale and its concomitant “cost-benefit” or “balancing approach” to the exclusionary rule reached a high point in *United States v. Leon*,\(^{153}\) the case that adopted a so-called “good faith” (actually a “reasonable mistake”) exception to the exclusionary rule. In *Leon* the Court held that what it called the “marginal or nonexistent” benefits produced by suppressing evidence obtained in objectively reasonable but mistaken reliance on a subsequently invalidated search warrant “cannot justify the substantial costs of exclusion.”\(^{154}\)

Although *Leon* may appear to be little more than a routine application of the “cost-benefit” approach utilized in earlier cases, it is not.

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152. *Leon*, 468 U.S. at 978 (Stevens, J., dissenting).
154. *Id.* at 922.
The earlier cases\textsuperscript{155} were based on the assumption that the exclusionary rule — fully applicable in a criminal prosecution against the direct victim of a Fourth Amendment violation — need not also be applied in certain “collateral” or “peripheral” contexts because “no significant additional increment of deterrence [was] deemed likely.”\textsuperscript{156}

\textit{Leon} was a search warrant case and there is a good deal to be said for confining the “good faith” exception to the warrant setting.\textsuperscript{157} Still, the case must be read in light of the Burger Court’s general hostility to the exclusionary rule, and the Court’s doubts that “the extreme sanction of exclusion,” as the Court called it in \textit{Leon},\textsuperscript{158} can “pay its way” in any setting, let alone a setting where the Fourth Amendment violations are neither deliberate nor “substantial.” In the future, I fear, the Rehnquist Court may say that the same cost-balancing that led to the admissibility of the evidence in \textit{Leon} supports a “good faith” exception across the board. It is hard to believe that the Court adopted such an exception in \textit{Leon} only to limit it to the tiny percentage of police searches conducted pursuant to warrants.

The \textit{Leon} decision is especially hard to defend in light of a decision the Court rendered only a year earlier, \textit{Illinois v. Gates},\textsuperscript{159} which dismantled the existing probable cause structure in favor of a mushy “totality of the circumstances” test. The \textit{Gates} Court made it fairly clear that “probable cause” is \textit{something less} than “more-probable-than-not” (although how much less is anything but clear). At one point, the \textit{Gates} Court told us that “probable cause requires only a probability or \textit{substantial chance} of criminal activity.”\textsuperscript{160}

\begin{flushleft}
\textsuperscript{155} See cases summarized supra note 146.
\textsuperscript{156} LaFave, supra note 150, at 50-51.
\textsuperscript{158} See 468 U.S. at 926.
\textsuperscript{160} Gates, 462 U.S. at 244, n.13 (emphasis added).
\end{flushleft}
What is a “Search” or “Seizure”? The Court Takes a Grudging View

“Probable cause” is the heart of the Fourth Amendment. But diluting the standard of probable cause is only one way that the post-Warren Court has reduced the protection against unreasonable search and seizure. “Search” and “seizure” are key words — and key concepts. For police practices need not be based on individualized suspicion or conducted pursuant to search warrants — indeed, are not regulated by the Fourth Amendment at all — unless they are classified as “searches” or “seizures.” Thus another way to diminish the security against unreasonable search and seizure is to take a narrow, stingy view of what amounts to a “search” or “seizure.” The Burger and Rehnquist Courts have done just that.

Thus, because, according to the Court, a depositor who reveals her affairs to a bank “takes the risk” that this information will be conveyed to the government, she has no legitimate expectation of privacy as to the checks and deposit slips she exposes to bank employees in the ordinary course of business.161 Similarly, because, we are told, one who uses the phone “assumes the risk” that the telephone company will reveal to the police the numbers he 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, but does not overhear oral communications) is not a search or seizure either.162 Thus, so far as the Fourth Amendment is concerned, the police need neither a warrant nor probable cause nor, presumably, any cause, to use such a device.

Asks Tracey Maclin:

Does the Court really believe that we have no sense of privacy in the telephone numbers we dial from our homes or in the financial records we deposit in the bank? . . . How would you feel if, during your drive to work, the radio station began broadcasting the telephone numbers you had dialed over the last month? Or if, while reading the morning newspaper, you saw copies of all the checks you had written during the past year?163

What makes the "assumption of risk" in these cases voluntary? If you want to participate in modern American life at all, do you not have to assume these risks? Although one takes sufficient precautions (e.g., erects a fence and posts warning signs) to render entry on his private land a criminal trespass under state law, police entry on and examination of that land is beyond the curtilage and, thus, unprotected by the Fourth Amendment. Moreover, even land admittedly within the curtilage (for example, a fenced-in backyard) may not come within the protection of the Fourth Amendment. Thus, the Court informed a marijuana-growing defendant that the Constitution failed to protect him against police aerial surveillance because, even though he had completely enclosed his backyard with two high fences, he had "knowingly exposed" it to the public. Evidently he should have placed an opaque dome over his backyard.

An examination of a person’s trash bags can reveal intimate details about his business dealings, political activities and associations, consumption of alcohol, and sexual practices. (Archaeologists tell us that if we want to find out what is really going on in a community, we should look at its garbage.) Nevertheless, the Rehnquist Court held that the police may rip open the sealed opaque trash bags one leaves at the curb for garbage pick-up and rummage through their contents for evidence of crime without engaging in a "search." Thus, this police investigatory technique, too, is completely uncontrolled by the Constitution.

