THE CONSTITUTION AND THE POLICE: INDIVIDUAL RIGHTS AND LAW ENFORCEMENT*

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Our topic is the Constitution and the police. With a new Chief Justice and the prospect of major change in the personnel of the Supreme Court, police power and individual rights are sure to be reexamined. Many observers confidently predict a new relationship between courts and the police. You can look forward to it with anticipation, apprehension or dread, depending on your perspective.

In order to understand what lies ahead, we must first consider the past. Was the Burger Court really so different from its predecessor? Are the continuities more important than the liberal-to-conservative shifts in the details of a particular doctrine? Many people think so. I will point out what I view as important differences between the Warren and Burger Courts, though they are not the liberal-conservative differences that are usually supposed.[1] I will suggest first that there were really two Warren Courts. Pursuing my theme of jurisprudential schizophrenia, I will then try to convince you that there have been three distinct Burger Courts.

Earl Warren assumed office in 1953. From the very beginning, his tenure was marked by vigorous pursuit of equality and civil liberty, for

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1. For further background on the differences between the Warren and Burger Courts, and helpful discussion of the salient themes of these two periods, see, Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. FORUM 518; Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185 (1983); KAMISAR, THE WARREN COURT (WAS IT REALLY SO DEFENSE-MINDED?), THE BURGER COURT (WAS IT REALLY SO PROSECUTION-ORIENTED?) AND POLICE INVESTIGATORY PRACTICES, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T (V. Blasi, ed. 1983); KAMISAR, *The "Police Practices" Phases of the Criminal Process and The Three Phases of the Burger Court*, in *The Burger Years* (H. Schwartz ed. 1987); Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980).

example, in school desegregation,[2] political reapportionment,[3] and the ban on prayer in the public schools.[4]

But in the area of police practices, the early Warren Court mirrored its predecessor. The Court (with Chief Justice Warren concurring) held that evidence seized illegally, by what the Court called a flagrant violation of the fourth amendment, could still be used in state criminal trials.[5] The Court continued to allow extended police interrogation without counsel and without any attempt to warn the suspect of his rights.[6] In fact for the entire first half of Earl Warren's tenure, from 1953 until 1961, the criminal decisions gave almost no evidence of what we today think of as the Warren Court approach.

In the field of criminal procedure, the second Warren Court, what I would call the "real Warren Court", emerged in 1961 with the landmark decision in *Mapp v. Ohio*.[7] *Mapp* held that illegally seized evidence was inadmissible in state trials—the so-called exclusionary rule. There followed a period of remarkably rapid, comprehensive innovation. In 1963, in *Gideon v. Wainwright*,[8] the Court guaranteed the right of the indigent to be represented by counsel in a felony case. We must pinch ourselves to remember that *before* 1963, though Earl Warren had served as Chief Justice for almost ten years, it still was permissible under some circumstances to try an indigent without counsel, even in a serious criminal case.

In 1964 (and again it seems incredible that this came so late) the Court held for the first time that states must respect the fifth amendment privilege against self-incrimination.[9] In 1966 the Court held, in its famous *Miranda* decision,[10] that the fifth amendment privilege extends to suspects questioned in police custody, and requires a detailed warning about the suspect's constitutional rights.

These and other decisions that guaranteed for the first time the right to confront witnesses,[11] to jury trial[12] and so on, truly transformed the face

2. *See* Brown v. Board of Education, 347 U.S. 483 (1954).
3. *See* Baker v. Carr, 369 U.S. 186 (1962).
4. *See* Engel v. Vitale, 370 U.S. 421 (1962).
5. Irvine v. California, 347 U.S. 128 (1954).
6. *See* Crooker v. California, 357 U.S. 433 (1958); Cicenia v. La Gay, 357 U.S. 504 (1958).
7. 367 U.S. 643 (1961).
8. 372 U.S. 335 (1963).
9. Malloy v. Hogan, 378 U.S. 1 (1964).
10. Miranda v. Arizona, 384 U.S. 436 (1966).
11. *See* Pointer v. Texas, 380 U.S. 400 (1965).

of American criminal justice. This all occurred in the space of the eight brief years from 1961 to 1969.

What factors produced the new, the "*real*", Warren Court? One obvious element was the replacement of Justice Frankfurter with Justice Goldberg in 1962. But in accounting for the *Mapp* decision, which came a year before Goldberg joined the Court, and in accounting for the voting behavior of Justices Harlan, Clark, Stewart, and White, a major factor has to be the Justices' actual experience with the realities of deference to police and to locally elected state courts. The Justices experienced firsthand a recurring frustration with the meager results produced by gentle prodding and by the cautious exercise of judicial restraint.

Consider one example. In a 1954 California case,[13] police illegally entered the defendant's home several times and installed microphones. They installed one microphone in the defendant's bedroom and listened to conversations there for over a month. The Supreme Court reaffirmed the view that states could not be required to exclude the evidence.[14] But the Court issued a blistering criticism of the police behavior.[15] Several Justices called upon the Attorney General to consider criminal prosecution of the officers. The FBI investigated but never sought an indictment. So in the end what message did the police really get?

Experiences like this were in the background of the Warren Court's eventual, and some would say very belated, recognition of the need for vigorous remedies.

Even so, the transformation of the Warren Court—the "greening" of the Warren Court—was never complete. The old, conservative Warren Court surfaced, often unexpectedly, throughout the 1960s. In some ways the old Court gained the upper hand again during the last two years of Warren's tenure, though no change in the Court's membership can account for this development.[16] The Court rejected important civil liberties claims related to jury service by women[17] and blacks.[18] It limited its fourth amendment decisions. For example, the Court allowed some

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

13. Irvine v. California, 347 U.S. 128 (1954).

14. 347 U.S. at 134.

