

# **“Be Careful What You Ask For”: The 2000 Presidential Election, the U.S. Supreme Court, and the Law of Criminal Procedure†**

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Remember also that the Supreme Court is at stake because the next president, the one you pick on Tuesday, will pick a majority on the court that will interpret our Constitution for the next 30 to 40 years. They say that three or four, possibly even five, justices of the Supreme Court will be named by the president elected just two days from now. My opponent has said that if he has that responsibility, he will use as his models Clarence Thomas and Antonin Scalia. I prefer Thurgood Marshall and Justice Brennan.

Think of all of the issues that are now pending, not only in the Supreme Court, but in front of all of the other federal courts, many of which will have judges appointed by the next president. Think of all the Supreme Court decisions that are now decided by a vote of five to four involving civil rights, women's rights, equal rights, labor law, antitrust law. You could go on—federalism. These decisions that will play out during the lifetimes of the children here, when they have children, will be determined by what you decide to do on Tuesday. I believe that it's extremely important that we adopt the right priorities.<sup>1</sup>

Two days after making this speech in Philadelphia, Vice President Al Gore lost his race for the presidency by a handful of votes in the State of Florida. He won the national popular vote by more than 500,000 votes, and only after a series of electoral “irregularities” in Florida—coupled with a peculiar adverse decision by the U.S. Supreme Court that finally terminated a pitched, five-week legal battle over whether to recount the Florida ballots manually—was Bush declared the winner. Many Americans will always believe that Al Gore, and not George W. Bush, was the true winner of the 2000 presidential election.

Throughout the campaign one consistent theme of both the Gore and Bush camps was the importance of the 2000 election for the future of the U.S. Supreme Court. Both sides pointed out that several of the Justices are now more than seventy years old, and that the likelihood of one or more Court appointments during the next president's term of office seems high.

But on what basis did the two candidates say that they would make such appointments, if elected? On almost every occasion when the Court was mentioned by the candidates—most prominently during the presidential debates—the specific topic of discussion was a woman's constitutional right to choose whether to have an abortion,<sup>2</sup> currently protected by the Court's 1973 decision in *Roe v. Wade*.<sup>3</sup> Gore was

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1. Vice President Al Gore, Vice President Al Gore Delivers Remarks at a Campaign Rally in Philadelphia, Campaign 2000 (Nov. 5, 2000) (transcript available at FDCH Political Transcripts, eMediaMillWorks, Inc.).

2. See, e.g., *Talk of the Nation*, (National Public Radio (NPR) Broadcast, Nov. 1, 2000),

even described as having a “litmus test” under which “only justices who support abortion rights” would be considered for appointment to the Court.<sup>4</sup>

Speaking personally, we agree strongly with the notion—promoted by Gore—that *Roe v. Wade* should not be overturned. But we disagree with the idea that abortion rights should be the only, or even the overriding, consideration in deciding who will serve on the U.S. Supreme Court. As Gore himself noted in his Philadelphia speech, the Court deals with myriad issues of vital importance to personal, local, national, and global interests of all kinds. Who is to say that a prospective Justice with the “correct view” on abortion rights (whatever that view may be) will also have the “correct view” on affirmative action, school prayer, gun control, and the death penalty? Or on federalism, inverse condemnation, the scope of the RICO statute, and the enforcement of antitrust law? Or on the application of the Equal Protection Clause to manual election recounts?<sup>5</sup>

We claim no expertise on most of these subjects. But we do claim to know something about one particular area of law that has been greatly affected by the Court over the past four decades—the law of criminal procedure.

We believe that had “President Gore” chosen enough Justices who truly did advance the views of Justices Brennan and Marshall in criminal procedure we would not like the system that resulted. To put it another way, Justices Brennan’s and Marshall’s dire predictions about the state of society under the regime of the Court majority have not been borne out by events, and sound unduly alarmist to the modern lawyer.

In this Article we will examine their criticisms and contemplate what the state of criminal procedure law would be had the great liberal dissenters prevailed. Our method for describing and assessing the likely effects on criminal procedure law of such a “liberal” shift in the Court’s membership will be simple and direct. We will base our analysis on the expressed views of Justices Brennan and Marshall

LEXIS, News Library, NPR File [hereinafter *Talk of the Nation*].

In my view, the Constitution ought to be interpreted as a document that grows with our country and our history. And I believe, for example, that there is a right of privacy in the Fourth Amendment. And when the phrase ‘strict constructionist’ is used and when the names of Scalia and Thomas are used as benchmarks for who would be appointed, those are code words, and nobody should mistake this, for saying that the governor would appoint people who would overturn *Roe v. Wade*.

*Id.* at \*1-2 (statement of Vice President Al Gore).

3. 410 U.S. 113 (1973).

4. David G. Savage, *More Than Just the Oval Office at Stake; Supreme Court: The Next President’s Appointments Could Shape the Outcome of Decisions for Decades*, L.A. TIMES, Oct. 2, 2000, at A1.

5. See Savage, *supra* note 4, at A1 (“The contrast [between Bush and Gore] goes far beyond abortion, however. On issues ranging from the environment and gun control to the death penalty, affirmative action, religion and gay rights, the Republicans and Democrats pledge to appoint judges who would push the law in quite different directions.”); *Talk of the Nation*, *supra* note 2, at \*2 (statement of Melinda Penkava) (“Abortion is mentioned most often as hanging in the balance, but there is much more in play with the next Supreme Court nominations.”).

themselves, in dozens of actual Court cases decided between 1961<sup>6</sup> and 1991.<sup>7</sup> In short, our method for predicting the likely outcome of a future Court controlled by Justices similar to Justices Brennan and Marshall will be to identify what the criminal procedure landscape would have looked like had Justices Brennan and Marshall themselves controlled the Court. We believe that even Gore himself would have been troubled by the criminal procedure jurisprudence of such a Brennan/Marshall Court. In short, in the area of criminal procedure, the maxim "Be careful what you ask for; You may get it," might be applicable.<sup>8</sup>

We recognize the limitations of this sort of analysis. It is possible that Justices Brennan and Marshall,<sup>9</sup> if a majority of the Court had shared their views (or in order to attract a majority), might have taken more moderate positions in making law than they expressed in dissent. In the initial stages of this Article, however, we will take Justices Brennan and Marshall at their word, for that can be ascertained with some certainty from their opinions, votes and other writings, and we will compare the criminal procedure system that they envisioned with the one we now have. We believe that this comparison will help to reveal just how far from the views of mainstream America these two great "liberal" justices were, with respect to most important criminal justice issues.

The bulk of this Article will evaluate the liberal position on police investigative procedures, as expressed by Justices Brennan and Marshall, including a detailed discussion of the Fourth Amendment and a slightly less detailed consideration of Fifth and Sixth Amendment law. To assess the likely doctrinal output of a Brennan/Marshall Court, it will be necessary to compare the views of Justices Brennan and Marshall with those of the Court majority against which they were so often pitted. In doing so, however, we propose to turn the tables on the typical legal scholarship in the area of criminal procedure for the past thirty years. Unlike most articles, which have focused on the implications and effects of the majority's decisions and have used the dissenting opinions as weapons with which to attack the majority, we will focus instead on what would have happened had the views of the dissenters prevailed. Towards the end of the Article, after reviewing the case law, we will try to summarize the law of criminal procedure under the Brennan/Marshall Court. Finally, we will discuss the possibility that, had Justices Brennan and Marshall actually enjoyed majority support on the Court, their views might have been somewhat more moderate than their dissenting opinions would suggest.

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6. The "criminal procedure revolution" began with *Mapp v. Ohio*, 367 U.S. 643 (1961).

7. Justice Marshall joined Justice Brennan in retirement in 1991.

8. We recognize of course that, as president, Gore would never have gotten such liberal Justices approved by a Republican Senate, but that does not render uninteresting the question of what the criminal procedure doctrine of a liberal Supreme Court would be.

9. Since Justices Brennan and Marshall voted together on so many occasions, they will be considered together in this Article, though the rare cases in which they diverged will be noted.

## I. INTRODUCTION

In a sense, our task is to complete—in hypothetical terms—the unfinished story of the Warren Court's "revolution" in criminal procedure law. It is true that no "counterrevolution" ever really occurred, in that the main Warren Court initiatives in criminal procedure remain in place, including extension of the exclusionary rule to the states, a fairly stringent warrant requirement for searches of dwellings and other structures,<sup>10</sup> and the *Miranda* warning requirement.<sup>11</sup> But the fact is that, in the nine years that the Warren Court was able to expound Fourth Amendment law after it opened up the area by extending the exclusionary rule to the states in *Mapp v. Ohio* in 1961,<sup>12</sup> it simply did not have the opportunity to address very many issues.

And, shortly after Chief Justice Warren's retirement in 1970, the criminal procedure "revolution" clearly came to an end. The Court has had a Republican majority ever since Justice Powell replaced Justice Black in 1972 and has not had more than three Democratic members since 1975.<sup>13</sup> This statistic is tempered somewhat by the fact that over the same years, two of the Republican appointees, Justices Blackmun and Stevens, frequently sided with defendants in criminal cases. But, as will be seen, while they may have softened the conservative thrust of some criminal procedure opinions, recent Republican dominance of the Court has had a

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10. In his chapter on criminal procedure in the book, *The Burger Court: The Counter-revolution That Wasn't*, Professor Yale Kamisar observes that while "the Burger Court [has] delivered some heavy blows to the Fourth Amendment" it did not "'retreat' . . . on all search and seizure fronts. Indeed, in some [areas] . . . the present Court has even expanded or invigorated Fourth Amendment protections." Yale Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Is It Really So Prosecution-Oriented?)* and *Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T* 62, 78 (Vincent Blasi ed., 1983) (citing *Payton v. New York*, 445 U.S. 573 (1980), *Ybarra v. Illinois*, 444 U.S. 85 (1979), and *Delaware v. Prouse*, 440 U.S. 648 (1979)).

11. Other significant rights extended by the Warren Court to criminal defendants that the Burger Court maintained, but which are beyond the scope of this Article, include the right to appointed counsel for indigent defendants, both at trial and on first appeal, (expanded to include misdemeanors by the Republican Court); the right to a speedy trial; the right to confront witnesses; and the right to receive material exculpatory information from the prosecutor. Indeed, the only right extended by the Warren Court that the Republican Court has actually severely undercut, as opposed to refusing to extend or limiting, is the right to counsel at lineups, limiting it to rare post-indictment lineups. See Kamisar, *supra* note 10, at 68.

12. Although the Republicans did not take full control of the Court until 1972, the Warren Court effectively ended two years earlier, in 1970, when Justice Blackmun—a conservative at the time—filled the vacancy created by Justice Fortas's resignation. Justice Blackmun thus joined his "Minnesota twin," Chief Justice Burger, who in 1969 had replaced Chief Justice Warren.

13. It didn't take long for the Republican Court to make its mark in criminal procedure. In 1971, a seven-Justice Court had voted, 4-3, to extend the holding of *United States v. Wade*, 388 U.S. 218 (1967), which required counsel at a post-indictment lineup, to a pre-indictment lineup. Before the opinion was issued, however, Justices Powell and Rehnquist joined the Court. The case was reargued and decided 5-4 *against* the defendant with the two new Justices swinging the Court to the State's position in *Kirby v. Illinois*, 406 U.S. 682 (1972). See BERNARD SCHWARTZ, *THE UNPUBLISHED OPINIONS OF THE BURGER COURT* 63-64 (1988).

tremendous impact on the law of criminal procedure.

Over the past thirty years, the Republican Court has fleshed out criminal procedure law in a way that has, rather consistently, advanced the interests of law enforcement over the interests of criminal defendants, frequently going against the spirit, if not the letter, of the Warren Court's decisions. With equal consistency, the Republican majority's vision was opposed by Justices Brennan and Marshall (until their retirements). Thus, while the Republican Court has not actually overruled much Warren Court precedent, the structure of criminal procedure today is as different from the Brennan/Marshall vision as the architecture (and politics) of the Capitol was from that of the White House during the Clinton administration.

While it is useful to recognize that the Republicans have dominated the Court since 1972, it also must be noted that the most conservative of the Republicans have never held a majority. Consequently, most of the Court's actual decisions have necessarily represented the views of the swing voters, who have ranged in ideology from moderately conservative to rather liberal, depending on the issue. Recent decisions in criminal procedure, such as the recent reaffirmation of *Miranda* in *Dickerson v. United States*,<sup>14</sup> have made it clear that the current Court is much more moderate than many expected.

Consider the seventeen Justices who have served on the Republican Court from 1972 to the present, with respect to their views on criminal procedure issues. Of these, four may be deemed consistent conservatives: Chief Justices Burger and Rehnquist, and Justices Scalia and Thomas. Four others may be deemed consistent liberals: Justices Douglas, Brennan, Marshall, and Stevens. The other nine are the swing voters: Justices Stewart, White, Blackmun, Powell, O'Connor, Kennedy, Souter, Ginsburg, and Breyer. While liberals might complain that Justices White and O'Connor ought to be included in the conservative camp, conservatives might equally well gripe that Justices Blackmun, Ginsburg, and Breyer should be deemed liberals.<sup>15</sup>

In any case, it is not necessary to decide how each Justice is to be characterized. As the squawks from dissenting Justices on the left and the right show, neither wing has been satisfied with many of the results. Still, it is certainly true that Justices Brennan and Marshall found themselves in dissent much more often than did Chief Justices Burger and Rehnquist, and thus it is fair to characterize the post-Warren Court as a "Republican" Court that advanced a moderate Republican agenda. Indeed, this label is closer to the mark than the more frequently used sobriquets "Rehnquist Court" and "Burger Court," which suggest a domination by the Chief Justices that, unlike during the Warren Court era, has never actually been the case.<sup>16</sup> In our view,

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14. 120 S.Ct. 2326 (2000).

15. Professor Sunstein's characterization of the dominant group on the current Court as "minimalists"—Justices who don't have a particular political agenda and simply try to decide each case on its merits—is perhaps a better characterization of today's majority. See generally CASS SUNSTEIN, *ONE CASE AT A TIME* (1999).

16. Justice Rehnquist, for example, urged the overruling of *Mapp v. Ohio*, 367 U.S. 643 (1961). See *New York v. Belton*, 453 U.S. 454 (1981) (Rehnquist, J., concurring). Chief Justice (then Judge) Burger rose to national prominence as an opponent of *Miranda v. Arizona*, 384 U.S. 436 (1966). CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* 30 (1993). Chief Justice Burger further urged that the exclusionary remedy against police misconduct be replaced by a tort remedy. See *Bivens v. Six Unknown Named Agents of the*

however, a Court that followed the Brennan/Marshall line on criminal procedure would have been considered by most Americans to be "very liberal" rather than "moderate" or even "moderately liberal." Now let us get down to the cases.

## II. THE FOURTH AMENDMENT

The Republicans may be seen, in retrospect, as having conducted a six-pronged offensive against the Warren Court's Fourth Amendment castle. *First*, the Court sought to limit the definition of a Fourth Amendment "search" so that many police investigative activities do not fall within the purview of the Amendment at all. *Second*, the Court has made it easier for police to avoid the strictures of the Fourth Amendment by obtaining consents. *Third*, the Court has expanded the scope of the less-than-probable-cause "stop and frisk." *Fourth*, the Court has taken a narrow view of what kinds of searches require a search warrant. That is, the exceptions to the so-called search warrant requirement have been broadened so as to virtually abolish it for outdoor searches. *Fifth*, when search warrants are required, the Court has made them easier to obtain and the corresponding searches more likely to be upheld. *Sixth*, and finally, the Court has limited the scope of the exclusionary rule, allowing material into evidence in various ways, despite the fact that it was illegally obtained. Justices Brennan and Marshall fought the majority every step of the way, and in two respects—maintaining a strong search warrant requirement for buildings and limiting the authority of police to stop and frisk in various circumstances—have achieved modest success. Still, the law is in a very different place from where it would have been had Justices Brennan and Marshall had their way.

### A. The Definition of "Search"

Since the Fourth Amendment protects only against unreasonable "searches and seizures,"<sup>17</sup> it follows that if a given activity is not a search or seizure, it is not covered by the Amendment. This area particularly demonstrates the power of the Republican majority over the last twenty-eight years to redefine the very limited Warren Court precedent in ways significantly different from the direction the Brennan/Marshall Court would likely have gone.

Prior to 1967, the term "search" implied a physical intrusion into "a constitutionally protected area."<sup>18</sup> However, in that year, the Warren Court decided *Katz v. United*

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Fed. Bureau of Narcotics, 403 U.S. 388, 422 (1971) (Burger, C.J., dissenting). As Professor Jerold Israel observed in 1977, "neither the record of the Court nor the tenor of its majority opinions, taken as a whole, really supports a broad movement towards restricting the protections afforded the accused." Jerold H. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1425 (1977); see also Kamisar, *supra* note 10. For a somewhat more pessimistic assessment of recent developments, see Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465 (1999).

17. U.S. CONST. amend. IV.

18. *Silverman v. United States*, 365 U.S. 505, 512 (1961) (holding that the insertion of a "spike mike" in the wall of the suspect's hotel room was a search); accord *Olmstead v. United States*, 277 U.S. 438 (1928).

*States*,<sup>19</sup> in which it struck down the warrantless bugging of a phone booth by government agents, despite the fact that the listening device was attached only to the outside of a phone booth. Declaring somewhat opaquely that "the Fourth Amendment protects people, not places," the Court defined a search as not requiring a physical penetration into a suspect's property, but including all intrusions into areas that the suspect "seeks to preserve as private."<sup>20</sup> This sounded as if the defendant's subjective expectations of privacy would govern the scope of permissible police searches. But such a standard would have been almost impossible for the police to apply since they often would have no way of knowing what the defendant sought to preserve as private in a given case, and the defendant's expectations should not, in any case, be able to control his rights against those of society.

