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FOREWORD—DUE PROCESS METHODOLOGY IN THE POSTINCORPORATION WORLD

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INTRODUCTION

In the area of criminal procedure in recent years, the Terms of the United States Supreme Court, like the month of March, have "come in like a lion and gone out like a lamb." Each Term begins with the legal-affairs editors of major news services telling us that this will be the Term in which the Court will overrule *Miranda*[1] or, at the other extreme, in which the Court will extend the exclusionary rule to encounters between crossing guards and school children. But when the Term is concluded we find that nothing monumental has happened. Members of the bench and bar complacently ask about the rule changes for this season's encounters, while those of us in academe search for important, if unreal, implications of cases to write about.

The past Term was no exception; the subject matter of the cases and most of the outcomes were predictable. The Term included the seemingly obligatory six to ten opinions on the fourth amendment,[2] a few decisions refusing to extend *Miranda* safeguards to any situation not directly covered by a Supreme Court decision made prior to the beginning of this decade,[3] and a case restricting the right to counsel.[4] Typically, there is a spattering of decisions on a variety of procedural topics, with no more than two cases on any topic apart from the "big three" of fourth, fifth, and sixth amendment issues. This Term the Court gave us a series of rulings regarding the use of codefendants' statements at trials,[5] the permissibility of granting lower sentences for guilty pleas,[6] and the number of jurors that must agree on a verdict.[7] There also were cases involving traditional winners and losers: the Court remained true to the constitutional principle that racially discriminatory practices in the selection of jurors or grand jurors will invalidate a conviction[8] and equally true to its own working principle that the press always loses in criminal procedure cases.[9]

If there was something unusual about this Term it was that the Supreme Court focused more on

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[1] Miranda v. Arizona, 384 U.S. 436 (1966).

[2] *See* Delaware v. Prouse, 99 S. Ct. 1391 (1979); United States v. Caceres, 99 S. Ct. 1465 (1979); Dalia v. United States, 99 S. Ct. 1682 (1979); Dunaway v. New York, 99 S. Ct. 2248 (1979); Torres v. Puerto Rico, 99 S. Ct. 2425 (1979); Smith v. Maryland, 99 S. Ct. 2577 (1979); Arkansas v. Sanders, 99 S. Ct. 2586 (1979); Brown v. Texas, 99 S. Ct. 2637 (1979); Michigan v. DeFillippo, 99 S. Ct. 2627 (1979); Rakas v. Illinois, 439 U.S. 128 (1978).

[3] *See* North Carolina v. Butler, 99 S. Ct. 1755 (1979); Fare v. Michael C., 99 S. Ct. 2560 (1979). The Court did prohibit any use of testimonial evidence gained from a defendant at a grand jury proceeding when the defendant had been granted immunity at the grand jury. *See* New Jersey v. Portash, 440 U.S. 450 (1979). During this decade the Supreme Court has not found that any item of testimonial evidence should be excluded from evidence solely on the basis of *Miranda*, thus effectively limiting *Miranda* to the picture "no warning" problem examined by the Warren Court. *See* Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 100–01. During this Term the Justices were evenly divided on the issue of whether evidence gained as the result of a *Miranda* violation could serve as a basis for establishing probable cause for a search. Massachusetts v. White, 439 U.S. 280 (1979) (per curiam).

[4] *See* Scott v. Illinois, 440 U.S. 367 (1979).

[5] Parker v. Randolph, 99 S. Ct. 2132 (1979).

[6] Corbitt v. New Jersey, 439 U.S. 212 (1978). The problem has arisen in a variety of settings in the past dozen years. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357 (1978); United States v. Jackson, 390 U.S. 570 (1968).

[7] Burch v. Louisiana, 99 S. Ct. 1623 (1979) (six-person jury must be unanimous).

[8] Rose v. Mitchell, 99 S. Ct. 2993 (1979).

[9] Gannett Co. v. DePasquale, 99 S. Ct. 2898 (1979)(press barred from pretrial proceedings). *See also* Houchins v. KQED, Inc., 438 U.S. 1 (1978) (plurality decision)(no press right of access to prison facilities); Zurcher v. Stanford Daily, 436 U.S. 547 (1978)(no first amendment barrier to warranted searches of press offices); Branzburg v. Hayes, 408 U.S. 665 (1972)(rejecting reporter's assertion of privilege from grand jury questioning).

due process than it has in the past several terms. The Court found that due process gave virtually no protection to prisoners being considered for parole[10] and imposed practically no limits on the conditions of prison facilities.[11] However, the Justices did struggle with problems of sufficiency of evidence in a criminal trial and the use of presumptions at trial.[12] In related decisions the Court also found that the reasonable doubt standard did not apply to the involuntary commitment of adults to mental institutions[13] and that parents could have their children locked away in such institutions without any precommitment adversary process.[14]