15. 347 U.S. at 137.

16. Justice Tom Clark retired and was replaced by Justice Thurgood Marshall in 1967. Clark had written *Mapp*, but nonetheless was generally a conservative on law enforcement issues; he dissented, for example, in *Miranda*.

17. *See* Hoyt v. Florida, 368 U.S. 57 (1961).

18. *See* Swain v. Alabama, 380 U.S. 202 (1965).

street searches on less than probable cause[19] and denied the exclusion remedy to defendants who lack so-called "standing."[20]

Even the heralded *Miranda* decision must be seen as a deeply ambivalent compromise. *Miranda* was a response to several problems in the law of police interrogation. Previous precedents judged interrogation practices on an amorphous case-by-case basis.[21] The law left police and lower courts without guidance. The situation made it difficult for federal courts to insure that local judges, who were often unsympathetic to the rights of the accused, would respect constitutional claims.[22]

In addition, and the *Miranda* opinion stressed this problem repeatedly, the secrecy of police interrogation made it difficult to know what actually occurred in the interrogation room.[23] Judicial fact-finding depended on a swearing contest, with several respectable police officers on one side and an unsavory suspect on the other. In this kind of a swearing contest, a defendant's claims about beating, psychological abuse, or questioning for hours on end will just not be believed, whether they happen to be true or not. The defendant will almost always be the loser.

Miranda addresses these problems in two ways. First, it grants the suspect an absolute right to silence.[24] Second, it requires that the suspect receive a series of detailed warnings before he can validly waive that right.[25]

The right to silence eliminates the slippery and uncontrollable case-by-case approach, in which the degree of pressure on the suspect was somehow "balanced" against the law enforcement need for a confession.[26] The warnings are intended to insure that the suspect is aware of his rights and has the opportunity to consult counsel. Counsel in turn is important not only to advise the defendant but also as a much-needed observer. The *Miranda* Court explained that "the need for counsel to protect the fifth amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel pres-

19. *See* Terry v. Ohio, 392 U.S. 1 (1968).

20. *See* Alderman v. United States, 394 U.S. 165 (1969).

21. *See* Kamisar, *A Dissent from the Miranda Dissents*, 65 MICH. L. REV. 59 (1966), *reprinted in* Y. KAMISAR, POLICE INTERROGATION AND CONFESSIONS 524 (1980).

22. *See* Schulhofer, *Confessions and the Court*, 79 MICH. L. REV. 865 (1981).

23. Miranda v. Arizona, 384 U.S. 436, 445 (1966).

24. *Miranda*, 384 U.S. at 467-68.

25. *Miranda*, 384 U.S. at 469-73.

26. *See* Schulhofer, *supra* note 22.

ent during any questioning if the defendant so desires."[27]

The trouble with all this is that any request for counsel must be made while the suspect is still isolated in police custody, still surrounded by what the Court called "hostile forces," forces whose presence makes free choice so difficult. In fact, it is only from these "hostile forces" that the suspect gets the crucial warnings.

Listen to the *Miranda* Court again: "[the defendant has] not merely a right to consult with counsel prior to questioning but also to have counsel present . . . *if the defendant so desires.*" The coherence of *Miranda*'s reasoning and much of its practical value collapse with those last five words. *Miranda* conditions the presence of counsel on the defendant's choice and then assumes that a free choice can be made by an isolated prisoner who must communicate his decision to the very people whose hostility has created the need for counsel in the first place. And notice that no neutral witness need be present to observe or record a waiver of counsel, a waiver which will later be claimed by those respectable police officers and denied by the unsavory suspect.

In short, *Miranda* does precious little to break the wall of isolation surrounding the target of a custodial interrogation, and it does nothing whatsoever about the all-important swearing contest.

I don't want to suggest that *Miranda* has no value at all. Its recognition that the prisoner has some rights conveys an important symbolic message to the suspect and, above all, to the police. *Miranda* helped educate police officers and raised law enforcement standards considerably. It was nonetheless a deeply ambivalent compromise. Far from "handcuffing the police," it was riddled with loopholes. The first Warren Court, the conservative Warren Court, was evident even in *Miranda*.

That brings us to 1969, when Warren Burger became Chief Justice. The product of the Burger Court was a very mixed bag. Those who like to think in terms of simple liberal-conservative stereotypes are confounded by some of the progressive and activist decisions of the 1970s and, 80s. In 1972 the Burger Court struck down standardless sentencing in capital cases,[28] thus tackling a momentous problem that the Warren Court had failed to reach. In 1975 the Burger Court held that excluding women from mandatory jury service was unconstitutional,[29] overruling

27. *Miranda*, 384 U.S. at 470.

28. Furman v. Georgia, 408 U.S. 238 (1972).

29. Taylor v. Louisiana, 419 U.S. 520 (1975).

(in effect) a 1960's decision of the Warren Court.[30]

This phenomenon continued into the last and most conservative years of the Burger Court. In 1985, for example, the Burger Court restricted the use of deadly force by police officers,[31] a problem of major importance on which the Warren Court had never spoken. In 1986 the Burger Court restricted the use of peremptory challenges against black jurors,[32] explicitly overruling a 1965 decision of the Warren Court.[33] These criminal procedure innovations were coupled with other progressive advances, including attention to sex discrimination[34] and the abortion ruling,[35] which was (like it or not) certainly the most activist decision of the past half-century.

Against this background, the claim can be made, very plausibly made, that the Warren Court was not so radical after all. And the Burger Court was hardly conservative. There are important continuities. Sometimes, most surprising of all, decisions seemed to be guided by law rather than by politics.