The Rehnquist Court has also given the crucial term "seizure" a narrow reading. Recently, for example, 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 permission to search his luggage — a police practice that some lower courts “have compared to the tactics employed by fascist

167. California v. Greenwood, 486 U.S. 35 (1988). See also United States v. Scott, 975 F.2d 927 (1st Cir. 1992) (extending Greenwood to apply even when an individual shreds his papers before putting them in the garbage, but IRS agents painstakingly reassemble them).
and totalitarian regimes of a bygone era" — no "seizure" takes place. Under these circumstances, the Court has told us a reasonable person would feel free to terminate the encounter or to ignore the police presence and go about his or her business. In other words, we are supposed to believe that with a police officer towering over him and at least partially blocking the narrow bus aisle, a reasonable bus passenger would feel free to just say no. We are supposed to believe that with a police officer "in his face," a reasonable passenger would feel free to tell the officer that he wanted to finish reading a *Sports Illustrated* article or return to the crossword puzzle he was working on — or just go to sleep.

What Constitutes a "Consent" to an Otherwise Illegal Search or Seizure? The Court Takes a Relaxed View

Although the post-Warren Courts have taken a grudging view of what constitutes a "search" or "seizure" within the meaning of the Fourth Amendment, they have taken a relaxed view of what constitutes a consent to an otherwise illegal search or seizure. "Consent" is law enforcement's trump card. It is the easiest and most propitious way for the police to avoid the problems presented by the Fourth Amendment. Thus, the protection afforded by the Amendment will vary greatly depending on how difficult or easy it is for the police to establish consent. *Schneckloth v. Bustamonte* made establishing consent all too easy.

If an officer lacks authority to conduct a search, he may request permission to search, but he cannot demand it. To many people who confront the police, however, this distinction is very thin — or nonexistent. "[W]hat on their face are merely words of request take on color from the officer's uniform, badge, gun and demeanor."
All the police have to do to make the distinction between "request" and "demand" meaningful is to advise a person that he has a right to refuse an officer's "request" and that such a refusal will be respected. But the Schneckloth Court dismissed such a requirement as "thoroughly impractical."172 That such a warning would undermine what the Court called "the legitimate need for [consent] searches"173 is quite clear; that such a warning would be "impractical" (as that word is normally defined) is not at all clear.

After Schneckloth, a person may effectively consent to a search even though he was never informed — and the government has failed to demonstrate that he was ever aware — that he had the right to refuse the officer's "request" to search his person, automobile or home. After Schneckloth, the criminal justice system, in one important respect at least, can (to borrow a phrase from Escobedo) "depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights."174

More recently, in Illinois v. Rodriguez,175 the Rehnquist Court held that a warrantless entry of one's home is valid when the police reasonably, but mistakenly, believe that a third party (in this case, a girlfriend who had in fact moved out of the apartment) possesses common authority over the premises. Thus, even though (a) no magistrate has authorized the search, (b) no probable cause supports the search and (c) no exigency requires prompt action, the police may invade a person's home on the basis of the "seeming consent" of a third party.

The Rodriguez dissenters forcefully argued that when confronted with the choice of relying on the consent of a third party or obtaining a warrant, the police "should secure a warrant and must therefore accept the risk of error should they instead choose to rely on consent."176 But the majority was not impressed: "What [a person] is assured by the Fourth Amendment . . . is not that no government search of his house will occur unless he consents; but that no such

172. 412 U.S. at 231.
173. Id. at 227.
176. 497 U.S. at 193 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting).
search will occur that is 'unreasonable' — and a search is not unreasonable when the police "reasonably (though erroneously) believe that the person who has consented to their entry is a resident of the premises."  

Is the Exclusionary Rule the Enemy of the Fourth Amendment?

A critic of the exclusionary rule might take all the search and seizure cases I have discussed (as well as others I have not) and throw them back at me. All that I have demonstrated, the critic might say, is that the exclusionary rule is the enemy of the Fourth Amendment. For the rule puts tremendous pressure on the courts to avoid "freeing a guilty defendant" and the courts respond by watering down the rules governing search and seizure. If the exclusionary rule had not been imposed on the states, the critic might argue, the Fourth Amendment would never have been construed as narrowly as it has been.

However, a meaningful tort remedy or any other effective alternative to the exclusionary rule would also put strong pressure on the courts to water down the rules governing search and seizure. As Monrad Paulsen pointed out shortly before the Mapp case was decided:

Whenever the rules are enforced by meaningful sanctions, our attention is drawn to their content. The comfort of Freedom's words spoken in the abstract is always disturbed by their application to a contested instance. Any rule of police regulation enforced in fact will generate pressures to weaken the rule.

Disparaging the exclusionary rule, Judge (later Justice) Benjamin Cardozo once said of it: "The criminal is to go free because the constable has blundered." This epigram is the most famous criticism of the rule and surely the best one-sentence argument ever made against it. Cardozo made this statement some seven decades ago, but it would make a snappy ten-second "sound bite" today.