Thus, in a series of cases, the Court, without disagreement on this particular point from Justice Brennan, has read Justice Harlan's concurring opinion in *Katz* as if it were the holding of the case: "there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable,'"<sup>21</sup> with most of the emphasis on the latter point.<sup>22</sup>

As discussed below, in post-*Katz* cases, the Republican Court has consistently declared that society, as represented by the Court itself, did not consider the defendant's expectations of privacy to be reasonable, and hence that no search occurred. The application of Justice Harlan's two-part standard to the facts of particular cases reflects a fundamental disagreement between the majority and the liberal wing of the Court over the proper interpretation of the term, "reasonable."

One of the most important examples of police investigation that is deemed not a search for Fourth Amendment purposes is the open-fields doctrine, most recently reaffirmed in *Oliver v. United States*.<sup>23</sup> This holds that police entry onto land, other than the curtilage (that is, yard) of a home, is not a search. This is so even if the land is fenced, displays "No Trespassing" signs, and is protected from intrusion under state trespass laws.

[O]pen fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference . . . . There is no societal interest in protecting the privacy of those activities, such as cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be . . . . [F]ences [and] "No Trespassing" signs [do not] effectively bar the public from viewing open fields in rural areas. And

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19. 389 U.S. 347, 353 (1967).

20. *Id.* at 351. For an insightful critique of *Katz*, see Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

21. *E.g.*, *California v. Ciraolo*, 476 U.S. 207, 211 (1986) (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

22. See Morgan Cloud, *Pragmatism, Positivism and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 250 (1993) (pointing out the problems with the first prong).

23. 466 U.S. 170, 183-84 (1984). This doctrine, however, is hardly a product of the Republican Court, or at least of this Republican Court, since it dates back to the 1924 decision in *Hester v. United States*, 265 U.S. 57, 59 (1924).

. . . the public and police lawfully may survey lands from the air.<sup>24</sup> For these reasons, the asserted expectation of privacy in open fields is not an expectation that "society recognizes as reasonable."<sup>25</sup>

The dissent of Justice Marshall, joined by Justices Brennan and Stevens, would have considered entry onto "[p]rivate land marked in a fashion sufficient to render entry thereon a criminal trespass under the law of the [s]tate" to be a search,<sup>26</sup> which must be "legitimated by a warrant or by one of the established exceptions to the warrant requirement."<sup>27</sup> The majority's approach, Justice Marshall declared, "opens the way to investigative activities we would all find repugnant."<sup>28</sup>

In a similar vein, the Court concluded that what the majority itself called a search of a person's trash, which had been left for curbside pickup, was not a search for Fourth Amendment purposes.<sup>29</sup> Justices Brennan and Marshall would have required a warrant for such a search.<sup>30</sup> Likewise, police installation, at the telephone company, of a device that recorded the telephone numbers that the suspect dialed,<sup>31</sup> and overflights of a suspect's home by airplane<sup>32</sup> or helicopter,<sup>33</sup> were not searches. Nor was the use of a sophisticated camera by the EPA to photograph the defendant's industrial complex considered a search.<sup>34</sup>

The following activities were also held not to be searches: the reopening of a package that had previously been opened by a private citizen (and the testing of a white powder found therein),<sup>35</sup> the removal, for testing, of a paint sample from a car parked in public,<sup>36</sup> the use of an electronic beeper in a drum of chemicals to follow

24. This practice was not actually approved by the Court until *Ciraolo*, see supra note 21, and *Florida v. Riley*, 488 U.S. 445 (1989), decided in 1986 and 1989 respectively.

25. *Oliver*, 466 U.S. at 179. For a cogent critique of *Oliver*, see Stephen A. Saltzburg, *Another Victim of Illegal Narcotics: The Fourth Amendment (as Illustrated by the Open Fields Doctrine)*, 48 U. PITT. L. REV. 1 (1986).

26. *Oliver*, 466 U.S. at 195 (Marshall, J., dissenting).

27. *Id.*

28. *Id.* at 196.

29. See *California v. Greenwood*, 486 U.S. 35, 37 (1988).

30. *Id.* at 46 (Brennan, J., dissenting).

31. See *Smith v. Maryland*, 442 U.S. 735, 737, 745-46 (1979).

32. See *California v. Ciraolo*, 476 U.S. 207, 209, 215 (1986).

33. *Florida v. Riley*, 488 U.S. 445, 449-50 (1989). *Riley* was a plurality opinion in which Justice O'Connor, who cast the deciding vote, observed that while people did not have expectations of privacy in public airspace 400 feet or more above their house, a lower flight than that might be a search for Fourth Amendment purposes. *Id.* at 455 (O'Connor, J., concurring). With the four dissenters presumably agreeing on this point, it follows after *Riley* that overflights lower than 400 feet should be considered searches. See *id.* at 455 (O'Connor, J., concurring); *id.* at 464-65 (Brennan, J., dissenting); *id.* at 467 (Blackmun, J., dissenting).

34. *Dow Chem. Co. v. United States*, 476 U.S. 227, 239 (1986). Justice Stevens voted with the majority in this case while Justice Powell wrote the dissent. *Id.* at 228.

35. See *United States v. Jacobsen*, 466 U.S. 109, 111, 118 (1984); accord *Illinois v. Andreas*, 463 U.S. 765, 770, 773 (1983) (container previously opened by a customs agent). In *Andreas*, Justices Brennan and Marshall would have required a warrant. *Id.* at 782 (Brennan, J., dissenting).

36. See *Cardwell v. Lewis*, 417 U.S. 583, 588, 592-93 (1974) (plurality opinion). In this case, in the early days of the Republican Court, Justice Stewart wrote the dissent, joined by



its progress on the highway after the suspect placed the drum in his car,<sup>37</sup> and the use of a dog sniff to detect drugs in unopened luggage.<sup>38</sup> Justices Brennan and Marshall, the only Justices who dissented in all of these cases,<sup>39</sup> would have required a warrant for all but the dog sniff, for which they would have required probable cause.<sup>40</sup>

Justice Brennan's Orwellian dissent in the trash-search case, joined by Justice Marshall, declared that the "Court paints a grim picture of our society. It depicts a society in which local authorities may . . . monitor [citizens] arbitrarily and without judicial oversight—a society that is not prepared to recognize as reasonable an individual's expectation of privacy in the most private of personal effects . . ." <sup>41</sup> Likewise, the helicopter search case inspired Justice Brennan to quote balefully Orwell's famous polemic *Nineteen Eighty-Four*, that "*Big Brother Is Watching You.*" <sup>42</sup>

In a series of related cases, the majority held that the following activities were not stops, which would have required reasonable, individualized suspicion, but rather were not Fourth Amendment events at all: chasing a suspect,<sup>43</sup> approaching an individual on a bus and asking consent to search his luggage,<sup>44</sup> and questioning employees at a factory about their immigration status by Immigration and Naturalization Service ("INS") agents even though the employees were not "free to leave."<sup>45</sup> Justices Brennan and Marshall, dissenting in the latter case, and Justice Marshall (Justice Brennan having retired), dissenting in the first two, would have deemed all of these to be stops requiring reasonable suspicion.<sup>46</sup> In the INS case, Justice Brennan accused the majority of "abandoning our commitment to protecting the cherished rights secured by the Fourth Amendment"<sup>47</sup> when it upheld the inspections.

What lies at the core of these disputes is the true meaning of the second prong of Justice Harlan's *Katz* test.<sup>48</sup> The majority has consistently interpreted reasonableness

Justices Douglas, Brennan, and Marshall. Justice Powell, though he expressed no disagreement with the plurality's views on the issue, only concurred in the result because he felt that Fourth Amendment claims should not be cognizable on federal habeas corpus, *id.* at 596 (Powell, J., concurring), a view that prevailed two years later in *Stone v. Powell*, 428 U.S. 465, 494 (1976).

37. See *United States v. Knotts*, 460 U.S. 276, 277, 285 (1983).

38. See *United States v. Place*, 462 U.S. 696, 707 (1983).

39. Except in *Place*, where they concurred in the result of overturning the conviction because investigation subsequent to the dog sniff had amounted to an arrest without probable cause. *Place*, 462 U.S. at 710-11 (Blackmun, J., concurring in the result). They rejected the majority's conclusion that this was not a search. See *id.* at 719-20.

40. *Id.* at 710-11.

41. *California v. Greenwood*, 486 U.S. 35, 55-56 (1988) (Brennan, J., dissenting).

42. *Florida v. Riley*, 488 U.S. 445, 466 (1989) (Brennan, J., dissenting) (quoting GEORGE ORWELL, *NINETEEN EIGHTY-FOUR* 4 (1949) (emphasis in original)).

43. *California v. Hodari D.*, 499 U.S. 621, 626 (1991). In *Hodari D.*, the suspect threw away drugs during the pursuit. *Id.* at 623.

44. See *Florida v. Bostick*, 501 U.S. 429, 439-40 (1991).

45. See *INS v. Delgado*, 466 U.S. 210, 220-21 (1984).

46. See *Bostick*, 501 U.S. at 440 (Marshall, J., dissenting); *Hodari D.*, 499 U.S. at 629-30 (Stevens, J., dissenting); *Delgado*, 466 U.S. at 231 (Brennan, J., dissenting).

47. *Delgado*, 466 U.S. at 242 (Brennan, J., dissenting).

48. See *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

in terms of the likelihood that most Americans would—as a matter of simple probability analysis—have thought it “reasonable” for the defendant to have believed that his activities would remain private. For example, in the aerial surveillance cases, the majority focused primarily on the fact that, in modern society, most people realize that activities on the ground can often be seen from airplanes flying overhead; hence, the defendant could not have had a reasonable belief that his own activities would not be so detected.<sup>49</sup>

The views of Justices Brennan and Marshall, on the other hand, seem based on the idea that reasonableness involves a value judgment; that is, a normative, and not a descriptive or purely probabilistic, term.<sup>50</sup> In each of the above cases, the liberals would thus have asked, Would most Americans prefer that the particular police practice under review go wholly unregulated by the Fourth Amendment, or was the defendant’s expectation of privacy reasonable, in the normative sense that most Americans would prefer to live in a society where the police would be required to satisfy minimal Fourth Amendment standards before engaging in such a practice? As Justice Marshall wrote in *Oliver*, “Privately-owned woods and fields that are not exposed to public view regularly are employed in a variety of ways that society acknowledges *deserve* privacy,”<sup>51</sup> such as “tak[ing] solitary walks,” “conduct[ing] agricultural businesses,” and “meet[ing] lovers.”<sup>52</sup>

### B. Consents

Another way for police to avoid Fourth Amendment strictures is to obtain the consent of the person who has authority over the property to be searched. The leading Republican Court holding on this issue is *Schneckloth v. Bustamonte*.<sup>53</sup> In this case,

49. See *Florida v. Riley*, 488 U.S. 445, 449-50 (1989); *California v. Ciraolo*, 476 U.S. 207, 215 (1979).

50. This view may be traced back to the post-*Katz* opinions of Justice Harlan himself. For example, in *United States v. White*, 401 U.S. 745 (1971), a plurality of the Court concluded that the surreptitious police taping of a conversation between a defendant and a government informant was not a Fourth Amendment event. *Id.* at 752-54 (plurality opinion). Justice White, writing for the plurality, stressed the empirical reality that “[i]nescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police,” and found no constitutional difference between such reporting and surreptitious police taping of the conversation. *Id.* at 752. Justice Harlan, in dissent, argued that the plurality’s view depended on the improper normative assumption that “uncontrolled consensual surveillance in an electronic age is a tolerable technique of law enforcement, *given the values and goals of our political system.*” *Id.* at 785 (Harlan, J., dissenting) (emphasis added). He added:

Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the *desirability* of saddling them upon society. The critical question, therefore, is whether . . . we *should* impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.

*Id.* at 786 (emphasis added).

51. *Oliver v. United States*, 466 U.S. 170, 192 (1984) (Marshall, J., dissenting) (emphasis added).

52. *Id.* at 192.

53. 412 U.S. 218 (1973).

the Court, per Justice Stewart, held that a consent to search must be voluntary, but that the "prosecution is not required to demonstrate . . . knowledge [of the suspect's right to withhold consent] as a prerequisite to establishing a voluntary consent."<sup>54</sup> The Court declined to adopt the view of the dissenters (Justices Douglas, Brennan, and Marshall), who would have required the prosecution to establish, perhaps through the use of *Miranda*-type<sup>55</sup> warnings, that the suspect was aware of his right to refuse consent.<sup>56</sup>

In *Illinois v. Rodriguez*,<sup>57</sup> the Court dealt with the issue of third party consents. There, a woman reported to the police that the defendant had beaten her in "our" apartment.<sup>58</sup> When the police went to the apartment with her, she opened the door with a key and gave the police permission to enter.<sup>59</sup> Inside they observed narcotics paraphernalia and a white powder that proved to be cocaine.<sup>60</sup> It was subsequently ascertained that the woman, though she had previously lived in the apartment with Rodriguez, did not live there currently and lacked authority to consent to a search.<sup>61</sup> However, the Court refused to exclude the evidence, holding that the woman may have had "apparent authority" to authorize the entry;<sup>62</sup> that is, if the police had a "reasonable belief" in her authority, then the search was valid.<sup>63</sup>

Justice Marshall, joined by Justices Brennan and Stevens, dissented, averring that, "by allowing a person to be subjected to a warrantless search in his home, without his consent and without exigency, the majority has taken away some of the liberty that the Fourth Amendment was designed to protect."<sup>64</sup> The dissenters looked at the exclusionary rule as designed to protect the defendant's expectations of privacy rather than as a mechanism for deterring police misbehavior, contrary to the "deterrence" rationale of the majority.<sup>65</sup> Since the defendant's reasonable expectations of privacy had been interfered with in this case, regardless of the good faith of the police, it followed that the evidence should be excluded.

However, in an earlier consent case, *United States v. Matlock*,<sup>66</sup> Justices Brennan and Marshall did not join the extreme position of Justice Douglas's dissenting opinion, which would have never allowed consent to dispense with the requirement of a search warrant to search a home.<sup>67</sup> Rather, they simply reiterated their *Schneckloth* dissents that consents made without knowledge of the right to refuse

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54. *Id.* at 249.

55. *See Miranda v. Arizona*, 384 U.S. 436 (1966).

56. *See Schneckloth*, 412 U.S. at 275-90.

57. 497 U.S. 177 (1990).

58. *Id.* at 179.

59. *Id.* at 180.

60. *Id.*

61. *Id.* at 180.

62. *Id.* at 187-89.

63. *Id.* at 186, 188-89. The Court remanded for a determination of whether the police in fact had a reasonable belief in the woman's "apparent authority" to consent. *Id.*

64. *Id.* at 198 (Marshall, J., dissenting).

65. The majority first declared deterrence of police misconduct as the goal of evidentiary exclusion in *United States v. Calandra*, 414 U.S. 338, 347 (1974). *See infra* note 186.

66. 415 U.S. 164 (1974).

67. *See id.* at 180-81 (Douglas, J., dissenting).

were invalid.<sup>68</sup>

### C. Stops and Frisks

Justices Brennan and Marshall had joined Chief Justice Warren's opinion for an 8-1 majority in *Terry v. Ohio*<sup>69</sup> in 1968, which held that police could stop an individual on the street when they "reasonably . . . conclude . . . that criminal activity may be afoot,"<sup>70</sup> and could frisk him for weapons upon reasonable suspicion that he "may be armed and presently dangerous."<sup>71</sup> Thus, *Terry* established that such stop-and-frisk procedures were searches and/or seizures under the Fourth Amendment,<sup>72</sup> but that they could be warrantless and justified by less than probable cause.<sup>73</sup>

In the first post-*Terry* case, *Adams v. Williams*,<sup>74</sup> the newly established Republican Court, per Justice Rehnquist, held that it was appropriate for a policeman to reach into a car for a gun in a suspect's waistband when he had been told by a previously reliable informant that the suspect was armed.<sup>75</sup> Justices Douglas, Brennan, and Marshall all wrote dissenting opinions.<sup>76</sup> Justice Brennan, supported on this point by Justices Douglas and Marshall,<sup>77</sup> suggested that stops and frisks might not be appropriate at all for "possessory offenses."<sup>78</sup> Justice Marshall, complaining that *Adams* was an unjustified expansion of *Terry* and ruing his majority vote in that case,<sup>79</sup> urged that frisks should be based only on the officer's "own personal observations,"<sup>80</sup> and that mere knowledge that a suspect was armed was insufficient to allow the officer to frisk, since this did not establish that he was "dangerous."<sup>81</sup>

Justices Brennan and Marshall were willing to agree with a unanimous opinion by Justice O'Connor in *United States v. Hensley*<sup>82</sup> in 1985 that such a stop could also be applied to people reasonably suspected of past criminal conduct, rather than just applying when criminal activity was "afoot."<sup>83</sup> And they were on the winning side in *Delaware v. Prouse*,<sup>84</sup> joining Justice White's 8-1 opinion holding that the reasonable-suspicion limitation also applied to auto stops by the police.<sup>85</sup> (Justice

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68. *Id.* at 188.

69. 392 U.S. 1 (1968). Only Justice Douglas dissented. *Id.* at 35 (Douglas, J., dissenting).

70. *Id.* at 30.

71. *Id.*

72. *Id.* at 16.

73. *Id.* at 27.

74. 407 U.S. 143 (1972).

75. *Id.* at 145.

76. *Id.* at 149, 151, 153.

77. *Id.* at 151 (Douglas, J., dissenting).

78. *Id.* at 153. Or at least that they must be based on the observations of the police themselves. *Id.*

79. *Id.* at 162-63.

80. *Id.* at 158.

81. *Id.* at 159. This was especially so, in Justice Marshall's view, because carrying a weapon was not a crime in the state. *Id.*

82. 469 U.S. 221 (1985).

83. *Id.* at 227.

84. 440 U.S. 648 (1979).

85. *Id.* at 663.