Still, the confusing mix of liberal and conservative results in both Courts does not tell the whole story. In criminal procedure particularly, there were crucial changes in emphasis, in tone, and in the Court's articulated goals.

The Warren Court, whatever its penchant for caution and compromise, left no doubt about its sense of mission. The Court said, for example, that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[36] Of course, the Court stopped miles short of fully implementing this insight. Statements like that left the Court wide open to the rigid logic of academic criticism. But the Court's goal was clear, its goal was the right one, and it was taking steps to get closer to the objective.

Three broad themes predominated in the Warren Court. One was the egalitarian impulse, the effort to stamp out not only racial discrimination but also to insure fair treatment for rich and poor alike. A second theme concerned the dangers of unchecked executive power. We have seen

30. Hoyt v. Florida, 368 U.S. 57 (1961).
31. *See* Tennessee v. Garner, 471 U.S. 81 (1985).
32. *See* Batson v. Kentucky, 476 U.S. 79 (1986).
33. Swain v. Alabama, 380 U.S. 202 (1965).
34. *E.g.*, Craig v. Boren, 429 U.S. 190 (1976); Frontiero v. Richardson, 411 U.S. 677 (1973).
35. Roe v. Wade, 410 U.S. 113 (1973).
36. Griffin v. Illinois, 351 U.S. 12 (1956).

many of those dangers materialize in the Iran-Contra mess. In the criminal process, the checks and balances come from a vigorous adversary system. The Warren Court saw the adversary systems of the state courts as woefully deficient. It set out to bring those systems up to the standards long followed by federal courts, standards that are set forth explicitly in the Bill of Rights.

There was a third theme, a preoccupation with practical implementation. The Court knew that criminal justice administration, like any large, amorphous bureaucracy, will not respond automatically and with enthusiasm to every new pronouncement from above. The Court understood that it was not enough simply to declare new rights. It usually chose to formulate those rights in bright-line terms, in order to make evasion more difficult. And the high visibility landmark holdings were accompanied by more technical decisions that widened access to federal courts, in order to insure a forum and a realistic remedy.[37]

Now let us turn to the police practice decisions in the Burger Court. Looking closely at the Burger Court product, we can identify three distinct phases in its work.[38] For its first six or seven years, the Burger Court showed considerable hostility toward the Warren Court landmarks of the 1960s. It dismantled protection against misidentification at police line-ups.[39] Both *Miranda* and the exclusionary rule, though left nominally intact, were repeatedly eroded.[40] The Court never once in this entire period held that a confession should be excluded.[41]

In the late 1970s the tone changed. The Burger Court (often over the Chief Justice's dissent) breathed new life into *Miranda*,[42] and it strengthened the fourth amendment warrant requirement.[43] Ironically, this moderate phase of the Burger Court, this tilt to the left, coincided with the retirement of Justice Douglas, the Court's most liberal member, who was replaced by Justice Stevens in 1977.

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37. *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963).

38. *See* Kamisar, *The "Police Practices" Phases of the Criminal Process and the Three Phases of the Burger Court*, in THE BURGER YEARS 143 (H. Schwartz ed. 1987).

39. *See* United States v. Ash, 413 U.S. 300 (1973); Neil v. Biggers, 409 U.S. 188 (1972); Kirby v. Illinois, 406 U.S. 682 (1972).

40. *See, e.g.*, Michigan v. Mosley, 423 U.S. 96 (1975); Michigan v. Tucker, 417 U.S. 433 (1974); United States v. Calandra, 414 U.S. 338 (1974); United States v. Robinson, 414 U.S. 218 (1973).

41. *See* Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99.

42. *See* Edwards v. Arizona, 451 U.S. 477 (1981); Tague v. Louisiana, 444 U.S. 469 (1980).

43. *See* Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977).

But the moderate Burger Court had a painfully short life span. It abruptly expired in its fourth or fifth year. Starting in 1981 a new Burger Court, perhaps the *real* Burger Court, emerged. Justice O'Connor replaced Justice Stewart, a centrist Republican, an Eisenhower appointee who had been a swing vote in many cases involving searches and police interrogation. Warren Burger served as Chief Justice for 17 years, but it was mainly in the last five years of his tenure that his Court hit its stride as an aggressively pro-law enforcement institution. In search and seizure cases particularly, it began to seem almost impossible for the prosecution to lose.[44]

More significant than the pattern of results was the way that the Burger Court succeeded in changing the discourse about police power and individual rights. I mentioned that three themes permeated the Warren Court decisions—pursuit of equality, reinforcement of adversarial procedure, and a concern with practical implementation. In the Burger Court, in fact in all three Burger Courts, these goals got short shrift. Instead, the decisions talked first and foremost about the truth-finding function of the criminal trial. The major goal of criminal procedure was no longer to remedy the disadvantages of the poor or to control abuses of official power but to accurately separate the guilty from the innocent.

There was much to be said for the renewed attention to this goal. The Warren Court gave plenty of weight to law enforcement realities, (for example, in the way that it crafted its remedies[45]) but it seldom *talked* about the law enforcement realities. As a result, its decisions too often gave credibility to politicians who charged that it was "handcuffing the police" or favoring the "criminal forces" over the "peace forces." The Burger Court was the Warren Court's mirror image. The Burger Court gave weight to individual rights more often than is usually supposed, but it talked the language of law enforcement, of redressing the balance, of accurate factfinding. It was more important to convict the guilty than to control the police, more important to know whether evidence was relevant than to know whether it was tainted by irregularities in the investigation.

44. *See, e.g.*, Illinois v. Kroll, 107 S.Ct. 1160 (1987); Dow Chemical v. United States, 476 U.S. 227 (1986); New York v. Class, 475 U.S. 106 (1986); Illinois v. LaFayette, 462 U.S. 604 (1983).