In the post-Warren Court era, however, the criminal has "gone free" less and less because the exclusionary rule has been greatly narrowed by a "good faith" exception and other restrictions and because,

177. 497 U.S. at 183.
178. Id. at 186.
as I have tried to show, the scope of the Fourth Amendment itself has shrunk quite significantly.

Seven decades ago, when Cardozo delivered his famous one-liner (and, I am willing to concede, even three decades ago, when the Warren Court imposed the exclusionary rule on the states), the law of search and seizure probably did unduly restrict the police — on paper. But *Mapp v. Ohio* has had a large impact. Whether or not the Warren Court intended this result or foresaw it, *Mapp* and its progeny have brought about a great clarification and simplification of the law of search and seizure — almost always in favor of the police.

This is probably the price we have had to pay for the exclusionary rule — or the price we would have had to pay for any remedy that actually worked. But that price has been paid.

Cardozo's famous epigram is outdated. The time has come to revise it. And as revised that epigram becomes a powerful argument in favor of the exclusionary rule: Nowadays, the criminal does not “go free” because the constable has made an honest blunder or a technical one. The post-*Mapp* cases have provided the police with so much room to operate without fear of the exclusionary rule that nowadays the criminal only “goes free” if and when the constable has flouted the Fourth Amendment — if and when he has blundered badly.

The “Selective Incorporation” Doctrine — And Its Impact on the Fourth Amendment Exclusionary Rule

The “total incorporation” doctrine, the view, advocated most notably by Justice Hugo Black,\(^{181}\) that the Fourteenth Amendment “incorporates” all of the guarantees found in the Bill of Rights and applies them to the states in the same manner that they apply to the Federal Government, has never commanded a majority.\(^{182}\) But during the Warren Court era the “selective incorporation” doctrine came to the fore, and, as a practical matter, produced the same results the “total incorporation” doctrine would have brought about.\(^{183}\)

Under the “selective incorporation” approach, “[o]nce the Court had determined, upon analysis of the whole of a [Bill of Rights] guarantee, that the guarantee protected a fundamental right, that guarantee ‘would be enforced against the States under the Fourteenth


\(^{183}\) See id. at 290-98.
Amendment according to the same standards that [apply] against federal encroachment.” In less than a decade, in a series of cases beginning with Mapp, “the Court’s conception of what was fundamental was expanded to include all the significant provisions of the Bill of Rights.”

In Malloy v. Hogan, holding that the privilege against self-incrimination was a fundamental right, and thus safeguarded against state action under the applicable federal standard of the Fifth Amendment, the Warren Court “undisputably established that selective incorporation had become the majority view.” As Professors LaFave and Israel have observed:

A series of cases decided during the remainder of the decade reaffirmed the position taken in Malloy. Those cases held applicable to the states, under the same standards applied to the federal government, the Sixth Amendment rights to a speedy trial, to a trial by jury, to confront opposing witnesses, and to compulsory process for obtaining witnesses, and the Fifth Amendment prohibition against double jeopardy. In each case, the Court relied squarely upon a selective incorporation analysis. Moreover, in Duncan v. Louisiana, the Court noted that . . . the crucial issue was not whether a particular guarantee was fundamental to every “fair and equitable” criminal justice system “that might be imagined,” but whether it was fundamental “in the context of the criminal processes maintained by the American states.”

The fact that the “incorporated” Bill of Rights guarantee applied to the states to the same extent that it applied to the federal government had an unfortunate side effect — one that Justice John Harlan, a formidable critic of “selective incorporation,” was quick to flag. The only way to “temper” the “incorporated” Bill of Rights provision in order to “allow the States more elbow room,” Harlan pointed out, was to dilute the federal guarantee itself. Thus the many Supreme

187. LAFAVE & ISRAEL, supra note 184, at 96-97.
188. LAFAVE & ISRAEL, supra note 184, at 97. The quotation from Duncan v. Louisiana, 391 U.S. 145 (1968) (holding that the Sixth Amendment right to jury trial is fully applicable to the states via the Fourteenth Amendment) appears at 391 U.S. at 149-50, n.14. See also the Court’s summary of the “specifics” of the Bill of Rights that it had “selectively incorporated” by the year 1968 in Duncan, 391 U.S. at 148.
Court cases arising from state courts that narrowly and grudgingly interpret the scope of the protection against unreasonable search and seizure apply to federal, as well as state, prosecutions. Nor is that all.

Although Justice Tom Clark, the author of the *Mapp* opinion, presented as many reasons for the exclusionary rule as he could possibly muster,\(^1\)\(^9\) his essential position, as Francis Allen observed at the time, was that "the exclusionary rule is part of the Fourth Amendment; the Fourth Amendment is part of the Fourteenth; therefore the exclusionary rule is part of the Fourteenth."\(^1\)\(^9\) As a result, critics of *Mapp* had to direct their fire at the efficacy, validity and constitutional basis of the "federal" or "Fourth Amendment" exclusionary rule itself, i.e., the long-established rule excluding illegally seized evidence in federal prosecutions. This they have done did with great force and considerable success.