Rehnquist, as obdurate on the right as Justices Brennan and Marshall on the left, dissented, arguing that the distinction between roadblocks and individual stops made no sense and that random stops of cars to check documents, but not to search for criminal evidence, should be allowed.)<sup>86</sup> However, Justices Brennan and Marshall balked at upholding suspicionless sobriety-checkpoint roadblocks, which the Court had explicitly excluded from its *Prouse* holding, in *Michigan Department of State Police v. Sitz*.<sup>87</sup> Instead, they joined Justice Stevens's dissent<sup>88</sup> deeming such roadblocks "publicity stunts"<sup>89</sup> and urging that their efficacy as a means of reducing drunk driving did not outweigh their interference with liberty.<sup>90</sup>

As noted above,<sup>91</sup> Justices Brennan and Marshall were unsuccessful in their efforts to characterize certain police activities, such as chasing a fleeing suspect, as stops. They did experience some success, however, on the issue of when a stop becomes an arrest. In *Dunaway v. New York*,<sup>92</sup> with Justice Brennan authoring a rare majority opinion, the Court held that taking someone "downtown for questioning" is tantamount to an arrest requiring probable cause, regardless of what the police call it.<sup>93</sup> Likewise, *Florida v. Royer*<sup>94</sup> held that requiring a suspected drug courier to accompany officials to a closed room in an airport was an arrest,<sup>95</sup> even though he had been held for only fifteen minutes before the police obtained consent to search his luggage.<sup>96</sup> (The consent was invalidated due to the no-probable-cause arrest.)<sup>97</sup> However, Justice Brennan refused to join the *Royer* plurality opinion (which Justice Marshall joined) because he disagreed with the plurality's conclusion that the initial stop was valid based on the fact that Royer was traveling under an assumed name, had paid cash for a one way ticket,<sup>98</sup> and otherwise fit a "drug courier profile."<sup>99</sup> This

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86. *Id.* at 664. As subsequent cases have shown, police will use the power of a traffic stop, and would have used even more broadly the power of random driver's license checks, to attempt to ferret out criminal activity. *See, e.g., Ohio v. Robinette*, 519 U.S. 33 (1996) (discussing traffic stops routinely used to seek consent to search); *Whren v. United States*, 517 U.S. 806 (1996) (upholding pretext traffic stops, where the police's true purpose is to search for drugs).

87. 496 U.S. 444 (1990).

88. *Id.* at 460.

89. *Id.* at 475.

90. *Id.* at 476.

91. *See supra* text accompanying notes 43-46.

92. 442 U.S. 200 (1979).

93. *Id.* at 216. Justice Rehnquist, joined by Chief Justice Burger, dissenting, agreed with the general holding but believed that *Dunaway* had voluntarily accompanied the police to the station house and that, even if he had not, his voluntary, warned statements should not have been suppressed since the police were acting consistently with New York law at the time. *Id.* at 221, 226-27 (Rehnquist, J., dissenting).

94. 460 U.S. 491 (1983). Justice Rehnquist, joined by Chief Justice Burger and Justice O'Connor, dissented. *Id.* at 519 (Rehnquist, J., dissenting). Justice Blackmun dissented separately. *Id.* at 513 (Blackmun, J., dissenting).

95. *Id.* at 502-03.

96. *Id.* at 495.

97. *Id.* at 507-08.

98. *Id.* at 511-12.

99. *Id.* at 493 n.2.

was a serious tactical error because it prevented the plurality's least-intrusive-means limitation on *Terry* stops from achieving majority support, and thus left the door open for a six-Justice majority to abandon this important limitation two years later in *United States v. Sharpe*.<sup>100</sup>

In *Sharpe*, the drivers of a car and an overloaded pickup truck aroused suspicions of drug transporting when they piloted their vehicles in tandem. They also exceeded the speed limit by approximately thirty miles per hour.<sup>101</sup> A DEA agent stopped Sharpe's car, but the truck would not stop. A highway patrolman continued to pursue the truck.<sup>102</sup> After the patrolman stopped the truck, he radioed to the DEA agent.<sup>103</sup> The agent placed subsequently arriving local police in charge of Sharpe and went to the truck's location.<sup>104</sup> When the DEA agent arrived, he confirmed that the truck was overloaded and smelled of marijuana.<sup>105</sup> He then searched the truck and found marijuana.<sup>106</sup> Finally, thirty to forty minutes after the original stop, the DEA agent returned to the car and arrested Sharpe.<sup>107</sup> The majority rejected the appellate court's conclusion that the length of the stop alone converted it into a de facto arrest.<sup>108</sup> Finding that the police had "diligently pursued" their investigation<sup>109</sup> and, as noted, rejecting *Royer*'s least-intrusive-means analysis, the Court upheld the stop of Sharpe as legitimate under *Terry*.<sup>110</sup>

Justice Marshall concurred in the result only "because [of] . . . the evasive actions of the defendants,"<sup>111</sup> and Justice Brennan dissented.<sup>112</sup> They both supported the appellate court's view that the length of a stop alone, regardless of how reasonable the police action might seem, could turn it into an arrest for which probable cause was required (with Justice Brennan further disagreeing that the truck driver had engaged in evasive actions).<sup>113</sup> Justice Brennan declared:

The Court has . . . expand[ed] the bounds of *Terry*; engaged in questionable *de*

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100. 470 U.S. 675, 687 (1985); *see also* *United States v. Place*, 462 U.S. 696, 706 (1983) (holding that detaining a "stopped" suspect's luggage over the weekend to await a drug sniff by a dog was tantamount to an arrest, but that a brief detention for this purpose would not exceed the limitations on stops). Justices Brennan and Marshall did not agree with the latter point and thus concurred only in the result. *Id.* at 710-11 (Brennan, J., concurring in the result).

101. *Sharpe*, 470 U.S. at 677.

102. *Id.* at 678.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 683.

109. *But see, e.g., United States v. Place*, 462 U.S. 696, 709 (1983) (noting that police failure to take steps that would have "minimized the intrusion on respondent's Fourth Amendment interests" contributed to the holding that the seizure of the luggage was "unreasonable").

110. *Sharpe*, 470 U.S. at 687-88.

111. *Id.* at 688-89.

112. *Id.* at 702. Justice Stevens also dissented on different grounds. *Id.* at 721 (Stevens, J., dissenting).

113. *Id.* at 692-93, 701, 707-10.

*novo* factfinding in violation of its proper mission; either ignored or misconstrued numerous factors in the record that call into question the reasonableness of these custodial detentions; and evaded the requirements of squarely governing precedents. This breed of decisionmaking breaches faith with our high constitutional duty to "prevent wholesale intrusions upon the personal security of our citizenry."<sup>114</sup>

Beyond *Sharpe*, Justices Brennan and Marshall have disagreed with the majority about the quantum of evidence necessary to support reasonable suspicion, reiterating their view that *innocent*—that is, legal, even if suspicious—conduct cannot give rise to reasonable suspicion or probable cause,<sup>115</sup> and on the question of whether seeing a knife in a car during the investigation of a traffic accident gave the police the right to "frisk" the passenger compartment of the car for weapons and to open a pouch found therein.<sup>116</sup> "The Court takes a long step today toward 'balancing' into oblivion the protections the Fourth Amendment affords," declared Justice Brennan in a lengthy and impassioned dissent in the latter case.<sup>117</sup>

#### D. The Search Warrant Requirement

The fourth prong of the Republican Court's attack on the Warren Court lies in its substantial diminution of the search warrant requirement. The Warren Court had held in *Katz v. United States*,<sup>118</sup> that "searches conducted outside the judicial process without prior approval of a judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."<sup>119</sup> The *Katz* Court itself noted several exceptions such as automobile searches, searches incident to arrest, and searches based on exigent circumstances.<sup>120</sup> However, the Republican Court has turned this rule around, assuming that *reasonableness*, not a warrant, is the hallmark of a valid outdoor search,<sup>121</sup> and has effectively abolished the warrant requirement for searches outside

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114. *Id.* at 720-21 (citation omitted).

115. In *Alabama v. White*, 496 U.S. 325 (1990), Justices Brennan and Marshall joined Justice Stevens's dissent, in arguing that the anonymous tip in that case was insufficient. *Id.* at 333 (Stevens, J., dissenting). In *United States v. Sokolow*, 490 U.S. 1 (1989), they disagreed that innocent conduct by the defendant, which conformed to a drug courier profile, could lead to reasonable suspicion. *Id.* at 13 (Marshall, J., dissenting); see also *Brown v. Texas*, 443 U.S. 47, 49, 51-53 (1979) (joining a unanimous opinion for the defendant which held that seeing two men walking away from each other in a "high drug problem area," even if the police "had never seen [one of the men] in that area before," was not enough to constitute reasonable suspicion under *Terry*).

116. *Michigan v. Long*, 463 U.S. 1032, 1036-37 (1983).

117. *Id.* at 1054, 1065.

118. 389 U.S. 347 (1967).

119. *Id.* at 357.

120. *Id.* (citing *Carroll v. United States*, 267 U.S. 132 (1925) (automobile searches), *Brinegar v. United States*, 338 U.S. 160 (1948) (searches incident to arrest), and *Warden v. Hayden*, 387 U.S. 294 (1967) (searches based on exigent circumstances)).

121. See, e.g., *United States v. Sharpe*, 470 U.S. 675 (1985). Justice Brennan, dissenting, averred that *Sharpe* represented "an emerging tendency on the part of the Court [to believe] that the Fourth Amendment requires only that any seizure be reasonable" rather than that it

of structures. As Bradley has previously argued, the only thing left of the warrant requirement for outdoor searches is the very unusual search of a container carried by someone when police have probable cause that the container contains contraband, but *lack* probable cause to arrest the carrier.<sup>122</sup>

Justices Brennan and Marshall fought this development every step of the way. In *United States v. Ross*,<sup>123</sup> the majority per Justice Stevens, held that an auto search included the opening and searching of all containers found in the vehicle, including the glove compartment.<sup>124</sup> Justice Marshall, joined by Justice Brennan in dissent,<sup>125</sup> declared that the majority "not only repeals all realistic limits on warrantless automobile searches, it repeals the Fourth Amendment warrant requirement itself."<sup>126</sup> The dissent correctly observed that the "mobility problem—deciding what to do with both the car and the occupants if an immediate search is not conducted—is simply not present in the case of movable containers, which can easily be seized and brought to the magistrate."<sup>127</sup> The dissent was only half correct, however, in complaining that the majority had "repeal[ed] the Fourth Amendment warrant requirement."<sup>128</sup> This so-called Fourth Amendment warrant requirement does not appear in the amendment itself. Rather, it was made a part of the Fourth Amendment by the Warren Court, as discussed above, and had never been applied to automobile searches. It *had* been applied to containers in automobiles only a few years before *Ross*<sup>129</sup> and was eliminated in *Ross* because the majority considered that requirement unworkable. Thus, Justice Marshall's polemic was an exaggeration.<sup>130</sup>

In *California v. Acevedo*,<sup>131</sup> the Court further cut into the warrant requirement for containers in automobiles by declaring that even though a warrant was needed for the police to search suitcases, purses, and other containers carried by people on the street (unless they were being arrested), once such a container was placed in an automobile, it lost the warrant protection.<sup>132</sup> As both Justice Stevens's dissent<sup>133</sup> and Justice

employ the least intrusive means. *Id.* at 720 (Brennan, J., dissenting).

122. Craig M. Bradley, *The Court's "Two Model" Approach to the Fourth Amendment, Carpe Diem!*, 84 J. CRIM. L. & CRIMINOLOGY 429, 442 (1993); see also James J. Tomkovicz, *California v. Acevedo: The Walls Close In on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1115 (1992).

123. 456 U.S. 798 (1982).

124. *Id.* at 823.

125. *Id.* at 827 (Marshall, J., dissenting). Justice White also dissented; despite stating that he agreed with "much of Justice Marshall's dissent," he did not join it. *Id.* (White, J., dissenting).

126. *Id.* (Marshall, J., dissenting).

127. *Id.* at 831-32.

128. *Id.* at 827.

129. See *United States v. Chadwick*, 433 U.S. 1, 13-16 (1977), *overruled by California v. Acevedo*, 500 U.S. 565 (1991); *Arkansas v. Sanders*, 442 U.S. 753, 763-66 (1979), *overruled by California v. Acevedo*, 500 U.S. 565 (1991).

130. *But see* Cloud, *supra* note 22, at 297-98.

131. 500 U.S. 565 (1991).

132. *Id.* at 579-80.

133. Justice Stevens was joined by Justice Marshall. *Id.* at 585 (Stevens, J., dissenting). Justice White also dissented, "[a]greeing . . . with most of Justice Stevens's opinion." *Id.* (White, J., dissenting). Justice Brennan had retired.



Scalia's concurrence in the judgment<sup>134</sup> pointed out, this decision made no sense. Why should one receive *less* protection when locking his suitcase in an automobile than when carrying it on the street?<sup>135</sup> The answer, obviously, is that he should not. The Court's ultimate solution will likely be, as Justice Scalia suggested, the abolition of the warrant requirement altogether for outdoor searches.<sup>136</sup>

Justices Brennan and Marshall likewise objected when trailers and RVs were considered "vehicles" rather than "homes," and thus exempt from the search warrant requirement,<sup>137</sup> when "searches incident to arrest" of the driver of an automobile were extended to the entire passenger compartment,<sup>138</sup> when outdoor warrantless arrests were approved,<sup>139</sup> and when a full warrantless search of anybody subject to custodial arrest was approved.<sup>140</sup> As to the last case, Justice Marshall declared that the majority was "turn[ing] its back" on "fundamental principles" of the Fourth Amendment.<sup>141</sup>

When it came to indoor searches, however, Justices Brennan and Marshall were successful in holding the majority true to the Warren Court notion that there is a warrant *requirement*. In *United States v. Knotts*,<sup>142</sup> for example, the Court approved the warrantless attachment of a beeper device to a drum of chemicals used in manufacturing illegal drugs so that the police could track it on the highway.<sup>143</sup> However, when the same type of device in the same type of drum was used to ascertain whether the drum was still located at a particular house, a warrant was required.<sup>144</sup> More significantly, in *Payton v. New York*,<sup>145</sup> a 6-3 majority required police to obtain an arrest warrant before they could arrest someone in his own home.<sup>146</sup> And in *Steagald v. United States*,<sup>147</sup> a 7-2 majority required a search warrant

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134. *Id.* at 581 (Scalia, J., concurring in the judgment).

135. *Id.* at 581, 598.

136. The 1999 case of *Wyoming v. Houghton*, 526 U.S. 295 (1999), in which the Court approved the warrantless search of the passenger's purse in a car despite the fact that probable cause was limited to evidence that the driver was using marijuana, has taken the Court another step in this direction. *See id.* at 297-307.

137. *See* *California v. Carney*, 471 U.S. 386 (1985).

138. *See* *New York v. Belton*, 453 U.S. 454 (1981).

139. *See* *United States v. Watson*, 423 U.S. 411 (1976).

140. *See* *United States v. Robinson*, 414 U.S. 218 (1973).

141. *Id.* at 239 (Marshall, J., dissenting).

142. 460 U.S. 276 (1983).

143. *Id.* at 277, 285.

144. *United States v. Karo*, 468 U.S. 705 (1984). Justice O'Connor, joined by Justice Rehnquist, disagreed, arguing that only if the bug were to be placed in the defendant's *own* container would a warrant be required. *Id.* at 724-25 (O'Connor, J., concurring in part and concurring in judgment). However, the majority would have allowed use of such a beeper without a warrant if the container owner had consented. *Id.* at 711. As to this point, Justice Stevens, joined by Justices Brennan and Marshall, dissented, arguing that "[t]he attachment of the beeper . . . constituted a 'seizure.'" *Id.* at 728-30 (Stevens, J., dissenting).

145. 445 U.S. 573 (1980).

146. *Id.* Justice White, joined by the Chief Justice and Justice Rehnquist, dissented. *Id.* at 603 (White, J., dissenting). They felt that the common-law limitations on home arrests—"felony, knock and announce, daytime, and stringent probable cause"—were sufficient. *Id.* at 616. However, the dissent's claim that such arrest warrants will go "stale," *id.* at 619, is not responsive to the majority's holding. The majority did not require a search

before police could arrest someone in *another's* home.<sup>148</sup> Likewise, a search warrant has been required for police searches of hotel rooms.<sup>149</sup> The Court has also addressed the necessity of search warrants for searches of offices,<sup>150</sup> schools,<sup>151</sup> business premises,<sup>152</sup> and apparently even the outbuildings of a farm.<sup>153</sup>

Even some of the finer points of searches of homes beyond the general warrant requirement have seen the Republican Court backing defendants' arguments. For example, Justice Scalia's opinion for the Court in *Arizona v. Hicks*<sup>154</sup> held that when the police enter a dwelling without a warrant due to exigent circumstances, they cannot conduct even a very limited search—that is, lifting a piece of stereo equipment to see its serial number and thereby ascertain if it was stolen—without at least probable cause.<sup>155</sup> *Mincey v. Arizona*<sup>156</sup> declined to recognize a "murder scene exception" to the warrant requirement.<sup>157</sup> *Welsh v. Wisconsin*<sup>158</sup> held that an "exigent circumstance" warrantless entry into a house would not normally be approved for a "minor offense" such as drunk driving.<sup>159</sup> And in *Minnesota v. Olson*,<sup>160</sup> the Court took a narrow view of what constitutes "exigent circumstances" to search a home without a warrant.<sup>161</sup>

However, when the Court allowed police making an arrest inside a building to engage in suspicionless "protective sweeps" of "spaces immediately adjoining the

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warrant (which might go stale) but only an arrest warrant (which cannot) plus "reason to believe the suspect is within," *id.* at 603, a showing that apparently need not appear in the warrant and that would not seriously impede the arrest process.

147. 451 U.S. 204 (1981).

148. *Id.* at 220-22. Justice Rehnquist, joined by Justice White, dissented. *Id.* at 223 (Rehnquist, J., dissenting).