45. Note, for example, the way that the holding in United States v. Wade, 388 U.S. 218 (1967), permitted the prosecution to use an in-court identification by a witness who had previously been exposed to an unconstitutional line up, so long as the government was able to demonstrate an "independent source" for the in-court identification.

A second characteristic of the Burger years has to be called a methodology rather than a particular theme. It relates to the way the Court analyzed questions rather than to its goals. The method of analysis was instrumental; the focus was on costs and benefits.[46] The Warren Court would ask: Does the individual have a right? Does the state's practice burden that right? The Burger Court usually would ask: Will the remedy really deter? If so, to what extent? And how do the benefits compare with the costs? On some implicit level, the Warren Court undoubtedly considered the same pragmatic questions. But the questions remained below the surface. They influenced only how far to go and how fast. In the Burger years, these questions became primary.

The change in approach is very significant. The new language seems less inspiring, but is also more realistic, perhaps even more honest. In another sense it seems curiously unjudicial. In our constitutional mythology, the job of the courts, after all, is to find law, to ascertain the rights of the individual, not to balance costs and benefits like a legislature or even a construction engineer. In this sense, the Burger Court again seemed even less respectful of the judicial role than the Warren Court was, even less restrained in treading on the policy-making functions of the other branches of government. Yet the Burger Court never got a bad name for this in its criminal cases, probably because it tied its activist methods to conservative results. It used cost-benefit analysis like a legislature, but the government won.

In theory the cost-benefit analysis can be turned around. In more liberal hands it could produce more activist results. But I don't think this will happen. On the contrary, the reliance on cost-benefit, which now lies embedded in almost two decades of precedent, has a built-in tilt.

Notice the way the questions are formulated. The costs of the exclusionary rule are taken as obvious. The conviction is reversed. The criminal is assumed to be dangerous, and the reversal is assumed to set him free. In fact, these assumptions may be inaccurate, but on the surface the costs seem immediate and concrete.

What are the benefits? They involve safeguarding a zone of dignity and privacy for every citizen, controlling abuse 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.

46. *See generally* U.S. v. Crews, 445 U.S. 463 (1985); U.S. v. Ceccolini, 435 U.S. 268 (1978).

The Court has also questioned whether exclusion contributes to these values by deterring the police.[47] For some of us it seems crystal-clear that the exclusion remedy, which police plainly dislike, is not irrelevant to their behavior, that they will conduct more illegal searches if they can make use of the fruits than if they cannot. As the Warren Court said in *Mapp*, exclusion "compel[s] respect for the constitutional guaranty in the *only effectively available way*—by removing the incentive to disregard it."[48]

But the current Court calls this speculative too. It asks for *evidence* of the benefits, for *data* to support the claims. In the absence of data, the Court has repeatedly concluded that the tangible costs of excluding evidence, the assumed release of an assumed dangerous criminal, far outweigh the speculative, undocumented benefits. The Court loads the dice by its one-sided insistence on empirical proof. Then, to mix metaphors, the Court puts its thumb on the scales in calculating the subjective cost-benefit balance.

Let me give you an example to show how the analysis works in practice. The Internal Revenue Service suspected that a taxpayer named Payner was concealing income in off-shore bank accounts. Its investigators knew that a bank officer, one Wolstencraft, was coming to Miami and would have some of the relevant records in his briefcase. So the IRS arranged to have Wolstencraft meet a woman named Kennedy, who sometimes worked as an undercover agent for the IRS. And while Kennedy plied her undercover trade and diverted Wolstencraft's attention, IRS agents stole his briefcase, broke into it, and copied the documents.[49]

This was without doubt a flagrantly illegal search and a criminal offense under Florida law. No one ever denied that. But previous decisions had held that the exclusionary rule could be invoked only by the immediate victim of a search,[50] in other words only by Wolstencraft, not by the taxpayer.

The reason for this standing requirement harks back to the idea that the exclusionary rule aims to remove the incentive for police misconduct. The police cannot use the product of an illegal search against its victim, so they lose the incentive to conduct the search. The Court thought that

47. *See* U.S. v. Ceccolini, 435 U.S. 268 (1978).

48. Mapp v. Ohio, 367 U.S. 643, 656 (1961) (quoting Elkins v. U.S., 364 U.S. 206, 217 (1960) (emphasis added).

49. United States v. Payner, 447 U.S. 727 (1980).

50. *See* Rakas v. Illinois, 439 U.S. 128 (1978); Alderman v. United States, 394 U.S. 165 (1969).

suppression on behalf of third parties, non-victims, could not add significantly to the deterrent effects of the exclusionary rule.

Payner questioned whether this reasoning extended to a case like his. The IRS was interested only in him, not in Wolstencraft. Moreover, the IRS actually *encouraged* its agents to take advantage of the standing loop-hole. I suppose it is a fine thing for police to be taught the nuances of search and seizure law. But what the IRS did here was to instruct its agents that because of the standing rule, they could *purposely* conduct unconstitutional searches of one person in order to get usable evidence against another person who was the real target of the investigation.