If recent Terms are not notable for what the Court did, the opinions of the Court in those years are notable for what the Court did not do. During the late 1970's the Supreme Court abandoned any attempt to identify fundamental values in its decisions concerning Bill of Rights issues, as the Justices shifted from a due process methodology to a formalistic interpretation of the Bill of Rights. In its due process decisions the Court showed some, if not great, concern with value definition and the principle of fairness, a concern which is missing in its Bill of Rights decisions. In short, it appears that incorporation has hindered the development of constitutional principles regarding the criminal process. My point is not that incorporation was ill conceived, initially doomed to failure, or due to be reversed, but only that the Supreme Court should employ a new form of due process methodology in resolving Bill of Rights, as well as due process, issues. I will take a brief look at due process methodology and at a sampling of recent cases to determine whether a due process methodology might improve the Court's decisionmaking and opinions on fourth, fifth, and sixth amendment issues. I will not explore all possible Bill of Rights issues, nor will I attempt an exhaustive treatment of Supreme Court decisions during the 1970's. It is hoped that the reader will develop his or her own framework for a due process analysis and use that to evaluate other issues and cases.

Before the Court began incorporating the Bill of Rights criminal procedure provisions into the fourteenth amendment, it appeared that the Court would develop a set of due process principles capable of resolving difficult procedural issues in our criminal justice system. Fifty years ago the Supreme Court turned its attention to the question of fairness in the criminal process.[15] From 1930 to 1955 the Court explored questions of due process as well as the meaning of the provisions of the Bill of Rights which applied to the federal criminal process and the meaning of the due process clauses in relation to the state and federal systems.[16]

[10] Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 99 S. Ct. 2100 (1979).

[11] Bell v. Wolfish, 99 S. Ct. 1861 (1979).

[12] *See* Sandstrom v. Montana, 99 S. Ct. 2450 (1979); County Court v. Allen, 99 S. Ct. 2213 (1979).

[13] Addington v. Texas, 99 S. Ct. 1804 (1979).

[14] Parham v. J.R., 99 S. Ct. 2493 (1979); Secretary of Pub. Welfare v. Institutionalized Juveniles, 99 S. Ct. 2523 (1979).

[15] The federal courts, including the Supreme Court, did not issue any significant rulings regarding constitutional restraints on federal criminal prosecutions until this century, and there was no serious inquiry into the fairness of state proceedings until the 1930's. *See* Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 2-4 (1956).

[16] The Court had incorporated the basic principles of the fourth and eighth amendments into the concept of liberty prior to the 1960's, but it did not settle the question of whether those principles applied to the states in the same manner as to the federal government. *See* Wolf v. Colorado, 338 U.S. 25 (1949)(fourth amendment, but not exclusionary rule, applicable to the states); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947)(cruel and unusual punishment clause applied to states). The Court had incorporated the promise of the first amendment to the states prior to the 1950's. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 414-15 (1978). The modern process of incorporation of the criminal procedure provisions of the Bill of Rights began with Mapp v. Ohio, 367 U.S. 643 (1961)(fourth amendment exclusionary rule applies to states) and Ker v. California, 374 U.S. 23 (1963)(fourth amendment standards identical for federal and state cases).

In the 1960's and early 1970's the Court incorporated all of the Bill of Rights provisions related to criminal procedure except for the grand jury clause of the fifth amendment, whose incorporation has been rejected since 1884. *See* Hurtado v. California, 110 U.S. 516 (1884).

A basic list of the other incorporation cases is as follows:

Fifth Amendment—Ashe v. Swenson, 397 U.S. 436 (1970)(collateral estoppel); Benton v. Maryland, 395 U.S. 784 (1969)(double jeopardy); Griffin v. California, 380 U.S. 609 (1965)(self-incrimination); Malloy v. Hogan, 378 U.S. 1 (1964)(self-incrimination).

Sixth Amendment—Duncan v. Louisiana, 391 U.S. 145 (1968)(jury trial); Washington v. Texas, 388 U.S. 14 (1967)(compulsory process); Klopfer v. North Carolina 386 U.S. 213 (1967)(speedy trial); Pointer v. Texas, 380 U.S. 400 (1965)(confrontation); Gideon v. Wainwright, 372 U.S. 335 (1963)(right to counsel); Irvin v. Dowd, 366 U.S. 717 (1961)(impartial jury); *In re* Oliver, 333 U.S. 257 (1948)(public trial).