149. *Stoner v. California*, 376 U.S. 483 (1964).

150. *O'Connor v. Ortega*, 480 U.S. 709 (1987) (finding a reasonable expectation of privacy for employees' desks and files and setting out a reasonableness standard for employer searches of employee offices).

151. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The Court found the warrant requirement to be unsuitable to the school environment and allowed school officials to search without a warrant upon a finding of reasonableness. *Id.* at 340.

152. *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978) (requiring search warrants for OSHA inspections of business premises for safety hazards).

153. In *United States v. Dunn*, 480 U.S. 294 (1987), the Court stated, "We may accept, for the sake of argument, respondent's submission that his barn enjoyed Fourth Amendment protection and could not be entered and its contents seized without a warrant." *Id.* at 303.

154. 480 U.S. 321 (1987).

155. *Id.* at 324-27.

156. 437 U.S. 385 (1978).

157. *Id.* at 395.

158. 466 U.S. 740 (1984).

159. *Id.* at 750-53.

160. 495 U.S. 91 (1990).

161. See *id.* at 100-01. Chief Justice Rehnquist dissented with various other Justices in *Olson*, *Hicks*, and *Welsh*. See *Olson*, 495 U.S. at 101 (Rehnquist, C.J., joined by Blackmun, J., dissenting); *Hicks*, 480 U.S. at 330 (Rehnquist, C.J., joined by Powell & O'Connor, JJ., dissenting); *Welsh*, 466 U.S. at 756 (Rehnquist, J., joined by White, J., dissenting).

place of arrest from which an attack could be immediately launched,"<sup>162</sup> Justices Brennan and Marshall were alone in advocating a requirement of probable cause for any search beyond the area within the suspect's immediate control.<sup>163</sup>

*E. Search Warrants: Obtainment and Execution*

Contrary to the success enjoyed by Justices Brennan and Marshall (and criminal defendants) on the issue of whether a search warrant is required to search structures, the resolution of issues concerning what constitutes an acceptable warrant and how it should be executed have consistently gone against them. In *Illinois v. Gates*,<sup>164</sup> the Court, per Justice Rehnquist, made it easier for the police to obtain a warrant based on information provided by an anonymous informant by rejecting the approach seemingly commanded by the Warren Court case of *Spinelli v. United States*.<sup>165</sup> *Gates* held that an informant's tip need not show that the police had reason to believe in both the informant's "veracity" and her "basis of knowledge"; rather, in issuing the warrant, the magistrate could rely on the totality of the circumstances in assessing whether probable cause existed.<sup>166</sup> Thus, although the police in *Gates* had no knowledge of the informant's identity, they could nevertheless rely on her tip because it was very detailed and accurate in predicting behavior by the suspects that was consistent with drug smuggling.<sup>167</sup> Likewise, a tip provided by an "unquestionably honest citizen" could be relied upon, even if that person's basis of knowledge was not established.<sup>168</sup>

Justice Brennan in dissent argued that the new approach was invalid and joined Justice Stevens in arguing that the warrant in this case failed even the Court's new test.<sup>169</sup> Thus, Justice Brennan (and Justice Marshall) would never allow a search to be based on an unknown informant's tip, no matter how detailed the tip or how accurately it predicted the suspect's behavior. In *Gates*, Justice Brennan declared that "today's decision threatens to obliterate one of the most fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law."<sup>170</sup> *Gates* further illustrates the dispute between the

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162. *Maryland v. Buie*, 494 U.S. 325, 334 (1990); see also *Washington v. Chrisman*, 455 U.S. 1 (1982) (allowing the police to monitor the movements of an arrested person—e.g., into another room to change clothes—following an arrest).

163. *Buie*, 494 U.S. at 342-43.

164. 462 U.S. 213 (1983).

165. 393 U.S. 410 (1969). There is a dispute in *Gates* over just what *Spinelli* required. Compare *Gates*, 462 U.S. at 228-30 (Rehnquist, J.), with *id.* at 270 & n.22 (White, J., concurring in the judgment), and *id.* at 279-82 (Brennan, J., dissenting).

166. *Gates*, 462 U.S. at 238 (defining "probable cause" as a "fair probability that contraband or evidence of a crime will be found").

167. *Id.* at 245-46. As Justice Stevens pointed out in dissent, however, the tip was not as accurate as the majority described it. *Id.* at 291-93 (Stevens, J., dissenting).

168. *Id.* at 233-34.

169. *Id.* at 274 (Brennan, J., dissenting).

170. *Id.* at 291. Likewise, Justices Brennan and Marshall dissented (without opinion) in *Massachusetts v. Upton*, 466 U.S. 727 (1984), where the Court applied *Gates* to uphold a search warrant based on an informant's tip. *Id.* at 728-35 (per curiam). For criticism of *Gates*,

majority and Justices Brennan and Marshall over whether legal but suggestive behavior can be the basis of probable cause.

Justices Brennan and Marshall also dissented in a series of cases involving the execution of warrants. In *Gooding v. United States*,<sup>171</sup> the majority held that no special showing need be made to execute a search warrant at night.<sup>172</sup> In *Horton v. California*,<sup>173</sup> the Court's 7-2 majority held that items found in plain view during the execution of a warrant could be seized as evidence of a crime establishing probable cause, regardless of whether the police could have anticipated finding them and thus arguably should have listed them in the warrant application, as Justice Brennan urged in his dissent.<sup>174</sup> Finally, in *Michigan v. Summers*,<sup>175</sup> the Court, per Justice Stevens, approved the detention of a house resident during the execution of a search warrant without any special showing of the resident's dangerousness or flight risk, likening the situation to a *Terry* stop.<sup>176</sup> In dissent, Justice Stewart, joined by Justices Brennan and Marshall, would have required probable cause for such a detention.<sup>177</sup> However, when the search was at a public bar, the police were not permitted to routinely frisk patrons in the bar without an individualized suspicion that a patron was armed.<sup>178</sup>

#### F. Limits on the Exclusionary Rule

The final assault by the Republican Court on the sensibilities of Justices Brennan and Marshall and their liberal supporters has been in limiting the scope of the exclusionary remedy. The most well-known example of this is the so-called good-faith exception to the exclusionary rule announced in *United States v. Leon*.<sup>179</sup> The *Leon* Court held that when police rely in "reasonable good faith" on the conclusion of a magistrate that a search warrant affidavit sets forth probable cause, the evidence should be admitted at trial even if the trial court (or subsequent appellate court) concludes that, in fact, the affidavit did not establish probable cause.<sup>180</sup> Since the mistake, in the majority's view, was that of the magistrate, it makes no sense to exclude the evidence since the exclusionary rule is for the purpose of deterring *police* misconduct. However, the Court did not thereby insulate all search warrants from

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see Wayne R. LaFare, *Fourth Amendment Vagaries (of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171, 1186-99 (1983); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 274-75, 329-40 (1984).

171. 416 U.S. 430 (1974).

172. *Id.* at 458.

173. 496 U.S. 128 (1990).

174. *Id.* at 137-42, 144.

175. 452 U.S. 692 (1981).

176. *Id.* at 698-706.

177. *Id.* at 708-09. It is unclear whether the dissenters would also have required that such detention be authorized by the warrant or justified by exigent circumstances beyond those present in the usual search.

178. *Ybarra v. Illinois*, 444 U.S. 85 (1979). Justice Rehnquist, joined by two others, dissented. *Id.* at 98-110 (Rehnquist, J., joined by Burger, C.J., & Blackmun, J., dissenting).

179. 468 U.S. 897 (1984).

180. *Id.* at 905.

exclusionary sanction, holding that where the police had reason to believe that the affidavit was defective or that it contained false information, they could not rely on the "rubber stamp" of a magistrate to cleanse it.<sup>181</sup> Nor were mistakes in execution insulated. Since all of these would be mistakes by the police, not the magistrate, the exclusionary rule would still apply.<sup>182</sup> Also, contrary to academic speculation at the time, the Court has not gone on to apply the *Leon* exception to warrantless searches or, with minor exceptions,<sup>183</sup> to any other area of law-enforcement behavior.

Justices Brennan and Marshall, as apoplectic as they were apocalyptic, declared that "the Court's victory over the Fourth Amendment is complete."<sup>184</sup> Even if the police had no reason to doubt the magistrate's assessment of probable cause, they would have always required suppression of evidence found pursuant to a defective search warrant and stressed that the abridgement of privacy interests is the same regardless of the good or bad faith of the police.<sup>185</sup> While this is true, their position ignored the well-established view—shared by all of the other Justices in *Leon*—that the purpose of the exclusionary rule is deterrence, not protection of privacy.<sup>186</sup>

Another important way in which the Court has limited the operation of the exclusionary rule is through the doctrine of standing. The leading case is *Rakas v. Illinois*,<sup>187</sup> in which the majority, per Justice Rehnquist, held that only a person whose rights were infringed by the police action in question could exclude evidence obtained as a result of police violations of the Fourth Amendment.<sup>188</sup> In *Rakas*, this holding meant that a passenger in a car that allegedly had been searched illegally by the police could not exclude the fruits of the search. Only the owner's or possibly the driver's rights—not the passenger's—were infringed by the search.<sup>189</sup>

Justice White dissented, joined by Justices Brennan, Marshall, and Stevens. They pointed out, quite logically, that if, as the majority has consistently held, deterrence of police misconduct is the purpose of the exclusionary rule, then it makes no sense

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181. *Id.* at 917 n.18.

182. *Id.* at 923.

183. One exception is for police reliance on a state statute that is later declared unconstitutional. *Illinois v. Krull*, 480 U.S. 340 (1980). Another is for police reliance on a clerical error committed by generally reliable court employees. *Arizona v. Evans*, 514 U.S. 1 (1995).

184. *Leon*, 468 U.S. at 929 (Brennan, J., dissenting). Justice Stevens dissented separately. *Id.* at 960 (Stevens, J., dissenting).

185. *Id.* at 929.

186. This view was first adopted by a majority in *United States v. Calandra*, 414 U.S. 338 (1974), in which Justice Brennan, joined by Justices Douglas and Marshall, dissented. *Id.* at 355 (Brennan, J., dissenting). Justice Stevens, though he also dissented in *Leon*, agreed that deterrence is the purpose for the exclusionary rule. *Leon*, 468 U.S. at 960 (Stevens, J., dissenting); see also Arnold H. Loewy, *Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence*, 87 MICH. L. REV. 907, 909-11, 939 (1989) (concluding that the majority's view is correct).

187. 439 U.S. 128 (1978).

188. *Id.* at 134, 148-49.

189. As Justice Powell pointed out in concurrence, the passengers *could* have protested the illegal stop of the car, since their right to proceed down the road unmolested was the same as the driver's. However, this issue was not raised. *Id.* at 150-51 (Powell, J., concurring).

to bar any defendant from raising Fourth Amendment claims.<sup>190</sup> If the defendant's connection to the property seized is sufficient to trigger a criminal prosecution in which the property is evidence, the connection should also be sufficient to raise the issue of police intrusions of privacy; the ability to raise the issue, of course, doesn't necessarily mean that the defendant would *win*, just that he would be allowed to litigate the legality of the search.<sup>191</sup>

Similarly, the majority has limited the fruit-of-the-poisonous-tree doctrine in a variety of ways: allowing subsequently found evidence to be admitted despite an initial illegality by the police;<sup>192</sup> allowing use of evidence excluded from the prosecution's case-in-chief for impeachment;<sup>193</sup> and allowing evidence that would be excluded from a criminal case to be used in a variety of collateral proceedings involving grand jury investigations, tax seizures, and civil deportations.<sup>194</sup>

Finally, in *Stone v. Powell*,<sup>195</sup> an important case that does not fit well into any of the previous categories, the Court held that Fourth Amendment claims could not generally be raised in federal habeas corpus petitions.

### III. THE FIFTH AND SIXTH AMENDMENTS

In the area of police interrogations constitutionally governed by the Fifth and Sixth Amendments, the Republican majority on the Supreme Court once again has engaged in a slow but steady campaign to erode the Warren Court's precedents over a period of decades. However, unlike in the Fourth Amendment context where the rules of police conduct have been changed significantly by the Republican Court, the linchpin of the Warren Court's regulation of police interrogations—*Miranda v.*

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190. *Id.* at 168-69 (White, J., dissenting).

191. *Id.* at 166.

192. *E.g.*, *Segura v. United States*, 468 U.S. 796 (1984) (taking a broad view of the independent-source doctrine); *see also* *Murray v. United States*, 487 U.S. 533 (1989) (taking an even broader view of the independent-source doctrine); *Oregon v. Elstad*, 470 U.S. 298 (1975) (holding that the fruit-of-the-poisonous-tree doctrine does not apply to *Miranda* violations); *Nix v. Williams*, 467 U.S. 431 (1984) (recognizing the inevitable-discovery doctrine). For a critique of these cases, see Craig M. Bradley, *Murray v. United States: The Bell Tolls for the Search Warrant Requirement*, 64 *IND. L.J.* 907 (1989).

193. *E.g.*, *United States v. Havens*, 446 U.S. 620 (1980) (holding that illegally seized evidence may be used to impeach defendant's testimony); *Harris v. New York*, 401 U.S. 222 (1971) (holding that a confession obtained in violation of *Miranda* may be used to impeach). *But see* *James v. Illinois*, 493 U.S. 307 (1990) (5-4 decision) (Brennan, J.) (refusing to allow prosecution to impeach defense witnesses other than defendant with illegally obtained statement of defendant). For an analysis of these cases, see James M. Spira, *James v. Illinois: A Halt to the Expansion of the Impeachment Exception*, 15 *SO. ILL. U. L.J.* 27 (1990); James L. Kainen, *The Impeachment Exception to the Exclusionary Rules: Policies, Principles, and Politics*, 44 *STAN. L. REV.* 1301 (1992).

194. *E.g.*, *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984) (holding that wrongfully obtained admissions from alleged illegal aliens may be used in civil deportation proceedings); *United States v. Janis*, 428 U.S. 433 (1976) (holding that cash illegally seized by the police may be subject to an IRS levy); *United States v. Calandra*, 414 U.S. 338 (1974) (holding that illegally obtained evidence may be used in grand jury proceedings).

195. 428 U.S. 465 (1976).

*Arizona*<sup>196</sup>—remains in place and has come to be accepted (and perhaps even embraced, to a limited extent) by the police as a clear and easy-to-follow rule.<sup>197</sup> Indeed, in some ways *Miranda*'s impact has even been expanded since the days of the Warren Court.<sup>198</sup> Most of the Republican Court's victories have been limited to the so-called decision rules<sup>199</sup> that directly affect the lower courts in their application and enforcement of *Miranda* but that only indirectly affect the way that police handle their daily affairs. Although these changes in the decision rules reflect a serious disagreement within the current Court over the constitutional dimension of *Miranda* itself, a majority of the Court has nevertheless recently reaffirmed *Miranda* in the face of an all-out frontal assault.<sup>200</sup>

Several specific areas of inquiry must be examined for evidence of the Brennan/Marshall Court's likely jurisprudence in the area of police interrogations. These areas include the following: (1) What is "custody" within the meaning of *Miranda*? (2) What is "interrogation," again within the meaning of *Miranda*? (3) What are adequate *Miranda* warnings? (4) What is an adequate *Miranda* waiver? (5)

196. 384 U.S. 436 (1966).

197. See, e.g., SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOCIETY, AM. BAR ASSOC., CRIMINAL JUSTICE IN CRISIS (1988). The committee found that "a very strong majority of those surveyed—prosecutors, judges, and police officers—agree that compliance with *Miranda* does not present serious problems for law enforcement." *Id.* at 28.

*Miranda* may even help the police in some situations by providing a safe harbor for what might otherwise be controversial interrogation tactics; for example, judges may be less likely to engage in searching judicial review under the traditional voluntariness standard if the police have properly Mirandized the subject of the interrogation. See, e.g., Charles J. Ogletree, *Are Confessions Really Good for the Soul?: A Proposal to Mirandize Miranda*, 100 HARV. L. REV. 1826, 1842 (1987) (stating that police officers have learned that once they obtain a waiver, they have great latitude in conducting an interrogation); Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 745-46 (1992).

In the quarter century since *Miranda*, the Court has reversed only two convictions on the ground that post-*Miranda* custodial interrogation produced an involuntary statement. . . . Not surprisingly, in the face of this silence at the top, many lower courts have adopted an attitude toward voluntariness claims that can only be called cavalier.

*Id.*

198. See, e.g., *Michigan v. Jackson*, 475 U.S. 625 (1986) (holding that police cannot request *Miranda* waiver from suspect who has previously invoked Sixth Amendment right to counsel); *Edwards v. Arizona*, 451 U.S. 477 (1981) (holding that police generally cannot request *Miranda* waiver from a suspect who has previously invoked *Miranda* right to counsel).

199. See Carol S. Steiker, *Counter-revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. L. REV. 2466 (1996) (discussing difference between "conduct rules," which directly regulate the police, and "decision rules," which regulate the enforcement of conduct rules by the courts). According to Professor Steiker, the general public is aware of many of the conduct rules but—unlike the police—is often unaware of the decision rules that limit the enforcement of these conduct rules. *Id.* at 2470. Thus, it often overestimates the degree to which police investigation is actually restricted. *Id.* at 2471. However, in the Fourth Amendment cases discussed earlier, the Republican Court has also substantially modified the conduct rules.

200. See *Dickerson v. United States*, 120 S. Ct. 2326 (2000).

What is an adequate invocation of *Miranda* rights, and what is the consequence of such an invocation? (6) What Sixth Amendment rules apply to police interrogations? (7) What are the consequences of an unconstitutional police interrogation?

A. "Custody"

*Miranda*, by its own terms, applies whenever a person "has been taken into custody or otherwise deprived of his freedom of action in any significant way."<sup>201</sup> A footnote in *Miranda* referred to "an investigation which had focused on an accused,"<sup>202</sup> suggesting that the Court might eventually extend *Miranda* to protect anyone who had become the specific object of police suspicion, but the Warren Court never really followed through on this suggestion.<sup>203</sup> Based on the views expressed in post-Warren Court cases, however, the Brennan/Marshall Court clearly would have adopted a very broad—though not extreme—view of custody.