Now you might think that this is pretty clear evidence of the value of suppression, that the failure to suppress under these circumstances will have an obvious effect on incentives to comply with the fourth amendment. But this evidence didn't satisfy the Supreme Court at all. It is not statistical. And where the potential effects seem a matter of obvious common sense to some, they remain a matter of mere speculation to many of the Justices. In the *Payner* case, the Court concluded that given "the *considerable harm* that would flow from indiscriminate application of the exclusionary rule . . . .[,] the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices."[51]

So Payner lost his case, and the Court took another bite out of the exclusionary remedy. Similarly, the Court held that illegally seized evidence can be used before grand juries,[52] in civil penalty proceedings,[53] and in deportation proceedings.[54]

Another significant inroad occurred in the cases adopting what is sometimes called the good-faith exception to the exclusionary rule.[55] I have no objection to good faith. In fact, when I read fourth amendment cases, I often feel that I would like to see more of it. But what the good-faith exception does is to focus attention solely on the police officer executing a search warrant. If *his* action is in good faith and reasonable, the evidence comes in, even if the magistrate who issued the warrant was *not* acting in good faith or was *not* reasonable. Why? Because the Court decided that the purpose of the exclusionary rule was to deter *police*, not

51. *Payner*, 447 U.S. at 735.
52. United States v. Calandra, 414 U.S. 338 (1974).
53. United States v. Janis, 428 U.S. 433 (1976).
54. INS v. Lopez-Mendoza, 468 U.S. 1032 (1984).
55. United States v. Leon, 468 U.S. 897 (1984).

magistrates.[56]

Why not magistrates too? The Court in its *Leon* decision gave two answers. First, the Court said, "[T]here exists no evidence suggesting that . . . magistrates are inclined to ignore or subvert the Fourth Amendment."[57] Here I have to drop a footnote because the Court dropped a footnote. As a footnote to its statement that there is no evidence that magistrates ignore the fourth amendment, the Court concedes that sometimes magistrates do ignore the fourth amendment, specifically by rubber stamping warrant requests that their fourth amendment role requires them to screen. The Court's footnote simply says, "We are not convinced that this is a problem of major proportions."[58]

Returning to the Court's text, we find another reason for the new "magistrate" loophole. "We discern no basis . . . for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect on the issuing . . . magistrate."[59]

This type of reasoning is capable of growth. In fact, the Court in *Leon* also speaks of the broader effects of exclusion, including the effects on police. The Court says: "No empirical researcher . . . has yet been able to establish with any *assurance* whether the rule has a deterrent effect."[60] The accumulation of loopholes, together with the instrumental methodology, the "loaded dice," and the "thumb on the scales," all suggest that the Rehnquist Court may choose to focus its attention not only on a simplification or contraction of search and seizure requirements but also on complete abrogation of the exclusion remedy.

Let me spell out two alternatives to the Burger-Rehnquist approach to the exclusionary rule. The first is to look a little more carefully at the costs and benefits. Suppression is bound to affect incentives, and incentives affect behavior. We cannot prove that criminal prosecutions deter bribery, but we know there would be a lot more bribery if it were never punished at all. In the same fashion, the emphasis with respect to the exclusionary rule should not be on measuring precisely what the exclusionary rule deters. Rather we have to ask what the *absence* of an exclusionary rule would encourage. I submit that sensible people know the answer to this question without awaiting sociological studies.

56. *Id.* at 916.
57. *Id.*
58. *Id.* n.14.
59. *Id.*
60. *Id.* at 918 (emphasis added).

What about the costs? Contrary to appearances and contrary to the Supreme Court's repeated rhetoric on the subject, the exclusionary rule inflicts no costs on society at all. There are costs to be sure, if a dangerous criminal goes unconvicted. But these are the costs of the fourth amendment itself, not costs of the exclusion remedy.

The fourth amendment denies government the power to search on less than probable cause. When government complies with this requirement, it sometimes fails to catch the guilty or gets insufficient evidence and loses convictions. But all this the Framers intended. We can escape these costs only by repealing the fourth amendment.

If we keep the fourth amendment and comply with it, as I think we should, then there will be costs, but we cannot blame them on the exclusionary rule.

Now let me mention a second and even more important alternative to the Burger-Rehnquist cost-benefit approach. This is an alternative that goes back not only to *Mapp*, but also to the Supreme Court's 1914 decision in the *Weeks* case.[61] *Weeks* was the decision that first applied the exclusionary rule in federal trials. Notice that the recent assault on the exclusionary rule is not just an attack on Warren Court precedent; it is an attack on the exclusion doctrine applied consistently in federal courts for over seventy years. In the *Weeks* case the Court did not talk about balancing costs against benefits. It reasoned that if a court cannot authorize an unreasonable search before the event (and the fourth amendment says clearly that it cannot), then the court cannot affirm or sanction such a search after the event by using its fruits. The Court said: "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles . . . embodi[ed] in the fundamental law of the land."[62]

This is the way of thinking that has grounded the exclusionary rule for nearly all of its life.[63] This is the way of thinking that permeates Justice Brandeis' famous 1928 opinion in the *Olmstead* case.[64] Justice Brandeis wrote:

> When the Government [sought] to avail itself of the fruits of these [illegal] acts in order to accomplish its own ends, it assumed moral responsibility for

61. Weeks v. United States, 232 U.S. 383 (1914).

62. *Id.* at 393.

63. *See* Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than on an "Empirical Proposition?"*, 16 CREIGHTON L. REV. 565 (1983).

64. Olmstead v. United States, 277 U.S. 438 (1928).

> the officers' crimes . . . [By using the evidence] the Government itself would become a lawbreaker. . . . If the Government becomes a lawbreaker, it breeds contempt for law. . . . To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution.[65]

This is the way of thinking that preceded *Mapp* and was the original basis for *Mapp*, what the Warren Court called "the imperative of judicial integrity."[66] In the Burger years the judicial integrity notion has been pushed far into the background. One clue about where the Rehnquist Court may go with this issue comes from a recent speech by one of our court of appeals judges whose name sometimes turns up in the news. Here is what Judge Robert Bork said about the exclusionary rule back in 1986:

> I have never been convinced by that argument [that courts shouldn't soil their hands by allowing in illegally seized evidence] because it seems the conscience of the court ought to be at least equally shaken by the idea of turning a criminal loose upon society. The only good argument really rests on the deterrence rationale, and it's time we examine that with *great care* to see how much deterrence we are getting and at what cost.[67]

What is important here is not only the rejection of the judicial integrity principle that goes back to Justice Brandeis and before. What is significant is the way the cost-benefit issue is formulated. Judge Bork does not state his conclusion, but I think you can catch the drift.