At the time of *Mapp*, the "federal exclusionary rule" seemed quite secure.\(^1\)\(^9\)\(^2\) But the "storm of controversy" over *Mapp* engulfed the "federal exclusionary rule" as well.\(^1\)\(^9\)\(^3\) Thus, the future of the 1914 federal rule, which had seemed so bright before the Warren's Court's revolution in criminal procedure got underway, is now rather clouded.

Another word about the exclusionary rule: the reasoning the post-Warren Court has employed in the search and seizure cases out-runs the results that have been reached to date. If, as the Court has told us, any search and seizure exclusionary rule must "pay its way" by deterring official misconduct\(^1\)\(^9\)\(^4\) and if, as it has also told us, the deterrent effect of the exclusionary rule has never been established (to the

\(^{1}\)\(^9\) See the discussion of the *Mapp* opinion in Kamisar, supra note 143, at 621-27.

\(^{1}\)\(^9\)\(^2\) Francis A. Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1, 26. See also id. at 23-24.

\(^{1}\)\(^9\)\(^3\) The disagreement in *Mapp* was only over the applicability of the search and seizure exclusionary rule to the states; "there is not a word in [Justice Harlan's dissenting opinion] suggesting that the rule is intrinsically bad." TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 20-21 (1969).

\(^{1}\)\(^9\)\(^4\) Concurring in *Mapp*, Justice Douglas observed that *Wolf v. Colorado*, 338 U.S. 25 (1949), overruled in *Mapp*, had evoked "a storm of constitutional controversy which only today finds its end." *Mapp*, 367 U.S. at 670. But the storm of controversy greatly intensified and embraced the 1914 *Weeks* rule as well as *Mapp*.

\(^{1}\)\(^9\)\(^4\) The exclusionary rule "must be carefully limited to the circumstances in which it will pay its way by deterring official lawlessness." United States v. *Leon*, 468 U.S. 897, 907 (1984) (quoting Justice White's earlier observation, with approval, in his concurring opinion in *Illinois v. Gates*, 462 U.S. 213, 257-58 (1983) (White, J., concurring)). Because the *Leon* Court concluded that the exclusionary rule can have "no substantial deterrent effect" when the police have acted in reasonable reliance on a search warrant issued by a neutral magistrate that is subsequently found to be invalid, it concluded that the rule "cannot pay its way in those situations." 468 U.S. at 907-08, n.6.
satisfaction of the post-Warren Court at any rate), why stop with only a narrowing of the exclusionary rule? Why not abolish the rule altogether?

Fortunately, law is not a syllogism. I very much doubt that the current Court will carry the way it talks about, and thinks about, the search and seizure exclusionary rule to its logical conclusion. I believe rather that a majority of the Justices are prepared to “live with” what they would probably call a “pruned” exclusionary rule and a “workable” Fourth Amendment (and what I would call a “battered” exclusionary rule and a “shrunken” Fourth Amendment).

The principal danger lies elsewhere. Now that the search and seizure exclusionary rule rests on an “empirical proposition” rather than a “principled basis” — now that application of the exclusionary rule presents a question not of “rights” but of “remedies” — the rule is almost defenseless against Congressional efforts to repeal it, (most likely by a statute that would purport to replace the rule with what we shall be assured is an “effective” tort remedy).

Why Was Gideon Warmly Applauded, But Mapp and Miranda Widely Criticized?

So far, I have said nothing about the famous Gideon case, the only Warren Court criminal procedure decision in favor of the defense that was greeted by widespread applause. What accounts for Gideon’s popularity?

An untrained, unrepresented, and often uneducated person trying to defend himself as best he can in a public courtroom makes a highly visible and most disconcerting spectacle. But few of us have ever seen or thought much about the plight of an individual who is being searched illegally in a poor neighborhood or “grilled” vigorously in the backroom of a police station.

Many of the people who accepted the Gideon principle “in principle” soon qualified their support or withdrew it completely when the Warren Court applied the principle to the point where it really bites — to custodial interrogation. Thurman Arnold may have provided as good an explanation as any for why Gideon received a warm reception but Mapp and Miranda evoked a hostile reaction. Arnold made the

195. See Janis, 428 U.S. at 452, n.24 and accompanying text.
point long before the Warren Court ever assembled. Too many people, he commented, are roused by any violation of "the symbol of a ceremonial trial," but "left unmoved by an ordinary nonceremonial injustice." 197

**IS ANY DECISION RESTRICTING POLICE POWERS LIKELY TO BE CRITICIZED?**

It was not the Warren Court's efforts to strengthen the rights of the accused in the courtroom, but its "activism" in the pre-trial "police practices" area that led many to believe that it was "too soft" on crime. It was the Court's search and seizure and confession cases that made it a major political issue in the 1968 presidential campaign.

It is hard to think of a single significant ruling against the police by any Supreme Court that has not evoked strong criticism — and from opposite directions. Either we are told that the ruling turns too heavily on the particular facts of the case and thus fails to provide clear-cut guidance for the future or we are told that the ruling is too broad and inflexible and thus demonstrates that the Court is acting like a legislature rather than a court. Almost every Supreme Court decision that has imposed some restraints on law enforcement can be, and I believe has been, criticized on one of these grounds or the other.