Eighth Amendment—Schilb v. Kuebel, 404 U.S. 357, 365 (1971)(assuming application of excessive bail provision to state cases); Robinson v. California, 370 U.S. 660 (1962)(cruel and unusual punishment clause); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947)(cruel and unusual punishment clause).

Judges of other courts and scholars encouraged the Court to develop a comprehensive theory of due process. Justice Schaefer of the Illinois Supreme Court, in his Holmes lecture of 1956, noted that the Court had not experienced great difficulty in its due process decisions because this initial stage of decisionmaking involved cases that did not present serious conflicts of social policies.[17] He anticipated conflicts in future cases between local law enforcement policies and the protection of constitutional values regarding individual dignity and fairness in the criminal justice system. Justice Schaefer urged the Supreme Court to adopt a flexible due process theory that would identify the fundamental constitutional values, resolve current conflicts in these social policies, and accommodate future changes in society.

In 1957 Professor, now Dean, Sanford Kadish constructed a framework for a due process methodology capable of protecting individual rights while allowing for the efficient prosecution of crime.[18] Dean Kadish demonstrated that a fixed due process theory was unworkable; no simple appeal to historical usage could resolve current issues and conflicts of values in the criminal process. A flexible concept of due process was needed so that the adversary system could adapt to changes in society. Kadish felt a due process methodology must insure continued respect for individual dignity and fairness to individual defendants, while maintaining or improving the reliability of the guilt-determination process. This goal could not be achieved merely through incorporating the Bill of Rights into due process, thereby turning difficult issues into formally simple ones regarding interpretations of specific provisions of the Bill of Rights. Dean Kadish noted that those provisions were limited and that formal reliance on them in difficult cases would obscure the judicial function of defining fundamental values in the adversary process.[19] Instead, Dean Kadish advocated the use of a flexible due process concept, which he described as a method of rational inquiry designed to identify values in procedural due process. Using this flexible methodology, a court considering a defendant's challenge to a state's investigatory practices, or to a point of procedure, would define the constitutional values regarding individual dignity or fairness that are brought into question by the claim and the degree to which a ruling either for or against the defendant would effect the reliability of the guilt-determination process or the ability of the state investigatory and adjudicatory agencies to identify and prosecute those guilty of crime. The Court then would determine the extent to which these societal values conflicted and whether competing values could be accommodated. To resolve the conflict, or to make the accommodation, the court openly would determine the value that should be placed upon a point of individual dignity or fairness raised by the defendant, including the practical and philosophical value of the asserted right, and the effect of the challenged practice on the reliability of the process.

In the 1960's the Supreme Court turned away from due process methodology by incorporating most of the Bill of Rights into the due process clause of the fourteenth amendment.[20] Earlier in

Some Justices believed that even if the Bill of Rights was applicable to the states there was no need to hold state laws to the same standards under those amendments. *See, e.g.*, Benton v. Maryland, 395 U.S. 784, 808 n.12 (1969)(Harlan, J., dissenting) (citing opinions of Justice Stewart); Malloy v. Hogan, 378 U.S. 1, 14 (1964)(Harlan, J., dissenting). However, a majority of the Justices have rejected this concept and held that when a provision of the Bill of Rights is made applicable to the states, it applies to state and local acts in the same manner as it does to federal actions. *See, e.g.*, Williams v. Florida, 399 U.S. 78 (1970); Baldwin v. New York, 399 U.S. 66 (1970)(plurality decision); Duncan v. Louisiana, 391 U.S. 145 (1968); Malloy v. Hogan, 378 U.S. 1 (1964). A recent ruling held that there may be less than unanimous jury verdicts in state but not federal trials. This anomalous decision resulted from a unique division of votes on the Court and the failure of any position of the substantive issue to gain a majority vote. Eight Justices believed that the sixth and fourteenth amendments required identical rules for state and federal trials, but four voted for a single standard of uniformity and four voted to allow nonunanimous verdicts in both systems. The decision, therefore, rested on the vote of Justice Powell, the only current member of the Court believing in dual standards. He voted to allow nonunanimous verdicts in the state but not the federal case. However, the principle of a single standard is still followed even though there were differing results in those cases. *See* Apodaca v. Oregon, 406 U.S. 404 (1972); Johnson v. Louisiana, 406 U.S. 356 (1972)(*Apodaca* and *Johnson* were decided together).

[17] *See* Schaefer, *supra* note 15, at 3-7, 17. *See also* W. SCHAEFER, THE SUSPECT AND SOCIETY (1966).

[18] Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319 (1957).