In the post-Warren Court era, "custody" has been essentially synonymous with "arrest" as that term is understood in the Court's Fourth Amendment decisions. Thus, it has been interpreted *not* to include (1) IRS agent questioning of a taxpayer (in his private home) who was the "focus" of an IRS investigation but was not under arrest;<sup>204</sup> (2) questioning of a "putative" or "virtual" defendant called before a grand jury;<sup>205</sup> (3) questioning in the police station of a suspect who agreed to meet with the police officers there and who went to the police station on his own;<sup>206</sup> (4) questioning in the police station of a suspect who "voluntarily agreed to accompany police to the station house";<sup>207</sup> and (5) questioning by a probation officer, in his office, of a probationer who was required to appear and respond truthfully to the officer's questions.<sup>208</sup>

Justice Brennan disagreed with the majority's resolution of the custody issue in each of these cases.<sup>209</sup> In the IRS case, for example, he wrote, "Interrogation under

201. *Miranda*, 384 U.S. at 444.

202. *Id.* at 444 n.4. The phrase was taken from *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964).

203. The Warren Court's greatest expansion of the term "custody" came in the case of *Orozco v. Texas*, 394 U.S. 324 (1969), where the Court held that a suspect who was interrogated in his bedroom at 4 A.M. by four police officers (one of whom conceded at trial that the suspect was effectively "under arrest" and not free to go where he pleased) was entitled to *Miranda* warnings. *Id.* at 325-26. The Warren Court, however, never extended *Miranda* to any situations that did not involve a formal arrest or its functional equivalent.

204. *Beckwith v. United States*, 425 U.S. 341, 347 (1976). *But cf.* *Oregon v. Elstad*, 470 U.S. 298, 315-16 (1985) (finding that a suspect questioned in his home by police was in custody because he had been arrested); *supra* note 203 (discussing *Orozco*).

205. *United States v. Mandujano*, 425 U.S. 564, 578-84 (1976).

206. *Oregon v. Mathiason*, 429 U.S. 492, 495-96 (1977) (per curiam).

207. *California v. Beheler*, 463 U.S. 1121, 1122, 1125 (1983) (per curiam).

208. *Minnesota v. Murphy*, 465 U.S. 420, 429-30 (1984).

209. In all of the cases save one, Justice Marshall joined with Justice Brennan on the custody issue. The lone exception was *Beckwith*, where Justice Marshall concurred in the judgment upholding the defendant's conviction because the IRS agents had given the defendant a warning that was similar enough to the *Miranda* warnings to comply with the Fifth



conditions that have the practical consequence of compelling the taxpayer to make disclosures, and interrogation in 'custody' having the same consequence, are in my view peas from the same pod."<sup>210</sup> Justice Brennan even went so far as to equate the suspect's naivete (which led the suspect to believe that he was required to answer IRS questions) with physical coercion by the police, stating that the taxpayer's "misapprehensions" about "the nature of the inquiry, his obligation to respond, and the possible consequences of doing so"<sup>211</sup> gave rise to compulsion "in much the same way that placing a suspect under physical restraint leads to psychological compulsion."<sup>212</sup> Thus, taking advantage of the taxpayer's naivete was as "equally violative of constitutional protections as a custodial confession extracted without proper [*Miranda*] warnings [would be]."<sup>213</sup> In short, it is highly likely that the Brennan/Marshall Court would have expanded *Miranda*'s application not only to IRS investigations but also to many other situations involving nonarrested suspects who nevertheless face significant pressure to cooperate with the police.

Indeed, in only one post-Warren Court case did Justice Brennan go along with the government's position on a contested custody issue. In *Berkemer v. McCarty*,<sup>214</sup> a suspect was questioned at the roadside during a "routine traffic stop."<sup>215</sup> Justice Marshall, writing for an 8-0 majority on the issue,<sup>216</sup> held that unlike a formal arrest, such a traffic stop is similar to a *Terry* stop and does not constitute custody for *Miranda* purposes (despite the fact that the suspect clearly was not free to leave).<sup>217</sup> Justice Marshall warned, however, that the Court's holding was conditioned on both the brevity and the "noncoercive aspect" of the stop: "If a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he will be entitled to the full panoply of protections prescribed by *Miranda*."<sup>218</sup> As with the analogous Fourth Amendment decision in *Terry v. Ohio*<sup>219</sup> (also joined by Justices Brennan and Marshall), *Berkemer v. McCarty* reflects the fact—obvious even to the Court's most liberal members—that extending *Miranda* to such a situation "would substantially impede the enforcement of the [n]ation's traffic laws . . . while doing little to protect citizens' Fifth Amendment rights."<sup>220</sup>

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Amendment's requirements. *Beckwith*, 425 U.S. at 348-49 (Marshall, J., concurring in the judgment).

210. *Id.* at 350 (Brennan, J., dissenting).

211. *Id.* at 351.

212. *Id.*

213. *Id.*

214. 468 U.S. 420 (1984).

215. *Id.* at 435.

216. Justice Stevens did not join this part of Justice Marshall's opinion, believing that the custody issue was not properly presented by the government's petition for certiorari. *Id.* at 445 (Stevens, J., concurring in part and concurring in the judgment).

217. *Id.* at 439-42.

218. *Id.* at 440.

219. 392 U.S. 1, 30-31 (1968).

220. *Berkemer*, 468 U.S. at 441.

B. "Interrogation"

As with "custody," the scope of *Miranda* also depends on the interpretation of the term "interrogation," which *Miranda* itself described as "questioning initiated by law enforcement officers."<sup>221</sup> The lead case on the subject of interrogation is *Rhode Island v. Innis*,<sup>222</sup> in which two police officers held a conversation (in the suspect's presence, en route to the police station) about a missing gun and the possibility of harm befalling nearby handicapped children that prompted the suspect to disclose the location of the gun.<sup>223</sup> The Court held that no interrogation had taken place because (1) no express questioning occurred and (2) the police officers did not engage in the "functional equivalent" of questioning;<sup>224</sup> that is, the officers had no reason to know that their conversation (which the Court, rather disingenuously, construed as innocently motivated and not designed to prompt the suspect to talk) was "reasonably likely to elicit an incriminating response."<sup>225</sup>

Justices Brennan and Marshall dissented, but not on the Court's legal definition of interrogation.<sup>226</sup> Rather, they disagreed sharply with the Court's application of that standard to the facts of the particular case. "I am utterly at a loss . . . to understand how this objective standard as applied to the facts before us can rationally lead to the conclusion that there was no interrogation," wrote Justice Marshall.<sup>227</sup> "One can scarcely imagine a stronger appeal to the conscience of a suspect—*any* suspect—than the assertion that if the weapon is not found[,] an innocent person will be hurt or killed."<sup>228</sup>

Similarly, in *Arizona v. Mauro*,<sup>229</sup> Justices Brennan and Marshall found themselves in the minority on the issue of whether the police conducted an interrogation when they allowed a suspect's wife to speak with the suspect in the presence of a police officer armed with a tape recorder.<sup>230</sup> The majority held that such a situation was not the "functional equivalent" of police interrogation, especially because the suspect could not have felt "coerced" by talking with his wife.<sup>231</sup> The dissenters felt that this situation fell within *Innis*'s legal definition of interrogation because the police knew (or should have known) that the conversation was "reasonably likely" to lead to the suspect's confession.<sup>232</sup> Otherwise, why would they have made sure to tape record the conversation? As Justice Stevens put it, "[T]he police took advantage of Mrs.

221. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966). On the subject of interrogation, see generally Yale Kamisar, Brewer v. Williams, Massiah, and *Miranda: What Is Interrogation? When Does It Matter?*, 67 GEO. L.J. 1 (1978); Welsh S. White, *Interrogation Without Questions: Rhode Island v. Innis and United States v. Henry*, 78 MICH. L. REV. 1209 (1980).

222. 446 U.S. 291 (1980).

223. *Id.* at 294-95.

224. *Id.* at 302.

225. *Id.*

226. *Id.* at 305 (Marshall, J., dissenting).

227. *Id.*

228. *Id.* at 306 (emphasis in original).

229. 481 U.S. 520 (1987).

230. *Id.* at 531 (Stevens, J., dissenting).

231. *Id.* at 527.

232. *Id.* at 533-34 (Stevens, J., dissenting).

Mauro's request to visit her husband."<sup>233</sup> Under such circumstances, the Court's failure to apply *Miranda* "removes an important brick from the wall of protection against police overreaching that surrounds the Fifth Amendment rights of suspects in custody."<sup>234</sup>

In other post-Warren Court cases, Justice Brennan adopted a slightly narrower view of when interrogation had occurred (and therefore when *Miranda* warnings were required) than did Justice Marshall. Indeed, of the very few interrogation cases in which Justice Brennan ever voted (even in part) with the government, three of them—*Pennsylvania v. Muniz*,<sup>235</sup> *South Dakota v. Neville*,<sup>236</sup> and *Illinois v. Perkins*<sup>237</sup>—involved the meaning of the term "interrogation."

In *Muniz*, a drunk-driving case, Justice Brennan ultimately voted (in part) with the government, but he rejected the government's argument on the interrogation issue.<sup>238</sup> Writing for a plurality of four Justices, Justice Brennan claimed that even "routine booking questions" (such as asking a suspect's name and address) constitute interrogation under *Miranda*; however, he concluded that such questions fall within an exception to *Miranda*, and hence the suspect's responses (as well as his manner of speech) could be used to prove his intoxication.<sup>239</sup> Justice Marshall dissented because the suspect's responses had the effect of incriminating him.<sup>240</sup> In *Neville*, another drunk-driving case, Justice Brennan agreed with the Court that merely asking a suspect to submit to a breathalyzer examination is not interrogation within the meaning of *Miranda*, because such a request (when made of a person stopped for drunk driving) is routinely attendant to the suspect's arrest.<sup>241</sup> Justice Marshall joined Justice Stevens's dissent, which argued that the Court should not reach the *Miranda* issue because there was an "adequate and independent state ground" for the decision below.<sup>242</sup>

More interesting and more revealing was Justice Brennan's opinion concurring in the *Perkins* judgment.<sup>243</sup> There, the majority held that secret jailhouse informants do not interrogate within the meaning of *Miranda*, because the suspect is not even aware that he is being questioned by a police agent (and thus cannot be coerced by the police).<sup>244</sup> Justice Brennan agreed with the government and the majority that *Miranda*

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233. *Id.* at 531.

234. *Id.* at 531-32.

235. 496 U.S. 582 (1990).

236. 459 U.S. 553 (1983).

237. 496 U.S. 292 (1990).

238. *Muniz*, 496 U.S. at 600-01.

239. *Id.* at 601. Four other Justices agreed with Justice Brennan's result, but on the alternate ground that the routine booking questions were not interrogation at all. *Id.* at 606-08 (Rehnquist, C.J., joined by White, Blackmun, & Stevens, JJ., concurring in the result in part).

On the separate issue of whether asking the suspect to state the date of his sixth birthday was interrogation, Justice Brennan wrote for a majority of five (including Justice Marshall), holding that it was. *Id.* at 592-600.

240. *Id.* at 608-09 (Marshall, J., dissenting).

241. *Neville*, 459 U.S. at 564-66.

242. *Id.* at 567 (Stevens, J., dissenting).

243. *Illinois v. Perkins*, 496 U.S. 292, 300 (1990) (Brennan, J., concurring in the judgment).

244. *Id.* at 296-300.

was not implicated: "I do agree that when a suspect does not know that his questioner is a police agent, such questioning does not amount to 'interrogation' in an 'inherently coercive' environment so as to require application of *Miranda*."<sup>245</sup> He went on to say, however, that "the deception and manipulation practiced on respondent raise a substantial claim that the confession was obtained in violation of the Due Process Clause."<sup>246</sup> Nevertheless, because the due process issue had not been raised by the defendant and was not properly before the Court, Justice Brennan concurred in the judgment.<sup>247</sup> Justice Marshall wrote a strong dissent, arguing that *Miranda* is concerned not only with police coercion but also with any situation in which a suspect might confess absent full awareness of his rights.<sup>248</sup>

How can Justice Brennan's view in *Perkins* be reconciled with the position he took just three years earlier in *Mauro*, that the police violated *Miranda* by using Mrs. Mauro to elicit incriminating information from her husband? Justice Brennan gave no direct answer in *Perkins*, failing even to cite *Mauro*. Perhaps the best explanation is that, sometime between *Mauro* and *Perkins*, Justice Brennan decided that the Due Process Clause would provide a more trustworthy source of protection than *Miranda* in such cases (especially if, as he certainly feared, the Republican Court would continue steadily to erode both the scope and the content of *Miranda*, and perhaps even overrule it someday).

It is impossible to know for sure whether the Brennan/Marshall Court would have adopted Justice Marshall's expansive reading of "interrogation" (applying the term to almost any situation involving a risk of self-incrimination)<sup>249</sup> or Justice Brennan's slightly narrower view (exempting jailhouse plants, as in *Perkins*,<sup>250</sup> and requests for physical testing, such as the breathalyzer test in *Neville*).<sup>251</sup> Given Justice Brennan's apparent willingness to use the Due Process Clause as a ready substitute for *Miranda*'s protection, however, it seems likely that—one way or the other—the Brennan/Marshall Court would have virtually eliminated the use of jailhouse plants, a common and effective police investigative tool for solving crimes that cannot be solved through physical evidence alone.

### C. Adequate Miranda Warnings

In the area of *Miranda* warnings, the Brennan/Marshall Court would have differed substantially from the Republican Court, in at least two respects. First, the Brennan/Marshall Court would have required far greater adherence to the precise language of the warnings as outlined in *Miranda*, out of concern that a suspect in a coercive environment might misconstrue warnings delivered in any alternative form.<sup>252</sup>

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245. *Id.* at 300 (Brennan, J., concurring in the judgment).

246. *Id.* at 301.

247. *Id.* at 300 (Brennan, J., concurring in the judgment).

248. *Id.* at 306 (Marshall, J., dissenting).

249. *Supra* note 248 and accompanying text.

250. *See Perkins*, 496 U.S. at 300 (Brennan, J., concurring in the judgment).

251. *See South Dakota v. Neville*, 459 U.S. 553, 564 n.15 (1993).

252. *See, e.g., Duckworth v. Eagan*, 492 U.S. 195 (1989); *California v. Prysock*, 453 U.S.

Second, and more importantly, the Brennan/Marshall Court would have insisted on providing the suspect with more information—even beyond that required by *Miranda*—if needed to ensure a truly knowing and voluntary waiver of rights. For example, in *Colorado v. Spring*, Justices Brennan and Marshall, in dissent, insisted that the suspect should have been informed, as part of his *Miranda* warnings, that he was about to be questioned about a crime different from the one for which he had been arrested.<sup>253</sup>

The key decision in this area—and the most important indicator of how different the world of police interrogation would likely have been under the Brennan/Marshall Court—is *Moran v. Burbine*.<sup>254</sup> There, Burbine (who was arrested for burglary but was also suspected in a brutal murder) was not told that a lawyer (who was contacted on Burbine's behalf by his sister) had called the police station to say that she would represent him at any interrogation.<sup>255</sup> The lawyer was told by a police officer that there would be no interrogation of Burbine that night.<sup>256</sup> Instead, Burbine was read the *Miranda* warnings, agreed to waive his rights, was questioned, and ultimately confessed to the murder.<sup>257</sup>

By a 6-3 majority, the Court held that Burbine's rights under *Miranda*, the Fifth Amendment, the Sixth Amendment, and the Due Process Clause had not been violated.<sup>258</sup> Finding *Miranda* to strike the proper balance between Fifth Amendment values and the need for societal protection, the majority explained:

Once it is determined that a suspect's decision not to rely on his [*Miranda*] rights was uncoerced, that he at all times knew he could stand mute and request a lawyer, and that he was aware of the State's intention to use his statements to secure a conviction, the analysis is complete and the waiver is valid as a matter of law.<sup>259</sup>

In the majority's view, the deception of Burbine's lawyer was irrelevant since, even had she come to the station, she would not have been allowed to meet with Burbine, who had neither asked for counsel nor taken an opportunity to phone one.<sup>260</sup> Burbine's Sixth Amendment claim failed because no formal proceedings had begun in the murder case as of the time of the interrogation,<sup>261</sup> and his due process claim failed because the police conduct did not "shock[] the sensibilities of civilized

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355 (1981) (involving suspects whose *Miranda* warnings were delivered in a nonstandard, and arguably confusing, form). Justices Brennan and Marshall joined the dissents in both cases. *Duckworth*, 492 U.S. at 214 (Marshall, J., dissenting); *Prysock*, 453 U.S. at 362 (Stevens, J., dissenting).

253. *Colorado v. Spring*, 479 U.S. 564, 578-79 (Marshall, J., dissenting).

254. 475 U.S. 412 (1986).

255. *Id.* at 417.

256. *Id.*

257. *Id.* at 417-18. While the statement made by the police officer to the lawyer was clearly false, it is not clear that the officer who made the statement knew that other police officers intended to question Burbine later that night about the murder. *See id.* at 418.

258. *See id.* at 420.

259. *Id.* at 422-23.

260. *Id.* at 422.