Now there are many more issues on the Court's agenda. Most of them will seem awfully academic if the exclusionary rule is overturned. But let me mention briefly three areas of importance. First, what kinds of privacy interests does the fourth amendment protect in the first place? As you might expect, the scope of the fourth amendment has been shrinking. Second, what protection does the fourth amendment guarantee in the growing practice of administrative searches, when admittedly private areas are invaded, not by police but by government investigators wearing different hats, in activities arguably collateral to traditional law enforcement? Third, what is the future of *Miranda* protections in police interrogation?

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65. *Olmstead*, 277 U.S. at 483-85.

66. Mapp v. Ohio, 367 U.S. 643, 649 (1961).

67. Speech to Free Congress Foundation (1986), *quoted in* Miller, Bork and the Supreme Court, THE BRIEF Summer 1987.

The first question is, when do fourth amendment protections come into play at all? The basic test has been whether the government action defeats a reasonable expectation of privacy.[68] The reasonable expectation concept has never been easy to apply, but it took on a major new twist in two Burger Court decisions of the late 1970s. In the first, *United States v. Miller*,[69] the government served a subpoena requiring a bank to produce microfilm records of its depositors' checks and financial records. The defendant, one of the depositors, argued that this constituted a search requiring probable cause and a warrant. The Court held that there was no reasonable expectation of privacy in the bank records; therefore no fourth amendment standards had to be met. The Court reasoned that the records had been "voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business." Therefore, the Court concluded, "The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the government."[70]

In the second case, *Smith v. Maryland*,[71] the police used a "pen register," which is a device that records all numbers dialed from the defendant's home telephone. The device does not overhear conversations, but permits police to identify the people who are called. The defendant argued that installation of such a device should meet fourth amendment requirements.

Again, the Court held that the defendant had no reasonable expectation of privacy in the phone numbers he dialed. Its reasoning was analogous to that in the *Miller* case: "When [the defendant] used his phone, [he] voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business. In doing so [he] assumed the risk that the company would reveal to police the numbers he dialed."[72]

What emerges here is an analysis that turns on identifying assumptions of risk. If the defendant voluntarily turns information over to a third party, even for a limited purpose, he is held to assume the risk that the third party will turn that information over to the government. He assumes that risk even if the third party conveys the information in viola-

68. *See* Katz v. United States, 389 U.S. 347 (1967).
69. 425 U.S. 435 (1976).
70. *Id.* at 442-43.
71. 442 U.S. 735 (1979).
72. *Id.* at 744.

tion of a commitment to the defendant. And, notice that the third parties in these cases are not taking the initiative. They are not running to the government with suspicious information. The bank in *Miller* was subpoenaed. Thus, the defendant not only assumes the risk that the third party will betray a confidence. He also assumes the risk that a loyal confidant will be *forced* to cooperate in revealing extensive personal details for the government to scrutinize.

This kind of analysis does great violence to the expectations of privacy that most of us share. The only factor that makes it at all plausible is the Court's view that the defendant chose to assume these risks. But what makes the assumption of risk voluntary? The bank depositor in the *Miller* case had a choice. He could have decided not to have a bank account. He could have decided to wait in line and pay his utility bills in cash every month. The telephone user in the *Smith* case had a comparable choice. He could refrain from using his telephone. But if you want to participate in modern American life at all, you *have to* assume these risks.

The assumption of risk approach simply cannot be used to decide cases. The question always has to be, why *should you* have to assume a particular kind of risk. That has to depend on the nature of the interest invaded, the means that the government uses to invade it, and on the defendant's ability to protect against the intrusion. Certainly, you can have a society in which people who want to preserve a private domain must avoid the telephone, handle all remotely personal affairs by cash, and never confide in any associate or employee. But then, the question is whether you aren't coming very close to the kind of suspicion-ridden, claustrophobic society that the framers of the fourth amendment abhored.

The problem surfaces again in connection with aerial surveillance. This is destined to be one of the hot fourth amendment issues for the rest of the 1990s. It combines fancy technology, the war on drugs, and several other topical concerns.

In one case, decided just a year ago,[73] police in Santa Clara, California hired a private plane, flew over the defendant's backyard at an altitude of only 1,000 feet, and observed marijuana. The yard was protected by two fences, a six-foot outer fence and a ten-foot inner fence. It certainly looks as if the defendant had an expectation of privacy. Commenting on a

73. California v Ciraolo, 476 U.S. 207 (1986).

related aerial surveillance case, Professor Wayne LaFave noted that the property owner had tried to prevent surveillance by every means short of anti-aircraft fire.[74] But the Court held that the expectations were not legitimate. Notice how the assumption-of-risk notion resurfaces. The defendant did not exactly put his plants in a living room window. With two high fences, he had tried pretty hard to keep out the intruding eye. But for the Court, the decisive point was that the fence did not totally preclude observation by the flying public.[75] Therefore, the defendant "chose" to assume the risk. Justice Powell in his dissent put his finger on the major problem: "The risk that a passenger on such a plane might observe private activities, and might connect those activities with particular people, is simple too trivial to protect against."[76]

The crucial consideration should be whether the defendant had any alternatives. How *could* you protect against this trivial sort of risk, even if you wanted to? You would have to build an opaque dome over your yard. In other words, the alternative is not to have an outdoor yard at all.