Is it any wonder that one gets the uncomfortable feeling that the police just want the Court to go away? That they resent and resist any external control — whether it comes from a civil rights commission or a civilian review board or a court?

When Escobedo was decided in 1964, it was severely criticized for being much too fuzzy — although it contained some sweeping language it also contained very narrow language that arguably limited the case to its special facts. 198 Then came Miranda.

The Miranda Court seemed to be responding to the criticism of Escobedo. *This time* it seemed to be striving hard to provide the guidance it had failed to furnish in Escobedo. But *this time* the Justices caught heavy fire for *not* handling the cases before them on an individualized basis, but providing too much guidance in the abstract; for deciding too many things in "one gulp"; and for promulgating rules that were *too* specific, too rigid and too inflexible.

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198. See supra text accompanying notes 29-31 and 43-44.
The requirement that the police issue the now-familiar warnings, and obtain valid waivers, before subjecting a custodial suspect to interrogation is probably the feature of the *Miranda* case that has caught the heaviest fire. But this aspect of the case should have disturbed law enforcement officials the least. As Professor Schulhofer has pointed out, three distinct steps were involved in *Miranda*: (1) informal pressure to speak (i.e., pressure *not* backed by legal process or any formal sanction) can constitute “compulsion” within the meaning of the Fifth Amendment; (2) this element of informal compulsion is present, indeed inherent, in custodial interrogation; and (3) the specified warnings or some equally effective alternative device is needed to dispel the pressure of custodial interrogation.199

The first two steps constitute “the core of *Miranda.*”200 If it had stopped with the first two steps and left law enforcement officials to guess at what countermeasures were needed to dispel the pressure of custodial interrogation, the Court would have incurred *far more* criticism.201

The required warnings may be *too feeble* a means of dispelling the pressure but it is hard to criticize the warnings on the ground that they “handcuff” the police. It would be more accurate to say that they serve to *liberate* the police. They enable the police to question a custodial suspect *without* running afoul of the Fifth Amendment.202

**DID THE WARREN COURT’S REFORM EFFORT COME AT A BAD TIME? COULD IT HAVE COME AT A BETTER TIME?**

In his lively book, *The Self-Inflicted Wound* (an account of the Warren Court’s revolution in criminal procedure), former *New York Times* Supreme Court reporter Fred Graham observes:

> History has played cruel jokes before, but few can compare with the coincidence in timing between the rise in crime, violence and racial tensions [and] the Supreme Court’s campaign to strengthen the rights of criminal suspects against the state. . . . The Court’s reform effort could have come at almost any time in the recent past . . . [at a time] when it could have taken root before crime became the problem that it has become.203

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200. *Id.*
201. *See id.* at 454.
202. *See id.*
When was that? According to the media, the claims of law enforcement officials and the statements of politicians, we have always been experiencing a "crime crisis" — at no time in our recent, or not-so-recent, past has there been a time when "society" could afford a strengthening or expansion of the rights of the accused.

In 1943, in *McNabb v. United States*, in the exercise of its supervisory authority over the administration of federal criminal justice, the Court held that voluntary confessions should be excluded from evidence if they were obtained while the suspect was being held in violation of federal requirements that he promptly be taken before a committing magistrate. The *McNabb* Court tried to do for the federal courts what, a quarter-century later, *Miranda* was designed to do for state, as well as federal, courts: by-pass the frustrating "swearing contests" over the nature of the secret interrogation and reduce, if not eliminate, both police temptation and opportunity to coerce suspects into making incriminating statements. The *McNabb* doctrine sought to do this by focusing on a relatively objective factor — the length of time a suspect was held by the police before being brought to a judicial officer to be advised of his rights.

Although it placed less restrictions on federal police than *Miranda* was to place on all police a quarter-century later, the *McNabb* rule was severely criticized by many law enforcement authorities and many members of Congress for barring the use of voluntary confessions. For example, in his testimony before a House Subcommittee, the then head of the District of Columbia Police Department called *McNabb* "one of the greatest handicaps that has ever confronted law enforcement officers."

Police officials and politicians were not the only ones unhappy with the *McNabb* decision. Most of the judges of the lower federal courts "were unsympathetic, if not openly hostile, toward a rule which suppressed evidence not only relevant but also cogent and often crucial in order to effectuate what seemed to them to be an exaggerated concern for individual rights."

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205. 318 U.S. 332 (1943).


A year after the McNabb decision, at a time when a bill to repudiate it was gathering much support, the Court took another look at the doctrine in the Mitchell case. With one eye on Congress, and stung by strong criticism from the bench and bar, as well as from police and prosecutors, the Court backed off, writing an opinion which could be read as limiting McNabb to its particular facts.

As James Hogan and Joseph Snee, co-authors of the leading article on the McNabb doctrine, have noted:

The Supreme Court's decision in the Mitchell case sent the McNabb rule into eclipse. To the judges of the lower federal courts, who had viewed the earlier decision with ill-concealed astonishment and apprehension, the Mitchell case signaled a face-saving retreat by the Court from the untenable position which it had occupied the year before.