261. *Id.* at 428.

society.<sup>262</sup>

Justices Brennan and Marshall joined Justice Stevens's stirring dissent. First, with respect to the purported *Miranda* waiver, the dissenters argued that

settled principles about construing waivers of constitutional rights and about the need for strict presumptions in custodial interrogations, as well as a plain reading of the *Miranda* opinion itself, overwhelmingly support the conclusion [that] . . . a suspect's waiver . . . is invalid if police refuse to inform the suspect of his counsel's communications.<sup>263</sup>

Second, the dissent claimed that "as a matter of law, the police deception of [Burbine's lawyer] was tantamount to deception of Burbine himself,"<sup>264</sup> violating his right to have counsel present during questioning. According to the dissent, "Whether the source of that right is the Sixth Amendment, the Fifth Amendment, or a combination of the two is of no special importance . . ."<sup>265</sup> Third, and finally, the dissent argued that the police conduct, which "effectively drove a wedge between an attorney and a suspect," violated Burbine's due process rights as well.<sup>266</sup> In his concluding words, Justice Stevens left no doubts about his overall assessment of the majority's decision: "Like the police on that June night . . . the Court has trampled on well-established legal principles and flouted the spirit of our accusatorial system of justice."<sup>267</sup>

Had the Brennan/Marshall Court produced a different outcome in *Burbine*, the long-term implications for police interrogations could have been quite significant, depending on the extent to which the Court would have pushed the various theories underlying Justice Stevens's *Burbine* dissent. At a minimum, it is clear that the Brennan/Marshall Court would have extended greater protection to all suspects in police custody who had previously established a relationship with a defense attorney, at least if the police were made aware of that relationship. In such situations, the police would be prohibited from interfering in any way with attempts at communication between the attorney and the suspect—including such interference as failing to inform the suspect about the attorney's desire to communicate with him, and misinforming the attorney about any aspect of the suspect's interrogation.

But would the liberals have stopped there? Certainly Justice Stevens's *Burbine* dissent begs more questions than it answers. For example, what about suspects who are not in police custody, but who have previously established a relationship with a defense attorney? The *Burbine* dissent stresses that the custodial setting imposes an "especially heavy" burden on the police to demonstrate a valid waiver of rights,<sup>268</sup> but Justice Stevens's emphasis on the suspect's Sixth Amendment right to counsel<sup>269</sup> (a right not limited to custodial settings), as well as his analogy to the norms of

262. *Id.* at 433-34.

263. *Id.* at 456 (Stevens, J., dissenting).

264. *Id.* at 463.

265. *Id.*

266. *Id.* at 468.

267. *Id.*

268. *Id.* at 450-51.

269. *See id.* at 462-65.

professional conduct prohibiting contact between a lawyer and a represented party in a civil case<sup>270</sup> (another noncustodial context), seem to suggest that the rights he would have created would extend beyond *Miranda*'s custodial setting.

And what constitutes an attorney-client relationship, within the context of the *Burbine* dissent? In a casual footnote, Justice Stevens states that "members of a suspect's family may provide a lawyer with authority to act on a suspect's behalf while the suspect is in custody."<sup>271</sup> What about the suspect's friends? Or members of the suspect's gang? Or perhaps the lawyer herself—as might predictably happen, once defense lawyers become aware of their ability to cut off police questioning by unilaterally triggering a suspect's "*Burbine* rights"?

Finally, and perhaps most importantly, would suspects need to be provided with information not only about communication with their attorneys, but also about other information that would help them avoid becoming—in the words of the dissent—"the deluded instrument of [their] own conviction"<sup>272</sup> The dissent seems to demand, as the *Burbine* majority put it, that the suspect must be informed of "any and all information [at least in the actual or constructive possession of the police] that would be useful to a decision whether to remain silent or speak with the police."<sup>273</sup> Because a confession is never a good legal strategy for the suspect, the more information he is given, the more likely he will be to conclude that he should not confess. Requiring the police to inform a suspect that "your attorney called and says not to talk to us"—or, in the alternative, that "if you were to ask an attorney, she would certainly tell you not to talk to us"—would thus severely limit otherwise voluntary confessions.<sup>274</sup> As Justice O'Connor wrote for the *Burbine* majority:

No doubt the additional information would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.<sup>275</sup>

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270. See *id.* at 463 n.53.

271. *Id.* at 435 n.3.

272. *Id.* at 434 n.1 (quoting 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 46, § 34 (Garland Publishing, Inc. 1978) (1716-21)).

273. *Id.* at 433 n.4.

274. This same point was made, in a different but related context, by lawyer and former Governor of Illinois James Thompson, who argued the State's case in *Escobedo v. Illinois*, 378 U.S. 478 (1964). In his brief to the Court in *Escobedo*, Thompson warned that conferring a right to counsel upon all arrested suspects, and then insisting that all waivers of such a right must be truly informed, "means the end of confessions as a tool of law enforcement." Brief of Respondent at 39, *Escobedo v. Illinois*, 378 U.S. 478 (1964) (No. 64-615).

275. *Burbine*, 475 U.S. at 422; see also James J. Tomkovicz, *Standards for Invocation and Waiver of Counsel in Confession Contexts*, 71 IOWA L. REV. 975, 1049 (1986) ("The policies of the fifth amendment privilege do not demand rationality, intelligence, or knowledge, but only a voluntary choice not to remain silent.").

## D. Waiver

Once adequate *Miranda* warnings are given, what is needed to show a valid waiver? In the real world, we know that *Miranda* waivers are common. Even according to *Miranda*'s most fervent academic critic, Professor Paul Cassell, only about sixteen percent of all Mirandized suspects successfully invoke their *Miranda* rights.<sup>276</sup> But would waivers have been so common under the Brennan/Marshall Court?

In *Miranda* itself, the Court referred to the well-known *Johnson v. Zerbst*<sup>277</sup> standard for waiver of constitutional rights—"intentional relinquishment of a known right"<sup>278</sup>—a very difficult standard for the prosecution to meet.<sup>279</sup> *Miranda* also declared that "a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived" his rights.<sup>280</sup>

In *North Carolina v. Butler*,<sup>281</sup> however, the Republican Court refused to adopt such a rigorous approach, holding that a suspect's oral assent or even silence "coupled with an understanding of his rights and a course of conduct indicating waiver" may be sufficient to show waiver.<sup>282</sup> The Court explained that "in at least some cases waiver can be clearly inferred from the actions and words of the person interrogated."<sup>283</sup> Justice Brennan, joined by Justices Marshall and Stevens, dissented, claiming that "the very premise of *Miranda* requires that ambiguity be interpreted against the interrogator."<sup>284</sup> One year later, in *Tague v. Louisiana*, a per curiam Court (with Justice Rehnquist as the lone dissenter) emphasized that—notwithstanding the decision in *Butler*—a waiver cannot be shown merely by the fact that a suspect confessed after receiving *Miranda* warnings.<sup>285</sup> Because "no evidence at all was introduced" to prove waiver, the resulting confession was inadmissible.<sup>286</sup> Still, in general, waiver has been easy for the government to establish.

In *Connecticut v. Barrett*,<sup>287</sup> after receiving *Miranda* warnings, the suspect stated that he understood his rights, would not give a written statement without his attorney present, but had "no problem" talking with the police; he then confessed to the crime.<sup>288</sup> Later, he reiterated that he "was willing to talk about [the incident] verbally but he did not want to put anything in writing until his attorney came"; once again,

276. See Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990's: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 842 (1996).

277. 304 U.S. 458 (1938).

278. *Id.* at 464.

279. See *Miranda v. Arizona*, 384 U.S. 436, 475 (1966). For a discussion of why *Johnson v. Zerbst*, a case about waiver of counsel at trial, should not be applied in the interrogation context, see Tomkovicz, *supra* note 275, at 1043-59.

280. *Miranda*, 384 U.S. at 475.

281. 441 U.S. 369 (1979).

282. *Id.* at 373.

283. *Id.*

284. *Id.* at 377 (Brennan, J., dissenting).

285. See *Tague v. Louisiana*, 444 U.S. 469, 470-71 (1980) (per curiam).

286. *Id.* at 471.

287. 479 U.S. 523 (1987).

288. *Id.* at 525.



he then confessed.<sup>289</sup> The Court held that the *Miranda* waiver was valid.<sup>290</sup> Justices Stevens and Marshall dissented;<sup>291</sup> Justice Brennan concurred in the judgment only because the defendant had signed a form indicating that he understood his rights,<sup>292</sup> and also had testified, in court, that he "understood that anything he said could be used against him."<sup>293</sup> In the usual case, however, it is clear that the Brennan/Marshall Court would require a written *Miranda* waiver, and would conclude that a suspect's failure to sign such a waiver renders subsequent statements to police, however voluntary, to be inadmissible. Had the Brennan/Marshall Court required a truly knowing and voluntary waiver in the sense of *Johnson v. Zerbst*, the number of confessions would likely have plummeted.<sup>294</sup>

#### *E. Invocation of Miranda Rights, and the Consequences*

In order for the *Miranda* warnings to have any meaning, a suspect's invocation of his *Miranda* rights must be respected by the police. But what constitutes such an invocation? In *Fare v. Michael C.*,<sup>295</sup> a majority of the Court held that a suspect who, in response to *Miranda* warnings, asked to see his probation officer, did not properly invoke his *Miranda* right to counsel and thus could be questioned by the police.<sup>296</sup> Justice Marshall, joined by Justices Brennan and Stevens, dissented, suggesting that the suspect's response should have been interpreted as a statement that he did not feel comfortable speaking with the police.<sup>297</sup> This seems generally consistent with the view, expressed previously by Justice Brennan in the context of waiver, that all ambiguities concerning *Miranda* should be resolved against the interrogator.<sup>298</sup>

However, on the separate question of what are the consequences of a valid invocation of *Miranda* rights, the Court has gone in a direction generally favorable to suspects. Thus, the Brennan/Marshall Court probably would have been content to reach many of the same conclusions as the current Republican Court.

When a suspect invokes the right to silence, *Michigan v. Mosley*<sup>299</sup> holds that the police are not absolutely barred from further questioning, but must "scrupulously honor" the suspect's wishes.<sup>300</sup> In *Mosley*, the police "immediately ceased the interrogation, resumed questioning only after the passage of a significant period of

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289. *Id.* at 526.

290. *Id.* at 527-28.

291. *Id.* at 536-37 (Stevens, J., dissenting).

292. *Id.* at 532 (Brennan, J., concurring).

293. *Id.* at 531.

294. Available empirical evidence suggests that, even after receiving *Miranda* warnings, suspects often do not understand that oral statements can be used against them in court. See Lawrence S. Leiken, *Police Interrogation in Colorado: The Implementation of Miranda*, 47 DENVER L.J. 1, 15 (1970) (finding that forty-five percent of post-*Miranda* suspects believed oral statements could not be used against them).

295. 442 U.S. 707 (1979).

296. *Id.* at 724.

297. *Id.* at 730-31 (Marshall, J., dissenting).

298. See *North Carolina v. Butler*, 441 U.S. 369, 377 (Brennan, J., dissenting).

299. 423 U.S. 96 (1975).

300. *Id.* at 103-04.

time and the provision of a fresh set of warnings, and restricted the second interrogation to a crime that had not been a subject of the earlier interrogation."<sup>301</sup> This combination of factors led the Court to allow the further questioning.<sup>302</sup> Justices Brennan and Marshall dissented, based on a concern that the ruling would water down *Miranda's* protections.<sup>303</sup> Subsequent lower-court decisions, however, have generally respected a suspect's assertion of the right to silence and excluded statements obtained thereafter, unless the police have suspended questioning for a significant period and re-warned the suspect prior to further interrogation.<sup>304</sup>

When a suspect invokes the right to counsel, *Edwards v. Arizona* establishes a much clearer rule: all interrogation must cease, until counsel is actually made available to the suspect, or unless the suspect initiates further communication with the police.<sup>305</sup> Two later cases expanded the *Edwards* rule: after an invocation of the right to counsel, the police may not even ask questions about another crime,<sup>306</sup> and the fact that the suspect has consulted with a lawyer (after the initial invocation) does not remove the protection of *Edwards* or permit further police questioning.<sup>307</sup> Justices Brennan and Marshall were part of the majority in *Edwards* and in the first of the expansion cases.<sup>308</sup> Although Justice Brennan retired just before the second of the expansion cases, there seems little doubt that he, like Justice Marshall, gladly would have joined with the majority in it as well.

The only *Edwards* case in which Justices Brennan and Marshall were on the losing side was *Oregon v. Bradshaw*.<sup>309</sup> In *Bradshaw*, the suspect invoked his right to counsel, and then asked a police officer, "Well, what is going to happen to me now?"<sup>310</sup> The majority found that in so asking, the suspect reinitiated communication, thus allowing further police questioning.<sup>311</sup> In dissent, Justice Marshall, joined by Justice Brennan, acknowledged that their disagreement with the majority was not over the legal standard, but over its application to the particular facts.<sup>312</sup>

#### F. Sixth Amendment Rules

Before the beginning of formal proceedings, usually through arraignment or indictment, a suspect's constitutional protection against improper police interrogation is based largely on *Miranda* and the Fifth Amendment. After the onset of formal proceedings, however, a defendant also gains the protection of the Sixth Amendment's right to counsel.

The Warren Court's most famous decisions applying the Sixth Amendment to

301. *Id.* at 106.

302. *Id.* at 106-07.

303. *Id.* at 112 (Brennan, J., dissenting).

304. See Kamisar, *supra* note 10, at 62, 83, 286 n.133.

305. *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

306. *Arizona v. Roberson*, 486 U.S. 675, 682-85 (1988).

307. *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990).

308. *Edwards*, 451 U.S. at 477.

309. 462 U.S. 1039 (1983).

310. *Id.* at 1039.

311. *Id.* at 1045-46.

312. *Id.* at 1055 (Marshall, J., dissenting).

police interrogations were *Massiah v. United States*<sup>313</sup> and *Escobedo v. Illinois*.<sup>314</sup> In *Massiah*, the Court held that an indicted defendant cannot be questioned by a codefendant who is secretly working for the police, because such questioning violates the indicted defendant's Sixth Amendment right to counsel.<sup>315</sup> In *Escobedo*, the Court extended the *Massiah* holding to the quite different context of a defendant who was under arrest, but who had not yet been indicted or otherwise subjected to formal adversarial proceedings.<sup>316</sup> *Escobedo* was potentially a watershed case, because it seemingly extended the Sixth Amendment's right to counsel to the moment of arrest—and would have prohibited post-arrest police interrogations in the absence of counsel, severely hampering the ability of the police to secure confessions. Two years later, however, in *Miranda*, the Court stepped back from the potential abyss created by *Escobedo*, reinterpreting that case as a Fifth Amendment rather than a Sixth Amendment case.<sup>317</sup> The significance of this shift was that, after *Miranda*, pre-indictment suspects could be questioned by the police even in the absence of counsel, so long as other methods—specifically, the now-famous *Miranda* warnings and a valid waiver—sufficiently guaranteed that the suspect was not being coerced or compelled to answer the questions. Nothing in *Miranda* requires that a suspect who asks for counsel must be given one—merely that interrogation must cease.<sup>318</sup>

Even under the Republican Court, defendants against whom formal proceedings have begun continue to enjoy extra constitutional protection under the Sixth Amendment. Thus, in *United States v. Henry*,<sup>319</sup> a majority of the Court held that *Massiah* and the Sixth Amendment were violated by a series of "conversations" between the defendant and a jailhouse informant—even though the police had specifically instructed the informant not to question the defendant.<sup>320</sup> And in *Maine v. Moulton*,<sup>321</sup> the majority applied *Massiah* to bar the prosecution's use of information even though it had been gathered for an entirely different (and lawful) purpose.<sup>322</sup> Justice Brennan joined the majority in *Henry*,<sup>323</sup> and wrote the majority opinion in *Moulton*.<sup>324</sup>

The only post-Warren Court case that might be said to have undermined the *Massiah* rule is *Kuhlmann v. Wilson*.<sup>325</sup> There, a majority of the Court held that it does not violate *Massiah*, or the Sixth Amendment, for the police to place a passive, "listening post" informant in a jail cell with an indicted defendant, in the hope that the defendant will volunteer some kind of incriminating information.<sup>326</sup> Justice

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313. 377 U.S. 201 (1964).

314. 378 U.S. 478 (1964).

315. *Massiah*, 377 U.S. at 204-07.

316. *Escobedo*, 378 U.S. at 485-92.

317. *Miranda v. Arizona*, 384 U.S. 436, 440-42 (1966).

318. *Id.* at 474.

319. 447 U.S. 264 (1980).

320. *Id.* at 269-75.

321. 474 U.S. 159 (1985).

322. *Id.* at 172-80.

323. *Henry*, 447 U.S. at 264.

324. *Moulton*, 474 U.S. at 161.

325. 477 U.S. 436 (1986).

326. *Id.* at 456-61.

Brennan, in dissent, argued that the question of the listening-post informant—which had been reserved by the Court in *Henry*—was not even presented by the facts of *Kuhlmann v. Wilson*, since the lower court had concluded that the informant was not completely passive but instead subtly encouraged the defendant to discuss his crime.<sup>327</sup> Justice Brennan believed that any statement “deliberately elicited” from a Sixth Amendment defendant, by the police or by their agent, must be suppressed.<sup>328</sup>

In two other contexts, the Republican Court gave significant new life to the Sixth Amendment as a restriction on police interrogations. The first arose in the case of *Brewer v. Williams*,<sup>329</sup> in which an arraigned defendant (whose Sixth Amendment rights had thus attached) confessed to the murder of a child.<sup>330</sup> This was in response to comments by two police officers (who were transporting the defendant from the place of his arrest to the place where he would be tried for the crime) that the murder victim was entitled to a “Christian burial.”<sup>331</sup> The Court construed the so-called Christian burial speech as interrogation within the meaning of the Sixth Amendment, because it was deliberately designed to elicit incriminating information (the location of the body) from the defendant.<sup>332</sup> This interpretation of “interrogation” appears to be more protective of the defendant’s rights than the interpretation of the same term in the *Miranda* line of cases.<sup>333</sup> Justice Brennan joined the majority in the *Williams* case.<sup>334</sup>

The second arose in the context of a Sixth Amendment analogy to the rule of *Edwards*, which prohibits the police from further questioning after a suspect invokes his Fifth Amendment *Miranda* right to counsel.<sup>335</sup> If the Republican Court’s willingness to side with the suspect in *Edwards* was surprising, much more so was the Court’s extension of the *Edwards* rule to the parallel context of the Sixth Amendment right to counsel. In *Michigan v. Jackson*,<sup>336</sup> the Court held that a defendant who makes a general request for counsel at his arraignment triggers an *Edwards*-like rule, under the Sixth Amendment, and can no longer be subjected to police questioning—even for the limited purpose of seeking to obtain an otherwise valid *Miranda* waiver!<sup>337</sup> In other words, after *Jackson*, a defendant who asserts his Sixth Amendment right to counsel, even in the context of preparing for trial, gains protection from police interrogation that is greater than the protection provided by

327. *Id.* at 472-76 (Brennan, J., dissenting).