Of course, there is one other alternative. The homeowner does not have to grow marijuana. This fact seems to play a large part in the Court's instinctive sense that his expectations were not legitimate. But notice that you cannot protect your privacy by choosing to grow only roses or crabgrass. By saying that this investigation is not a fourth amendment search at all, the Court makes surveillance permissible whether or not the police have reason to think that something illegal is happening. Most of those engaged in serious crime will find ways to keep their activities under cover. Meanwhile the law-abiding public will be exposed to surveillance not justified by any concrete suspicions.

A similar problem arises, and will be considered by the Supreme Court this Term, in connection with searching through discarded trash.[77] At this point, I have descended from the heights of aerial surveillance to the depths of garbage, from the sublime to the ridiculous. But you can learn a lot about people from careful analysis of their trash. Is this a risk that we all have to assume? Again, a real crook is not likely to toss his smoking gun into his own trash barrel. And he is subject to search on prob-

74. La Fave, *The Forgotten Motto of* Obsta Principiis *in Fourth Amendment Jurisprudence*, 28 ARIZ. L. REV. 291, 304 (1986).

75. *Ciraolo*, 476 U.S. at 211-12.

76. *Id.* at 223-24.

77. California v. Greenwood, 108 S. Ct. 1625 (1988).

able cause anyway. Why should the rest of us have to put up with this sort of an intrusion in the *absence* of probable cause?[78]

A second issue that is likely to be in the forefront during the 80s and 90s is the question of the administrative search. The Court recognizes that inspecting an employee's workspace,[79] and of course examining his blood or urine,[80] does invade a protected fourth amendment interest. But the Court has begun to say that when inspections are carried out in connection with regulatory programs and are not part of a traditional crime detection effort, the fourth amendment requirement of probable cause sometimes evaporates.[81] AIDS testing, drug testing, and other regulatory inspections are likely to be attempted and expanded. Public pressure to abandon fourth amendment principles is likely to grow.

The fourth amendment tradition has always left room for reasonable public-interest inspections.[82] But a major problem here is whether the state of the technological art has been oversold.

We often hear that there is a simple, painless, non-intrusive test that does no more than flag the presence of dangerous drugs. A requirement that air traffic controllers, pilots and those who run our high-speed trains get checked out in this way seems a modest price to pay for public safety. Certainly, when airline hijacking became a major concern and airport metal detectors became commonplace, few of us worried about the resulting invasion of our privacy.

But the drug-testing proposals are different. They have been extended to customs inspectors, police officers, and school teachers. They may one day reach all public employees. What public health or safety concerns justify that sort of a dragnet?

Moreover, it turns out that the tests are anything but simple and non-intrusive. Apparently the presence of *dangerous* drugs can sometimes be masked by commonplace drugs such as antibiotics. So more sophisticated tests are necessary. If they are expensive, then some employees will

78. As expected, the Supreme Court's decision, rendered after the delivery of this lecture, ignored the kinds of concerns expressed above. Adhering to a formalistic assumption-of-the-risk analysis, the Court held that examination of discarded trash did not constitute a "search" and thus was not subject to any Fourth Amendment requirement of reasonableness. *See* California v. Greenwood, 108 S.Ct. 1625 (1988).

79. O'Connor v. Ortega, 107 S. Ct. 1492 (1987).

80. Schmerber v. California, 384 U.S. 757 (1966).

81. New York v. Burger, 107 S. Ct. 2636 (1987); Donovan v. Dewey, 452 U.S. 594 (1981).

82. *See* Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967).

be excused while others are singled out. And with more sophisticated tests, wider patterns of medication usage will come to light. Medical and psychological conditions requiring treatment will be easily inferable.

There is also the problem that our free enterprise system has quickly created a new growth industry, and entrepreneurs are now offering vials of pure urine to those who worry that their own may not pass the test. Substitution has to be prevented. So your supervisor may have to watch you closely while you give your urine sample. That's not the same as walking through an airport metal detector.

AIDS testing raises other problems. The accuracy of the tests is a very relative matter. The tests inevitably produce some false positives; that is, people test positive for AIDS but the test result is false—they are not carriers at all. When a high-risk population, such as intravenous drug users, is tested, the false positive rate may be tolerable because the test will identify numerous true positives. But in wider test populations, such as Armed Forces personnel and prison inmates, the incidence of AIDS is very low. It can be about as low as the false-positive rate, which is dictated by the technical accuracy of the tests used. When this happens, a test may identify several hundreds AIDS cases but only half of these will be true positives. The rest will be falsely branded as carriers of AIDS.

So what do you do with the information? And even when the person is a confirmed AIDS carrier, what should you be able to do with the information? Public disclosure, with its inevitable harm to the AIDS victim, needs to be carefully controlled.

The fourth amendment does not disable us from dealing with the serious drug and AIDS problems. But it does require that courts resist hasty overreactions and take a hard look at the need for intrusion and at the means employed.

The last topic I want to touch on concerns the fate of *Miranda*'s restrictions on police interrogation. Throughout the Burger years, in a process comparable to the one it followed in the exclusionary rule cases, the Court chipped away at Miranda's rationale, and superimposed loophole after loophole.[83] The Justice Department now argues publicly that *Miranda* should be completely overruled.