[19] Dean Kadish anticipated the decisions of the 1970's as he incisively noted that incorporation theory might facilitate the issuance of restrictive rulings concerning the rights of defendants by removing the necessity for frank recognition of the judicial responsibility of interpretation and allowing for the avoidance of value oriented decisions. Kadish, *supra* note 18, at 336-38.

[20] *See* note 16 *supra* for a listing and overview of those cases.

the century, the Court based the question of incorporation on a due process methodology by asking which provisions of the Bill of Rights were essential to the concept of liberty.[21] However, in the 1960's the Court incorporated those provisions of the Bill of Rights that it found were fundamental to the American system of justice.[22] The Court not only incorporated the basic principle of each amendment, it also applied the incorporated provision to the states in the same way it applied the provision to the federal government.[23] Justices Frankfurter and Harlan argued that this process of incorporation and identical application would not work because of the differences in the federal and state systems and because difficult questions of modern criminal procedure could not be resolved by a simple appeal to a list of eighteenth century concerns.[24] As the trend of incorporation rulings emerged, Judge Friendly warned, as had Dean Kadish, that the attempt to base decisions on the Bill of Rights would divert attention from the problem of interpreting fundamental due process values. Judge Friendly also warned that assertion of an "historic" Bill of Rights basis for a decision, when none existed, would result in unjustifiable interference with state criminal proceedings.[25]

Although the story of incorporation has been written, it is worthwhile to analyze the question of the judicial function and constitutional interpretation as it relates to the process of incorporation. After 1937 the Court rejected the substantive due process principles which it used to overturn a variety of social and economic legislation during the first third of the century. The Court relied upon the text of the Constitution and its conception of the fundamental values of our democratic process.[26] The Court might have justified its activity by reference to our historic commitment to fairness in the adversary process, evidenced by the concern of the drafters of the Bill of Rights with some specific aspects of that process.[27] However, the Court used incorporation and the text of the Bill of Rights to justify its function in reviewing criminal legislation, executive agency practices relating to the investigation and prosecution of crime, and the work of state and lower federal courts in this area. Those who argued, as did Justice Black,[28] that this process of incorporation would limit the discretion of the Justices, were mistaken. There is no way to avoid making interpretative decisions on issues relating to topics arguably covered by the Bill of Rights when there is no historic guidance on, nor simple textual resolution of, the issue. States simply do not appear in the Supreme Court of the United States asking for the ability to conduct unreasonable searches without warrants or probable cause, to force defendants to incriminate themselves against their will, to exclude counsel from criminal proceedings, to eliminate juries in criminal cases, or to try defendants twice for the same crime. Yet only such claims could be resolved easily by an appeal to the Bill of Rights.

When cases raise questions that cannot be resolved by a quick reference to the language or history of the Bill of Rights, the Court must look elsewhere to justify its decisions. In so doing, the Supreme Court must justify its ability to define fundamental values in the governmental and adversary process. A simple appeal to the Bill of Rights cannot satisfy either defendants or other members of society who disagree with the Court's ruling. However, reliance on a specific Bill of Rights provision might cause the Court to abandon its attempt to define fundamental values in the criminal process, regardless of whether this reliance increased or decreased the rights of the defendant. In 1964 Professor Francis Allen noted that the Supreme Court's activity in the area of criminal procedure was necessary to protect the fundamental values of fairness and individual dignity and to spur local legislatures on to improve outdated aspects of the local administration of criminal justice.[29] But following the years of Supreme Court interpretation of the Bill of Rights in criminal procedure cases, Professor Allen noted that the Court's rulings were liable to be implemented and

[21] Palko v. Connecticut, 302 U.S. 319, 325-26 (1937).

[22] Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968).

[23] *See* note 16 *supra* for a listing and overview of these cases.

[24] The only way the difficult questions of modern criminal procedure could be resolved by a simple appeal to a list of eighteenth century concerns would be to consider the list a recognition of fundamental values which required modern definition and interpretation. *See, e.g.*, Pointer v. Texas, 380 U.S. 400, 408 (1965)(Harlan, J., concurring); Adamson v. California, 332 U.S. 46, 59 (1947)(Frankfurter, J., concurring).

[25] Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929 (1965).

[26] *See* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 16, at 410-19.

[27] *See generally* Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 265-66, 270-75 (1973).

[28] *See, e.g.*, Williams v. Florida, 399 U.S. 78, 106 (1970)(Black, J., concurring and dissenting); Adamson v. California, 332 U.S. 46, 68 (1947)(Black, J., dissenting).