328. *Id.* at 474.

329. 430 U.S. 387 (1977).

330. *Id.* at 387.

331. *Id.*

332. *Id.* at 399-401, 399 n.6.

333. *See, e.g., Rhode Island v. Innis*, 446 U.S. 291 (1980) (finding no interrogation, within the meaning of *Miranda*, on relatively similar facts).

334. *Williams*, 430 U.S. at 388. In a subsequent iteration of the same case, the body of the murder victim, discovered as a direct result of Williams’s confession, was held by a majority of the Court to be admissible, despite the Sixth Amendment violation, because the police inevitably would have found it anyway, given the scope and pace of the ongoing search for the victim. *Nix v. Williams*, 467 U.S. 431, 456-58 (1984).

335. *Edwards v. Arizona*, 451 U.S. 477, 486-87 (1981).

336. 475 U.S. 625 (1986).

337. *Id.* at 625, 634-35.

*Edwards* itself (because, under *Edwards*, the protection is not triggered until the police have had at least one opportunity to ask the suspect to waive his rights, whereas under *Jackson* there is no such opportunity). Justices Brennan and Marshall joined with Justices White, Blackmun, and Stevens to produce this surprising result.<sup>338</sup>

Especially because the Court continues to tinker with the *Jackson* rule, we still do not know the full impact of *Jackson* on post-indictment police interrogations.<sup>339</sup> But it seems likely that *Jackson* will have a major impact, since virtually all defendants either ask for, or obtain, counsel (thus asserting their Sixth Amendment rights and triggering *Jackson*) early in the formal adversarial process. Under *Jackson*, no such defendant may thereafter be approached by the police and asked to waive either his Fifth Amendment *Miranda* rights or his Sixth Amendment rights; the only remaining hope for the police is that such a defendant, or his lawyer, might initiate a conversation with a police officer, in which case the police officer would be allowed to request such a waiver.

### G. Exclusionary Rules

Finally, there are the numerous cases in which the Court has addressed the ultimate consequences—in the courtroom—of a police violation of either the Fifth or Sixth Amendment. It is in this context that the Republican Court has had its greatest success in reversing the impacts of *Miranda* and other Warren Court precedents. And it is in this context that a Brennan/Marshall Court would have been most likely to produce a different result.

The Republican Court generally continues to exclude any statement obtained by means of an unconstitutional police interrogation from direct use in the prosecution's case-in-chief. Moreover, the Republican Court has held that a defendant's silence in response to police interrogation following *Miranda* warnings cannot be used even to impeach the defendant at trial, because such use would fly in the face of the *Miranda* warnings, which state that the suspect has a "right to remain silent."<sup>340</sup>

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338. *Id.* at 625.

339. In *Patterson v. Illinois*, 487 U.S. 285 (1988), the Court (with Justice Brennan in dissent) held that a proper *Miranda* waiver also serves to waive the Sixth Amendment right at issue in *Jackson*. *Id.* at 296-97. However, *Patterson* is not a major limitation on *Jackson*, since even a *Miranda* waiver can only be requested by the police *before* the defendant has asserted the Sixth Amendment right to counsel, and most defendants assert their Sixth Amendment rights immediately upon the start of formal adversarial proceedings. In *Patterson*, however, the suspect was indicted while in police custody, and the *Miranda* waiver was requested *before* the suspect was arraigned (at which point he would surely have asserted his Sixth Amendment right to counsel and would thereby have acquired the air-tight *Jackson* protection). *Id.* at 288; see also *Texas v. Cobb*, 121 S. Ct. 1335 (2001) (post-Brennan decision) (holding that the Sixth Amendment *Jackson* right is offense specific and does not protect a defendant from questioning about other crimes, contrary to an *Edwards* assertion, which does); *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) (post-Brennan decision) (same).

340. *Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976) (Justice Brennan joined the majority opinion). But a suspect is not protected against impeachment use of post-arrest silence during the period before the suspect receives any *Miranda* warnings. *Fletcher v. Weir*, 455 U.S. 603,

At the same time, several important exceptions to this general principle of exclusion have been created by the Republican Court. For example, whether or not the police have violated the Fifth or Sixth Amendment, any statement obtained thereby generally can be used to impeach a defendant who takes the stand at trial and makes a contrary declaration.<sup>341</sup> If the statement leads to the discovery of other evidence, and if the police inevitably would have discovered the evidence anyway, then that evidence may be used directly in the prosecution's case-in-chief.<sup>342</sup> And if the statement was obtained in violation of *Miranda* (but not apparently, through a Sixth Amendment violation), but was otherwise voluntary, then the police may proceed to Mirandize the suspect properly and obtain a second statement that can be used in the prosecution's case-in-chief. This is because a *Miranda* violation, standing alone, does not give rise to a fruit-of-the-poisonous-tree effect, nor does it automatically undermine the voluntariness of any statements made after the suspect is subsequently re-Mirandized.<sup>343</sup>

Justices Brennan and Marshall vehemently dissented from each of the aforementioned decisions, in large part because they recognized that a primary rationale for the decisions was the majority's view that *Miranda* itself is not a constitutional mandate, but rather a mere prophylactic rule that goes far beyond the scope of the Fifth Amendment. Justices Brennan and Marshall would have required the government to prove that any subsequent evidence was not tainted by the improperly obtained statement.<sup>344</sup> As Justice Brennan explained in one of his dissents:

Even while purporting to reaffirm [*Miranda*], the Court has engaged of late in a studied campaign to strip the *Miranda* decision piecemeal and to undermine the rights *Miranda* sought to secure. . . .

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605-07 (1982) (per curiam). A suspect is not protected against the impeachment use of any statements made in response to the *Miranda* warnings. *Anderson v. Charles*, 447 U.S. 404, 408-09 (1980) (per curiam). In addition, a suspect is not protected against the impeachment use of pre-arrest silence. *Jenkins v. Anderson*, 447 U.S. 231, 238-41 (1980). Justices Brennan and Marshall dissented in *Jenkins. Id.* at 245-54 (Marshall, J., dissenting).

341. E.g., *Michigan v. Harvey*, 494 U.S. 344, 350-54 (1990) (*Jackson* violation); *Oregon v. Hass*, 420 U.S. 714, 720-24 (1975) (*Miranda* violation); *Harris v. New York*, 401 U.S. 222, 225-26 (1971) (*Miranda* violation).

342. See *Nix v. Williams*, 467 U.S. 431, 440-50 (1984).

343. See *Oregon v. Elstad*, 470 U.S. 298, 303-18 (1985).

344. See generally YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 802-11 (9th ed. 1999) (discussing whether confessions obtained in violation of *Miranda* are "poisonous trees"). We think that Justice Brennan had *Elstad* right. The *Elstad* loophole was not serious in that case, because the original conversation in the suspect's living room was arguably not custodial interrogation at all. But it has been pushed beyond reasonable limits by police, as Professor Alshuler predicted it would be at the time. Albert W. Alshuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442-43 (1987). For example, the D.C. Court of Appeals recently approved a police interrogation where the defendant was interrogated intermittently for almost two hours while in handcuffs at the station house. *Davis v. United States*, 724 A.2d 1163, 1165-70 (D.C. 1998). Only after he confessed was he given the *Miranda* warnings, after which his second confession, complete with warnings, was videotaped and used in court. *Id.* at 1165-66.

. . . *Miranda's* requirement of warnings and an effective waiver was not merely an exercise of supervisory authority over interrogation practices. . . . *Miranda* clearly emphasized that warnings and an informed waiver are essential to the Fifth Amendment privilege itself.<sup>345</sup>

As noted previously, the constitutional status of *Miranda* was recently challenged in a case involving the issue whether 18 U.S.C. § 3501 effectively overruled *Miranda*, thus requiring a return to the traditional Fifth Amendment voluntariness test.<sup>346</sup> A majority of the current Court rejected the challenge and reaffirmed *Miranda*.<sup>347</sup> The Brennan/Marshall Court surely would have reached the same result; indeed, that Court almost certainly would have invalidated 18 U.S.C. § 3501, and cemented the constitutional status of *Miranda*, a long time ago.

#### IV. THE BRENNAN/MARSHALL COURT: AN ASSESSMENT

During Justice Brennan's final years on the Court before his retirement in 1990, and again following his death in 1997, he was lionized as one of the great defenders of the Constitution. For example, Justice Brennan was once introduced before the Association of the Bar of the City of New York as follows: "He is a hero, there he is a hero, [sic] he is our hero of the Constitution of the United States."<sup>348</sup> And Professor Burt Neuborne recently remarked:

I would not want a Court of nine Brennans; five would do. One of the reasons we are so sure Brennan is a hero is that for so many of us, he has become the archetype of the constitutional judge. He will continue to be that archetype for generations to come.<sup>349</sup>

Justice Marshall received similar praise upon his retirement from the Court in 1991, and again upon his death in 1993. Senator Joseph Biden, then head of the Senate Judiciary Committee, said upon hearing of Justice Marshall's retirement: "The Supreme Court has lost a historic Justice—a hero for all Americans and all times."<sup>350</sup> And Judge William Justice commented, after Justice Marshall's death:

[P]art of Justice Marshall's genius came from his capacity to voice the anguish, despair, and social injury suffered by the excluded and oppressed in our land. As a Justice, his intellectual breadth allowed him to fold these simple truths into established legal principles. He was recognized and honored for his lifelong efforts to obtain progressive changes in human rights. Yet he fought for

345. *Elstad*, 470 U.S. at 319, 348 (Brennan, J., dissenting).

346. *Dickerson v. United States*, 120 S. Ct. 2326 (2000); *see supra* text accompanying note 200.

347. *Id.* at 2336-37.

348. *See* Robert McKay, *Introductory Remarks*, 42 REC. ASS'N B. CITY N.Y. 948, 950 (1987).

349. *See* Panel Discussion, *Brennan's Approach to Reading and Interpreting the Constitution*, 43 N.Y. L. SCH. L.R. 41, 47 (1999) (comments of Burt Neuborne).

350. Andrew Rosenthal, *Marshall Retires from High Court; Blow to Liberals*, N.Y. TIMES, June 28, 1991, at A13.

reformation only through allegiance to the rule of law.<sup>351</sup>

These plaudits, however, must be understood in the context of the special role played by Justices Brennan and Marshall within the Court. Although Justice Brennan enjoyed great success between 1961 and 1970 as one of the primary architects of the Warren Court's criminal procedure revolution, for more than half of his tenure, he served primarily not as a leader, but as a critic of a Court that he believed was moving in the wrong direction. Justice Marshall's legacy was similarly that of the "great dissenter." In this sense, certainly, one could accurately describe Justices Brennan and Marshall as "defenders" of the Constitution, or as standing up for the "rule of law," at least as conceived by the Warren Court, for without their strong and steady counterweight, the impact of Justice/Chief Justice Rehnquist, Chief Justice Burger, and Justice Scalia upon criminal procedure law would have been far greater. The influence of Justices Brennan and Marshall (along with that of Justices Stevens and, to a lesser extent, Justice Blackmun) helped to ensure that the post-Warren Court would turn out to be only moderately, rather than extremely, conservative on most criminal procedure issues.

Unlike most commentators, however, our mission is not to praise Justices Brennan and Marshall for their dogged perseverance in opposing Justice Rehnquist and the other conservatives, but instead to describe the legal landscape that the police would have faced if Justices Brennan and Marshall had been able to implement their own vision of criminal procedure law, rather than merely resisting the views of the conservatives. If one takes Justices Brennan and Marshall at their word, as expressed in the more than one hundred criminal procedure cases we have surveyed, that landscape would have been very different from what we now have.<sup>352</sup>

Here is what we can glean from Justices Brennan's and Marshall's opinions: In the area of Fourth Amendment law, the Brennan/Marshall Court would have given defendants both more opportunities to litigate and more opportunities to win exclusionary claims. The Court would have substantially widened the definition of a search, thus drawing much more police behavior within the scope of Fourth Amendment regulation. The Court also would have expanded the concepts of stop and arrest to include considerably more investigative activity than is currently covered. This would have required the police greatly to expand the use of warrants to search both people and places. For the most part, only a very small number of exigent-circumstance searches, searches incident to arrest, and consent searches would be permitted without a warrant, and the Court would have made consents much more difficult for the police to obtain. At the same time, the Court would have made warrants harder to get, and would have limited the scope of the search that the police could make both with, and without, warrants. The Court would have curtailed or eliminated all of the current exceptions to the Fourth Amendment exclusionary

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351. William Wayne Justice, *In Memoriam: Law Day Address at the University of Texas at Austin: The Enlightened Jurisprudence of Justice Thurgood Marshall*, 71 TEX. L. REV. 1099, 1109 (1993).

352. *But see infra* text accompanying notes 363-67 (suggesting that Justice Brennan might have moderated his stances had he been making law rather than criticizing the Republican court).



rule,<sup>353</sup> and would have broadened the concept of standing to give more defendants an opportunity to raise exclusionary claims.

In the Fifth and Sixth Amendment context, the Brennan/Marshall Court would have significantly limited the ability of the police to obtain confessions from suspects. The Court would have applied *Miranda* much more broadly than under current law, including to many situations where the defendant was not restrained at all in the traditional meaning of custody. The Court would have insisted on strict adherence to the language of the *Miranda* warnings, and would have construed any and all ambiguities against the government with respect to *Miranda* waivers. Moreover, such waivers would only be allowed if they were truly knowing and voluntary. The Court would have allowed only a very narrow exception<sup>354</sup> to the current rule that police interrogation generally must cease whenever the defendant asserts his right either to silence or to counsel under *Miranda*, and would have agreed with the current Court that the police may not even request a waiver once the defendant asserts his Sixth Amendment rights. Also, controversial interrogation techniques that were condemned but not prohibited by *Miranda*, such as falsely telling a suspect that a codefendant has implicated him, would be forbidden.

The use of jailhouse plants to obtain information would be prohibited both before and after the start of formal proceedings. The Brennan/Marshall Court would have barred any misinformation or police deception from interfering with the relationship between the defendant and his lawyer, and—most importantly—might even have allowed lawyers unilaterally to assert the rights of their clients, thus effectively eliminating almost all confessions by counseled defendants (including those for whom third parties had arranged for counsel). Finally, the Court would have imposed a broad Fifth and Sixth Amendment exclusionary rule, including the exclusion of all “fruits” of *Miranda* violations.

In addition, one must consider how the Brennan/Marshall Court probably would have applied these doctrines to the facts of particular cases. It is quite striking that, with but two minor exceptions,<sup>355</sup> Justices Brennan and Marshall *never* voted for the government in a Fourth Amendment case from the entire period between 1972 (the inception of the Republican Court) and their retirements.<sup>356</sup> In the Fifth and Sixth

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353. As discussed above, the inevitable-discovery and independent-source exceptions would have been significantly curtailed, but not eliminated. *See supra* Part III.G. The *Leon* good-faith exception, together with the various use-for-impeachment exceptions, would be gone. *See supra* Part III.G.

354. This exception exists only when a suspect spontaneously expresses a clear desire to reopen discussion of the case. *Oregon v. Bradshaw*, 462 U.S. 1039, 1052-54 (1983) (Marshall, J., dissenting).

355. The first of these two exceptions is the unanimous opinion in *Hensley*. *See supra* text accompanying note 82 (discussing *Hensley*'s extension of *Terry* stops to those reasonably suspected of past, as well as present, criminality). The second is the essentially unanimous portion of the opinion in *United States v. Crews*, 445 U.S. 463 (1980) (partial majority opinion by Justice Brennan, allowing in-court identification by a witness who had previously seen an improperly obtained photograph of the defendant, but refusing to agree with a majority that a defendant's face could *never* be a suppressible fruit of the poisonous tree).

356. Justice Rehnquist has frequently been criticized along the lines expressed by David Shapiro, that “the unyielding character of his ideology has had a substantial adverse effect on

Amendment area, the story is similar: in only a small handful of police interrogation cases did Justices Brennan and Marshall ever vote for the government.<sup>357</sup> This one-sided track record strongly suggests that cases involving such fact-laden issues as whether the police had probable cause to obtain a warrant or to conduct a warrantless search, or whether a consent to search or a *Miranda* waiver was voluntary, would also almost always have been resolved by the Brennan/Marshall Court (as well as by all lower federal courts, to the extent they might be expected to follow the Supreme Court's lead) against the government. Moreover, Justice Brennan's expansive view of habeas corpus would have increased federal court reconsideration of state court convictions, with concomitant reversals and/or retrials.<sup>358</sup>

The Brennan/Marshall Court would, to put it mildly, have left the police between a rock and a hard place. On the one hand, the police would face, as always, strong public pressure to conduct effective investigations and to solve crimes. On the other hand, the police would face significant new constitutional limitations on their ability to conduct what we view today as routine searches, seizures, and interrogations. It seems that Justices Brennan and Marshall either were willing to accept the possibility that more crimes would go unsolved or unprosecuted, or assumed that the police and courts would somehow adapt to their constitutional regime and manage to prosecute such crimes anyway. The latter view, however, reflects a serious naivete about the costs and effectiveness of additional procedures.