The problem with this view is twofold. First of all, *Miranda* as it

83. *See, e.g.*, New York v. Quarles, 467 U.S. 649 (1984); Oregon v. Elstad, 470 U.S. 298 (1985); Fare v. Michael C., 442 U.S. 707 (1979); Michigan v. Mosley, 423 U.S. 96 (1975); Michigan v. Tucker, 417 U.S. 433 (1974).

stands has had little or no demonstrably negative impact on law enforcement. Confession rates have dropped only slightly, and prosecutors have often found that they can get convictions even without confessions. Conviction rates have not dropped perceptibly at all.[84]

The second difficulty is not a matter of empirical effects, but one of principle. The fifth amendment says, in no uncertain terms, that no person shall be compelled to incriminate himself. How then can we legitimately attempt to hide from the criminal suspect the fact that he has a right to remain silent? How can we subject him to repeated questioning in a threatening custodial situation, where he has no opportunity to consult with counsel and no opportunity to walk away from his interrogators? How can we pretend that such practices do not compel him to speak? In the absence of the famous *Miranda* warnings, it is only natural for a suspect facing custodial interrogation to conclude that he is *obliged* to talk. *Miranda* does not go nearly far enough in protecting the suspect from compulsion, but it is the least we can do to insure against statements obtained only because the suspect felt he had no choice but to speak.

I want to close, in accord with academic tradition, by posing a short quiz. It is based on a situation that presents very starkly many of these problems relating to the pursuit of truth in law enforcement and the protection of human rights in complex modern societies. It is a real case, but it arises in a country that I will leave nameless for the moment.

Two law enforcement officials on patrol were shot and killed. An individual mentioned as a possible suspect was picked up by the investigators at 5:00 a.m. By 6:00 p.m. he was ready to give a statement which was formally recorded by a court stenographer. A short time later, he was taken to a hospital. Witnesses there observed roughly fifteen distinct injuries to his head, torso, and leg. Several cuts on his head required stitches, and his right eye had been blackened. There was also bleeding on the surface of that eye. He had long linear burns on his chest, shoulder, and chin. On his right thigh was a second degree burn, six inches long and one-and-a-half inches wide.

When a doctor at the hospital prepared to treat the defendant's injuries, an officer accompanying the suspect drew his pistol. The doctor was unwilling to treat the suspect while a weapon was pointing directly at him, so he asked the officer to put the gun away. The officer refused, and

84. *See* Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987).

the doctor then left the room. Two government agents spoke privately to the defendant. When they emerged, the defendant refused further treatment and signed a form stating that he was refusing treatment "against medical advice."

At trial, when the prosecution attempted to make use of the defendant's confession, the defendant testified that from the moment of his arrest, he was punched, kicked, smothered with a plastic bag, electrically shocked, and later chained to a hot radiator with his face, chest, and legs touching the radiator. Two other witnesses, who had been in government custody that day, testified that they heard the suspect being beaten and calling for help. The government admitted that the defendant had shown no signs of injury at the time he was taken into custody. But all his interrogators denied that he had been threatened or beaten in any way. The judge admitted the defendant's confession. He was convicted of murder and sentenced to death.

Now, in a smaller group, I would at this point go around the room and ask each of you to guess where this horrid story took place. Some might say Iran. It would be interesting to see whether there were more votes for Chile or for Nicaragua. Unfortunately, the facts I just read occurred only an hour's flight from here in my own hometown, the city of Chicago. Of course you also need to tell me the year or at least the decade that we are talking about. The 1920's would be a reasonable guess. But these facts came from an opinion of the Illinois Supreme Court announced on April 2, 1987.[85] The events themselves go a little bit further back in time, to February 1982.

I am happy to be able to report that the Illinois Supreme Court reversed the conviction, voiding a death sentence for a man who we now know might very well be wholly innocent.

I do not by any means wish to suggest that this sort of behavior is commonplace among Chicago police officers or police officers elsewhere. But I draw several lessons from this case. First, conscientious police officers have to solve brutal crimes, and they are human beings.' There is no reason to think that they never lose their self-control or that they need fewer restraints than any other public officials who exercise power. The trial judges who find the facts are not perfect either.

Second, we know that power corrupts. A vigorous system of checks and balances is in the end the only guarantee of a free society. Third, we

85. People v. Wilson, 116 Ill.2d 29, 506 N.E.2d 571 (1987).

are miles away, in both the *Miranda* doctrine and in the search and seizure cases, from having an effective system to deter police abuse and to provide realistic remedies when abuse occurs.

Fourth, what is the responsibility of courts confronted with this sort of case? It is simply tragic that all of the Supreme Court's recent energies have been directed to the search for new ways to escape the thrust of the Warren Court innovations. We need to be moving in precisely the opposite direction.

Finally, my last question in this quiz is simply whether the Illinois Supreme Court decision suppressing the confession was correct. I assume that the non-lawyers in the audience will have no trouble with this issue and will respond to it in human terms. But the lawyers and law students can see that the question is tricky. The confession is inadmissible only if the defendant was compelled to incriminate himself. Even after the defendant established horrendous abuses beyond any shadow of a doubt, there remained the question whether it was the abuses that caused him to confess. The State of Illinois admitted that the injuries had occurred in police custody. But it argued that the injuries could have been inflicted *after* the confession rather than before. The trial judge, who heard all the evidence, believed the testimony of the interrogators who swore that they never mistreated him. So on the crucial question whether all these horrors involve any violation of the defendant's self-incrimination rights, the trier of fact resolved all the credibility questions against him.

Was it really proper for the Illinois Supreme Court to reverse? On what basis can it disregard the factual findings of the judge who heard the evidence firsthand? That is the kind of dry logic that some justices of the Burger Court and some prominent judges in our courts of appeals have applied all too often. As a purely technical matter, it is not necessarily wrong. But as a matter of human intuition and simple common sense, of course, it is terribly wrong.

The future of individual liberties in this country depends on reinvigorating the system of vigorous checks and balances built into our Bill of Rights. And it also depends crucially on the willingness of judges to keep their eyes open to the sordid realities that lie behind the abstractions of legal doctrine.