Some years later, the Court revived and reaffirmed McNabb, first in Upshaw v. United States and then in Mallory v. United States. However, the storm of controversy over the rule never subsided:

The Mallory decision was greeted by law enforcement officials of the District of Columbia (where its impact was greatest) with something bordering on panic. The Chief of the Metropolitan Police Department declared (hyperbolically, it is hoped) that the decision renders the Police Department "almost totally ineffective." There were loud demands for a legislative re-examination of the law of arrest, and in the Congress bills were introduced either to expand the period of allowable detention or to abolish the McNabb rule itself.

After Mallory, more bills were introduced to repeal, or at least soften, the doctrine and in 1968 a law was finally enacted that badly crippled it. (Because the McNabb-Mallory doctrine was a rule of evidence formulated in the exercise of the Court's supervisory authority over the administration of federal criminal justice, it was subject to repeal or revision by the Congress.)

211. 335 U.S. 410 (1948).
212. 354 U.S. 449 (1957). From 1957 on, the rule was often called the McNabb-Mallory Rule or simply the Mallory rule.
213. Hogan & Snee, supra note 207, at 17. The claim that the McNabb-Mallory rule adversely affected law enforcement in the District of Columbia is not supported by the available data. See Yale Kamisar, On the Tactics of Police-Prosecution Oriented Critics of the Courts, 49 CORNELL L.Q. 436, 464-71 (1964).
The experience with the McNabb-Mallory rule is strong evidence that the 1940s and 1950s were hardly auspicious times for the Court to do what it was to do in Miranda — deem custodial interrogation by state, as well as federal police, “inherently coercive.” Indeed, when, in the 1944 case of Ashcraft v. Tennessee, a majority of the Court called thirty-six hours of continuous relay interrogation “inherently coercive,” it evoked a powerful dissent by three Justices who severely criticized the majority for departing from the traditional “voluntariness” test.

In Watts v. Indiana, another coerced confession case, decided in 1949, concurring Justice Robert Jackson warned that our Bill of Rights, as interpreted by the Court up to that time, imposed “the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself” — good reason for not indulging in any further expansion of them.

Were the 1950s a good time to impose the search and seizure exclusionary rule on the states? When the California Supreme Court adopted the exclusionary rule on its own initiative in 1955, the cries of protest were almost deafening. Prominent law enforcement officials called the exclusionary rule “the ‘Magna Carta’ for the criminals” and “catastrophic as far as efficient law enforcement is concerned” and warned that it had “broken the very backbone of narcotics enforcement.”

What of the 1930s? In 1935 Governor Herbert Lehman opened a conference on crime by warning:

There is no question that in recent years there has come a substantial increase in organized crime. The professional criminal has become bolder . . . .

216. See 322 U.S. at 156 (Jackson, J., joined by Roberts & Frankfurter, JJ., dissenting).
We must take steps to increase the certainty of punishment following crime.

We must have fewer legal technical loopholes in trials and appeals.

The New York gathering on crime was not a unique event in those troubled times. The U.S. Attorney General also called a conference on crime and similar conferences were held in various states. The public was so alarmed by the apparent increase in crime that a U.S. Senate investigating committee, chaired by Royal Copeland of New York, scoured the country for information and advice which could lead to a national legislative solution. At these 1933 Congressional hearings, witnesses attacked virtually every procedural safeguard found in the Bill of Rights.

Going back still further, in 1931 the famous criminologist Harry Elmer Barnes voiced fear that the repeal of prohibition would trigger "an avalanche of crime" — as thousands of crooks, chased out of the booze business, would return to their old rackets. He warned that "the only effective check we can think of . . . would be to turn our cities over for the time being to the United States Army and Marines." Transferring the Marines from Central America to the streets of Chicago, added Barnes, "might not only promote the checking of the crime menace but also solve at one and the same time our diplomatic relations with Central America."

"Every generation supposes that its own problems are new, unknown to its forefathers." To most of those who lived during that period, the 1930s (as usual) was not a time for strengthening the rights.  

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220. Proceedings, The Governor's Conference on Crime, the Criminal and Society, State of New York 25, 26, 27 (1935). The next day a former governor, Nathan L. Miller, took up the theme. To the accompaniment of applause, he "suggest[ed] that the police ought not to be hampered in dealing with the enemies of society" and he warned that "in a war upon crime, the primary consideration must be not the criminal but the protection of society from the criminal." Id. at 55.


222. See A Resolution Authorizing an Investigation of the Matter of So-Called "Rackets" With a View to Their Suppression, Hearings Before Subcomm. of the Senate Comm. on Commerce Pursuant to S. Res. 74, 73d Cong., 2d Sess. (1933).

223. See generally Kamisar, supra note 204.

224. HARRY E. BARNES, BATTLING THE CRIME WAVE 87-88 (1931).

225. Id. at 88.

226. Id.

of the accused. Rather it seemed to be a period when (as usual) criminal procedural safeguards had already been stretched to the breaking point.