Justices Brennan's and Marshall's deep mistrust of the police was forged in the 1930s, 1940s, and 1950s, in the fire of painful, and sometimes personal, experience.<sup>359</sup> But their views seemingly did not evolve in light of the major societal changes that began to occur (in large part due to the decisions of the Warren Court in which they participated) in the 1960s, and have continued to this day. Today, when

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his judicial product." David L. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 293 (1976). However, as Shapiro's own statistics, as well as the cases discussed in this Article demonstrate, Justice Rehnquist—while hardly a moderate—was not as "unyielding" as Justices Brennan and Marshall, at least as to the Fourth Amendment. See also Craig M. Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?*, 62 IND. L.J. 273 (1987).

357. The few cases include *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), where Justice Brennan, but not Justice Marshall, exempted "routine booking questions" from the scope of *Miranda*, *id.* at 601-02 (plurality opinion); *Illinois v. Perkins*, 496 U.S. 292 (1990), where Justice Brennan, but not Justice Marshall, concluded that use of a jailhouse plant does not implicate *Miranda* (but likely violates due process), *id.* at 300-03 (Brennan, J., concurring); *Berkemer v. McCarty*, 468 U.S. 420 (1984), where Justices Brennan and Marshall agreed that *Miranda* does not apply to a brief traffic stop, *id.* at 435-42; *South Dakota v. Neville*, 459 U.S. 553 (1983), where Justice Brennan, but not Justice Marshall, agreed that asking a suspect to take a blood-alcohol test was not interrogation under *Miranda*, *id.* at 564 n.15 (citing *Rhode Island v. Innis*, 496 U.S. 291, 301 (1980)); and *Michigan v. Tucker*, 417 U.S. 433 (1974), where Justices Brennan and Marshall wrote that *Miranda* should not be applied retroactively to exclude the fruits of a pre-*Miranda* interrogation, *id.* at 453-58 (Brennan, J., concurring).

358. See *Wainwright v. Sykes*, 433 U.S. 72 (1977) (Brennan, J., dissenting).

359. Justice Marshall's experiences in the civil rights movement are well known. Less well known is that Justice Brennan, as a ten-year-old, witnessed his father, a union organizer, carried home by his comrades, beaten and bloody, after an encounter with the Newark, New Jersey police. KIM I. EISLER, *A JUSTICE FOR ALL* 19 (1993).

minorities are much better represented among police, prosecutors, judges, and state officials, one of the key aspects of the liberal agenda in the 1950s and 1960s—protecting minorities from oppression by the white establishment—while hardly forgotten, is a lesser imperative than it once was. The Court has changed in response to a changing society, a society in which minorities—disproportionately represented among crime *victims* as well as *defendants*, and often wielding considerable political power—frequently demand tougher, not more lenient, law enforcement.<sup>360</sup> The fact that the newer Democratic Justices Ginsburg and Breyer do not take such an extreme antipolice stance<sup>361</sup> further suggests that times may have changed.<sup>362</sup>

It might be argued that, had Justices Brennan and Marshall been in the majority, they might have been more balanced in their assessment of the needs of law enforcement versus the rights of the defendant. Their doomsday rhetoric, so striking in dissent, would have been unnecessary if they were on the winning side. But there is little evidence that they did not mean exactly what they said about the substance of the law of criminal procedure. In his famous 1977 *Harvard Law Review* article,<sup>363</sup> Justice Brennan surveyed the field of constitutional litigation broadly, removed from the conflicts and passions of individual cases. Far from moderating his views, he condemned recent Court decisions restricting criminal and other constitutional rights, and he urged state courts to recognize, under state constitutions, rights newly

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360. See Craig M. Bradley, *The Changing Face of Criminal Procedure*, TRIAL, Oct. 1999, at 84 (comparing *City of Chicago v. Morales*, 527 U.S. 41, 48 (1999) (striking down, reluctantly, an antiloitering ordinance demanded by inner-city residents, with helpful suggestions for redrafting), with *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972) (striking down a similar ordinance to discourage “harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure” (quoting *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940))); see also Tracey L. Meares & Dan M. Kahan, *Law and Norms of Order in the Inner City*, 32 LAW & SOC’Y REV. 805, 805 (1998) (noting that although the crime tide is receding nationally, America’s predominantly minority inner-city neighborhoods remain awash in violent lawbreaking).

361. See, e.g., *Ohio v. Robinette*, 519 U.S. 33 (1996) (8-1 decision) (holding that police may seek consent to search a car after a traffic stop without telling the motorist he is free to go); *Whren v. United States*, 517 U.S. 806 (1996) (unanimous decision) (upholding pretextual stops of cars by police). In *Robinette*, only Justice Stevens dissented. *Robinette*, 519 U.S. at 45 (Stevens, J., dissenting). Justice Ginsburg concurred in the result, agreeing that the Fourth Amendment contained no such requirement, but suggesting, à la Justice Brennan, that Ohio could base such a right on the Ohio constitution. *Id.* at 40-45 (Ginsburg, J., concurring). *But cf.* *Knowles v. Iowa*, 525 U.S. 113 (1998) (unanimously striking down Iowa law allowing the police to “search incident to arrest” if they have probable cause, even if there was no arrest). Such agreement on Fourth Amendment issues—going both ways—never occurred during the period from 1972 until Justices Brennan and Marshall retired.

362. Of course, it could be argued that the only reason that these relatively moderate Justices were appointed, rather than “true liberals,” was because a “true liberal” could not have gotten past a hostile Senate. But it is surely the case that “true liberals” are not as thick on the ground as during the 1960s and 1970s.

363. William J. Brennan, *State Constitutions and the Protection of Individuals Rights*, 90 HARV. L. REV. 489 (1977).

circumscribed, or never endorsed, by the Court under the federal constitution.<sup>364</sup> It is ironic that Justice Brennan, whose Supreme Court career was characterized by extreme mistrust of the states, should, having failed to garner a majority of the Court, turn to the states to advance his liberal agenda in constitutional law.<sup>365</sup>

We have therefore taken Justices Brennan and Marshall at their word, and assessed the criminal procedure system that they adumbrated. Still, it is one thing to issue impassioned dissents and quite another to be declaring the law. We suspect that Justice Brennan in particular, as the great conciliator of the Warren Court,<sup>366</sup> would have been motivated—had he been writing for a majority of the Court—to implement his views in a manner that would not so thoroughly arouse the ire of the police or of society as a whole.<sup>367</sup>

For example, in cases where the police did have probable cause, which likely includes many of the cases in which they were never required to show it,<sup>368</sup> warrant procedures could be streamlined so that the warrant requirement would not be so burdensome.<sup>369</sup> Since neither Justice Brennan nor Justice Marshall ever had occasion to declare themselves as to the validity of telephonic or radio warrants, it is not clear whether a Brennan/Marshall Court would have approved them. Had it not, however,

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364. Justice Brennan reiterated these views nine years later in William J. Brennan, *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

365. One might suppose that it was different states that Justice Brennan mistrusted from the ones he was addressing in the Harvard article. But this was not so. For example, in one portion of the article he cited Hawaii, California, Michigan, South Dakota, and Maine as states with admirable decisions advancing the rights of criminal defendants. Brennan, *supra* note 363, at 500. But, with the exception of Hawaii, the Supreme Courts of all of the above states also had issued criminal procedure rulings, discussed above, which Justice Brennan condemned.

366. For example, it was Justice Brennan who convinced Chief Justice Warren to not “prescribe rigid rules” in *Miranda* but to allow the states “latitude to devise other means” to protect the right against self-incrimination. EISLER, *supra* note 359, at 195. Ironically, this language was used by the Republican Court to undermine the constitutional force of *Miranda*. See *supra* notes 341-43 and accompanying text.

367. For example, Justice Brennan wrote the pro-police majority opinion in *Warden v. Hayden*, 387 U.S. 294 (1967), which abandoned the mere-evidence limitation on what incriminating material police could seize, but also suggested that there might be some “items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure.” *Id.* at 303. Likewise, in *Schmerber v. California*, 384 U.S. 757 (1966), Justice Brennan wrote the 5-4 majority opinion allowing the compelled extraction of blood from a drunk-driving suspect. *Id.* at 768.

368. That is, in a case such as *Oliver v. United States*, 466 U.S. 170 (1984), the police may well have had, or could have acquired, probable cause before they trespassed onto the suspect’s land, but they were never forced to make this showing. See *supra* text accompanying notes 23-28. Since it is rarely the case that police waste resources conducting suspicionless, random investigations, it may well be that a probable cause showing would not ordinarily be difficult to make.

369. See, e.g., Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1499 (1985) (arguing that the police could easily radio for search warrants prior to conducting automobile searches, for which they must already have probable cause under current law). Such search warrants are available under FED. R. CRIM. P. 41(c)(2).

the stringent warrant requirement often advocated by Justices Brennan and Marshall would have proved totally unworkable, and society would likely have rebelled as the toll of reversed convictions increased. Likewise, the feasibility of a warrant requirement for outdoor arrests, which Justices Brennan and Marshall urged in *Watson*, would depend on how tightly the Court enforced the exigent-circumstance exception to that requirement.

Another example is the law of consent. We agree with Professor William Stuntz that the kind of wholesale consent seeking that has become the policy of many police departments under current Supreme Court rules should be limited. If the police want to search someone as to whom they lack even articulable, reasonable suspicion, then they should have to warn such a person of the right to refuse consent.<sup>370</sup> It is not at all obvious that requiring such warnings would discourage consents, any more than the *Miranda* warnings have discouraged confessions.<sup>371</sup> As Justice Marshall pointed out, dissenting in *Schneckloth v. Bustamonte*,<sup>372</sup> the FBI routinely warns suspects of their right to refuse consent.<sup>373</sup> And neither Justice Brennan nor Justice Marshall ever advocated the extreme position that consent searches not be allowed at all.<sup>374</sup> Still, the imposition of yet another *Miranda*-type warning for virtually all consent searches, as Justices Brennan and Marshall suggested,<sup>375</sup> seems unduly restrictive. Perhaps Justices Brennan and Marshall would have adopted Stuntz's compromise had they been presented with it.

In most areas, though, with the benefit of hindsight, the views of Justices Brennan and Marshall seem generally less reasonable than those of the Republican Court with which they so often battled. At the very least, it is fair to say that the police state, foretold in so many strident Justices Brennan and Marshall dissents, has not occurred.<sup>376</sup> We agree with Justice Brennan (and the Court) that search warrants should be required for searches of structures, but we do not believe that an expanded

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370. See William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016, 1064-65 (1995). *But cf.* Lloyd Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 57-58 (1974) (arguing that only when there is some technical difficulty with obtaining a warrant, such as the unavailability of the magistrate, should unwarned consent searches be allowed).

371. We are, of course, aware of the continuing controversy on this point. Compare Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387 (1996) (arguing *Miranda* has discouraged confessions), with Stephen J. Schulhofer, *Miranda's Practical Effect: Substantial Benefits and Vanishingly Small Costs*, 90 NW. U. L. REV. 500 (1996) (arguing *Miranda* has not significantly discouraged confessions).

372. 412 U.S. 218 (1983).

373. *Id.* at 287 (Marshall, J., dissenting).

374. *Contra* *United States v. Matlock*, 415 U.S. 164 (1974) (Douglas, J., dissenting); *supra* text accompanying notes 66-68.

375. They would have required such a warning except in the rare case where the defendant's knowledge of the right to refuse could otherwise be established by the police. See *Schenckloth*, 412 U.S. at 229-30.

376. It is, of course, also true that the breakdown of law and order foretold by the Warren Court dissenters, see, e.g., *Miranda v. Arizona*, 384 U.S. 436, 534-45 (1996) (White, J., dissenting), did not come to pass.

warrant requirement for other searches is necessary.<sup>377</sup> It would simply be too time consuming to require magistrates to be ready, twenty-four hours a day, to issue the tens of thousands of new warrants that would be required, especially for arrests in public. Insisting on such a process would necessarily either mean tacitly condoning rubber stamping or foregoing many arrests. Likewise, requiring the application of the exclusionary rule to grand juries and civil deportation hearings would drastically clog up the system.<sup>378</sup>

In the area of police interrogation, we have very serious reservations about some of the suggestions made by Justice Brennan and his liberal colleagues in *Moran v. Burbine*, especially the idea that a defense lawyer—who may not even have met the defendant yet—might be allowed unilaterally to invoke the *Miranda* rights of the defendant and thereby prevent an interrogation.<sup>379</sup> Even more damaging would have been the notion that the police must warn suspects that their lawyers (or a hypothetical one) would want them to shut up.<sup>380</sup> In general, retention of the traditional *Miranda* warnings, while making Fifth Amendment rights readily waivable, seems a reasonable compromise.

Oddly, neither the liberals nor the Supreme Court majority has endorsed a tape or video recording requirement for confessions. Such recording would be helpful both to deter police misbehavior and to refute defendant recantations or claims of abuse.<sup>381</sup> We suspect that the majority is reluctant to confront the various ploys used by police to extract confessions from people whose best interest lies in silence. In our view, the benefits overcome this problem.<sup>382</sup>

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377. It would be possible, and perhaps desirable, to regulate other searches in some way short of requiring a warrant, but this was not Justices Brennan's and Marshall's position.

378. *But cf.* Craig M. Bradley, *Pennsylvania v. Scott: No Fourth Amendment Protection for Parolees*, TRIAL, Apr. 1999, at 89 (arguing that the exclusionary remedy should be available at parole and probation revocation proceedings where loss of liberty is at stake).

379. *Moran v. Burbine*, 475 U.S. 412 (1986); *see supra* text accompanying notes 254-75.

380. Professor Kamisar likewise agrees that the majority position in *Burbine* is a "plausible and defensible reading of *Miranda*." Yale Kamisar, *Confessions, Search and Seizure and the Rehnquist Court*, 34 TULSA L.J. 465, 465-66 (1999). Moreover, he argues that the Republican Court was too "suspect friendly" in *Minnick v. Mississippi*, 498 U.S. 146 (1990), when it extended *Edwards* to bar police from seeking further statements from a suspect after he has spoken to counsel. Yale Kamisar, *The Warren Court and Criminal Justice*, in THE WARREN COURT: A RETROSPECTIVE 116, 125 (Bernard Schwartz ed., 1996). This is a view that we share.

381. England, for example, requires tape recording of suspects' statements, and failure to tape record may lead to evidentiary exclusion. David J. Feldman, *England and Wales*, in CRIMINAL PROCEDURE: A WORLDWIDE STUDY 91, 109 (Craig M. Bradley ed., 1999) [hereinafter A WORLDWIDE STUDY]. Of course, such a requirement is hardly foolproof, as Professor Ogletree has pointed out. *See* Ogletree, *supra* note 197, at 1843 n.94 (arguing that street videotaping is impractical and that in any case, police can "manipulate statements" made without counsel). Nevertheless, it would surely be helpful.

382. In England, for example, "stratagems designed to induce a confession by bringing psychological pressure to bear" are permitted as long as they aren't "oppressive." Craig M. Bradley, *The Emerging International Consensus as to Criminal Procedure Rules*, 14 MICH. J. INT'L L. 171, 185 (1993) (quoting David J. Feldman, *Regulating Treatment of Suspects in Police Stations: Judicial Interpretation of Detention Provisions in the Police and Criminal*

A good overall indicator of how the current American system of police investigation stacks up is the experience of other countries. It is significant that, while most of the other countries discussed in a recent book have now adopted a system of *Miranda*-type warnings for police interrogation, the United States remains the most protective country with respect to suspects' rights against unreasonable searches and seizures. America is further unique in mandating evidentiary exclusion (from the prosecution's case-in-chief) for virtually every rule violation by the police.<sup>383</sup>

The bottom line is that Justices Brennan and Marshall were, by the ends of their careers, out of touch with the views of most Americans about what the constitutional restraints on police should be. There can be little doubt that Justices Brennan's and Marshall's dogged demand that civil liberties be protected against the popular zeal for "putting criminals in jail" had a salutary tempering effect on the decisions of the Republican Court. Nevertheless, when the seizure of 1300 pounds of cocaine has become a routine back-page story in local newspapers,<sup>384</sup> most people are willing to tolerate more aggressive police work, up to a point.

#### V. CONCLUSION

At the risk of seeming to be lickspittles to the Supreme Court majority, and renewing our contention that courts are not the appropriate venue for the drafting of comprehensible rules for the police to follow,<sup>385</sup> we think that most Americans generally applaud the direction that the Court has taken in the area of criminal procedure law. We do not believe that our civil liberties have gone up in smoke as a result of an unduly police-friendly Court, and we question whether many of the constraints that Justices Brennan and Marshall said they would have placed on the police would have been desirable (or even workable). In fact, as discussed, the group that might be most upset by further limitations on police might be the very minority groups that Justices Brennan and Marshall sought to protect.

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*Evidence Act of 1984*, 1990 CRIM. L. REV. 452, 464). In Canada, "police may legitimately lie and engage in deception in order to obtain statements." Kent W. Roach, *Canada, in A WORLDWIDE STUDY*, *supra* note 381, at 53, 70. Canada is strict about giving suspects access to counsel upon arrest, (not just the empty *Miranda*-type warning of the United States) but "[o]nce an accused has been given a reasonable opportunity to consult counsel, questioning may resume without again informing the accused of the right to counsel or providing another reasonable opportunity to consult counsel." *Id.* at 69.

383. All of the other countries studied have codes of criminal procedure rather than relying on the interpretation of court decisions to discern the rules that police must follow. Exclusion is generally discretionary with the trial judge, but this does not mean that it is never (or almost never) employed, especially in England and Canada where such exclusion is relatively common, though still far less common than in the United States. *See generally* A WORLDWIDE STUDY, *supra* note 381. The book further argues that the more diverse a country is, the more stringent and specific its rules of criminal procedure should be. *Id.* at xxi.

384. *See, e.g., Police Seize Truckload of Cocaine*, BLOOMINGTON HERALD-TIMES, July 6, 1999, at C8.

385. This position is the gravamen of CRAIG M. BRADLEY, *THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION* (1993).