**Legislative Rulemaking vs. Constitutional Decision Making**

I am sometimes asked if I would still be in favor of the search and seizure exclusionary rule or *Miranda* if the legislature were to provide more effective, or at least equally effective, protection for criminal suspects. My answer is the same one Charles Black gave when asked whether he would still be against capital punishment if he were sure it were being administered with perfect fairness, with divinely scrupulous and infallible fairness. Professor Black replied that that was like asking him, "Would you take trains if the earth were made flat, or would you fear they would run off the edge?"228

In 1968 the Congress dealt with the confession problem. How? By "repealing" both *Escobedo* and *Miranda* and offering nothing plausible in its place — nothing but the old elusive, unruly and largely unworkable "totality of the circumstances" "voluntariness" test.229

Judge Henry Friendly, the most powerful critic of the Warren Court's criminal procedure cases, warned that "the situation with which the Court was confronted in *Miranda* was sufficiently disturbing that those of us [who criticize the case] ought to search hard for alternatives rather than take the easy course of returning simply to the rule that statements to the police are admissible unless 'involuntary.'"230 But Congress did take that easy course.

One might say that Congress pretended that *Miranda* never happened because it believed that violations of that case rarely if ever produced an untrustworthy confession. But the 1968 Congress also legislated in another area — lineups.


229. Although Title II of the Omnibus Crime Control and Safe Streets Act of 1968 purports to "repeal" *Miranda* in federal prosecutions, 18 USCA § 3501(a), the Department of Justice has studiously avoided the statute. See Henry J. Friendly, *The Constitution 24-25* (U.S. Dep't. of Justice Bicentennial Lecture Series, 1976). Recently, however, Justice Antonin Scalia announced that he "will no longer be open to the argument that this Court should continue to ignore the commands of § 3501 simply because the Executive declines to insist that we observe them." Davis v. United States, 114 S. Ct. 2350, 2358 (1994) (Scalia, J., concurring).

As discussed earlier, a year after Miranda, the Court at long last turned its attention to the problem of misidentification — a matter of serious concern in the administration of justice. "The problem here is not that of releasing an obviously guilty defendant because of the system's failure to respect his rights . . . [but] one of convicting the innocent."232

Although the Court dealt with the problem of misidentification by applying the right to counsel to lineups, this may not have been the best way to deal with the problem. It certainly is not the only way to do so. For example, in order to ensure that lineups are fairly conducted, a legislature might require that they be photographed and videotaped and that these records be produced in court. Or a legislature might remove identification procedures entirely from the police and place them in the hands of an expert and neutral administrative agency.

What alternative device did the Congress choose? None. It simply enacted a law purporting to repeal the lineup decisions.233 I believe Francis Allen expressed it best when he said that the Congressional response (or lack of response) to this critical problem was "deplorable."234

It is sometimes said that the Warren Court's activism in the criminal procedure area removed both the incentive and opportunity to deal with these matters by legislative reform. Indeed, Chief Justice Warren Burger once said that "the continued existence of [the exclusionary rule] inhibits the development of rational alternatives."235 However, it is hard to take this argument seriously.

For many decades a large number of states had no exclusionary rule, yet none of them developed any meaningful alternative to the rule. Some forty-seven years passed between the time the federal courts adopted the exclusionary rule and the time the Court finally imposed the rule on the states, but in all that time none of the twenty-

231. See supra text at notes 132-33.
233. Although Title II of the Omnibus Crime Control and Safe Streets Act of 1968 purports to "repeal" the 1967 lineup decisions, this Congressional action has "proved to be meaningless. The inferior federal courts have considered themselves bound by the Supreme Court's reading of the Constitution rather than that of the Congress and have appeared to ignore the new statute." Carl McGowan, Constitutional Interpretation and Criminal Identification, 12 WM. & MARY L. REV. 235, 249 (1970).
four states which still admitted illegally seized evidence on the eve of Mappp236 had developed an effective alternative to the rule. In short, a half-century of post-Weeks "freedom to experiment" with various ways to discourage police misconduct did not produce any meaningful alternative to the exclusionary rule anywhere.

One critic of the exclusionary rule has maintained that no alternative to the exclusionary rule will emerge until the rule is abolished because "[s]o long as we keep the rule, the police are not going to investigate and discipline their men, and thus sabotage prosecutions by invalidating the admissibility of vital evidence."237 But this argument is not persuasive. How does the fear of "sabotaging" prosecutions inhibit law enforcement administrators from disciplining officers for committing the many unlawful searches that turn up nothing in criminating, in which no arrest is made, and about which the criminal courts do nothing?

To be sure, there is no shortage of theoretically possible ways, aside from the exclusion of evidence, to make the Fourth Amendment viable. But various commentators have called attention to the need for an effective alternative to the exclusionary rule and underscored the inadequacies of existing tort remedies or criminal sanctions against transgressing police since the 1930s.238 The problem is not a lack of imagination or intellectual capacity, but rather a lack of political will.

Is there any reason to believe that today's or tomorrow's politicians are, or will be, any less fearful of crime and any more concerned about protecting people under investigation by the police than the politicians of any other era? Is there any reason to think that the lawmakers of our day are any more willing than their predecessors to invigorate tort and criminal remedies against law enforcement officials who commit excesses in their overzealous efforts to contend with "criminals" and "suspected criminals"?

238. See the articles collected in Yale Kamisar, Remembering the "Old World" of Criminal Procedure: A Reply to Professor Grano, 23 U. Mich. J.L. Rev. 537, 564, n.88 (1990). See also id. at 562, n.82.
Was the Warren Court's Revolution in American Criminal Procedure Bound to Fail?

Craig Bradley has forcefully argued that the Warren Court's revolution in criminal procedure has failed and that, given the inherent limitations of the judicial process, it was bound to do so — "no Supreme Court, no matter how competent and regardless of its political leanings, could have done much better." Observes Bradley:

[I]n the area of criminal procedure, unlike any other field of Supreme Court endeavor, the doctrine must be clear, it must be complete, and it must be stable. It is in these respects that criminal procedure law has failed. The usual leisurely manner of constitutional decision making where the Supreme Court announces a rule one year and then answers the questions to which that rule gives rise over the next fifteen or twenty years is inappropriate in this field, where the police need clear guidance and where the penalty for police mistakes is high.

The Court is never, by its nature, able to sit back and decide, apart from the cases before it, what the entire body of confession or search law should be like or to examine comprehensively what police behavior, in terms of arrest, booking, interrogation, identification procedures, and so on, is reasonable and what is not. A case-specific system necessarily leads to a patchwork system and to resulting confusion on the part of everyone involved in the process.

The worst problem with the case method... is that it is not forward looking. It does not allow that Court, as an ordinary rulemaking body would, to anticipate future cases and to craft its rules, and the exceptions to those rules, with such cases in mind. Thus the Court is invariably left in the position of declaring a partial rule, such as the rule [about] when questioning must cease upon a suspect's invocation of the right to silence, that fails to deal adequately with the majority of subsequent cases that present related issues.

Few, if any, would deny that in the field of criminal procedure legislative rulemaking has advantages over constitutional decision making. But are the courts supposed to do nothing in the absence of

239. Craig M. Bradley, The Failure of the Criminal Procedure Revolution 62 (1993). See also Allen, supra note 232, at 540-41 (despite its “ingenious, persistent, and some may feel, heroic efforts to overcome the inherent limitations of judicial power, the [Warren] Court attempted more than it could possibly achieve”); Anthony G. Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases, 45 N.Y.U. L. Rev. 785, 788 (1970) (stating that the U.S. Supreme Court “is uniquely unable to take a comprehensive view of the subject of suspects’ rights”).

legislative rulemaking? A legislature never \textit{has} to act, but a court does; it must decide the case at hand.

I think there is much truth in Anthony Amsterdam's observation that "[t]he judicial 'activism' that [the Court's conservative critics de- plored a generation ago], usually citing the Court's 'handcuffing' of the police, has been the almost inevitable consequence of the failure of other agencies of law to assume responsibility for regulating police practices."^{241} As the late Herbert Packer said of the Warren Court's revolution in criminal procedure at a time when it was still taking place, "it is naive or disingenuous to expect the Court to hold its hand when its hand is the only one raised or raisable."^{242}

Professor Packer called the Warren Court's landmark decisions "moves of desperation" — there was a law-making vacuum into which the Court felt it had to rush. Nobody else was policing the police, so the Justices felt they had to do so.^{243}

It is easy enough to poke holes in this development, observed Packer, but what is the alternative? "If we can look nowhere else but to the courts," wrote Packer, "it is silly to ask whether the courts are doing an optimal job. One might as well ask whether surgery is optimally undertaken with a carving knife without revealing that on the particular occasion the surgeon has no other instruments at his disposal."^{244}

The Warren Court did not accomplish nearly as much as its supporters hoped and its many critics in and out of law enforcement circles feared. But I, for one, am grateful that, for a time, the Supreme Court used its judicial resources in a determined effort "to alter significantly the nature of American criminal justice in the interest of a larger realization of the constitutional ideal of liberty under the law."^{245}

Someday, perhaps (but not, I am afraid, in the lifetime of anyone now reading this article), the Court will be able to put down its carving knife in favor of the legislature's scalpel. In the meantime, it is comforting to know that, although battered and bruised, most of the

\begin{thebibliography}{9}
\bibitem{241} Amsterdam, \textit{supra} note 239, at 790.
\bibitem{243} \textit{See id.}
\bibitem{244} \textit{Id. See also} Herbert L. Packer, \textit{The Courts, The Police, and the Rest of Us, 57 J. CRIM. L., CRIMINOLOGY & POLICE SCI.} 238, 240 (1966).
\bibitem{245} Allen, \textit{supra} note 232, at 525.
\end{thebibliography}
Warren Court's famous precedents remain in place — waiting for a future Court to reclaim the torch.\textsuperscript{246}

There is a distinct possibility, of course, that another Supreme Court will not reclaim the torch (at least not for a long time). Even so —

By reason of what the Warren Court said and did, we now perceive as problems what too often were not seen as problems before. This is the dynamic of change, and that fact may well be more significant than many of the solutions proposed by the Warren Court.\textsuperscript{247}

\textsuperscript{246} A few state supreme courts, it should be noted, have picked up the torch. See the authorities collected and discussed in Yale Kamisar, Wayne R. LaFave & Jerold H. Israel, Modern Criminal Procedure 57-63 (8th ed. 1994).

\textsuperscript{247} Allen, supra note 232, at 539.