[29] F. ALLEN, THE BORDERLAND OF CRIMINAL JUSTICE 135-39 (1964).

honored in the future only if the Court openly confronted the question of justifying its rulings on the basis of the proper scope of the judicial function and definition of fundamental values in our society. As the Professor incisively noted:

> The Warren Court enjoyed its greatest successes when it advanced solutions that were supported by a broad ethical consensus, as in cases involving the right of impoverished defendants to counsel in the courtroom .... The central problem of the Warren Court's activism in the criminal area was not that it threatened serious abuses of power by politically irresponsible judges. Rather, it was simply that, despite the Court's ingenious, persistent, and some may feel, heroic efforts to overcome the inherent limitations of judicial power, the Court attempted more than it could possibly achieve.[30]

These comments do not attack the Court's attempt to expand the rights of defendants in criminal cases, rather they indicate that narrowing one's focus to the Bill of Rights can lead to a failure to view criminal process issues in the proper perspective of defining the judicial role in that process. The failure to question the judicial role in assuring fairness in the criminal process may lead to a restriction of the rights of the defendant as easily, and perhaps even more easily, than it may lead to an expansion of those rights. Use of a due process approach would require the Supreme Court in each case to examine its role in insuring fairness in the adversary process and in our society's historic commitment to the values involved in that process. Often these issues will involve specific provisions of the Bill of Rights; but if those provisions are not interpreted with due process methodology, then the Court will fail to consider the concept of fairness in its decision.[31]

[30] Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 540. Professor Allen's concern with the identification of fundamental values in the criminal process is reflected throughout his writings. *See, e.g.*, Allen, *The Law as a Path to the World*, 77 MICH. L. REV. 157(1978); Allen, *Criminal Law and the Modern Consciousness: Some Observations on Blameworthiness*, 44 TENN. L. REV. 735 (1977); Allen, *Rights in Conflict: A Balanced Approach*, 3 VAL. U.L. REV. 223 (1969); Allen, *Legal Values and Correctional Values*, 18 U. TORONTO L.J. 119 (1968); Allen, *Federalism and the Fourth Amendment: A Requiem for Wolf*, 1961 SUP. CT. REV. 1.

[31] It is interesting to note that it was Justice Harlan who dissented from the Supreme Court's ruling that the appointment of counsel for a defendant shortly before trial did not violate the defendant's rights. Chambers v. Maroney, 399 U.S. 42, 55 (1970) (Harlan, J., concurring and dissenting).

There should be little doubt that the process of incorporation benefited those who are confronted by the investigatory or adjudicatory government agencies in the criminal process. However, one must recognize the danger that postincorporation criminal procedure decisions will assume an arbitrary quality if the Court fails to consider its proper function in analyzing fundamental values in the criminal process. For that reason one should seek to identify a due process methodology and then examine the postincorporation criminal procedure decisions of the 1970's to determine whether an attempt should be made to employ a due process methodology when interpreting the meaning of specific provisions of the Bill of Rights which have been incorporated into the due process clause and applied to the states.

A DUE PROCESS METHODOLOGY

In describing a due process methodology one cannot be very specific since it is a method of deciding cases, rather than a specific test for judging the constitutionality of any particular component in a criminal justice system. The method of decisionmaking that the Court has used in resolving due process issues both in criminal procedure cases and in cases concerning deprivations of liberty or property in the civil area should be considered here. In using a due process methodology for deciding criminal procedure issues, whether or not they involve a Bill of Rights issue, the Court should go through four stages in its analysis and opinion. This four step process will serve as our "model" of due process adjudication. First, the Court should face the question of judicial interpretation openly and identify the values that are involved in the case. The opinion should note the precise Bill of Rights or due process clause issues and the problem of defining and protecting values when no historical means exist for arriving at a fixed meaning for the constitutional provision in question. Second, the Court should determine the importance of the values endangered by the state's practice. The opinion should inquire into either the nature of the values reflected in the Bill of Rights provision at issue in the case or the general principles of due process, *i.e.*, protection of individual dignity, equality of treatment, and traditional conceptions of fairness.[32] Third, the Court should examine the

[32] These principles of due process are developed and explained in the context of procedural rulings outside the criminal area in Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge*:

impact of a ruling (for or against the defendant) on the reliability of the guilt-determination process, and it should evaluate the cost of administering a system with the procedural safeguard, if any, sought by the defendant. This portion of the analysis involves questions of economic and social costs, including the difficulty of administering a system of justice with limited resources and expanded procedures. Fourth, the Court should determine whether the due process or Bill of Rights values outweigh the social costs of a ruling adverse to the state. This entails more than a mere utilitarian balancing test; it involves explicit reasoning in the opinion which confronts the question of the extent to which the state practice endangers fundamental constitutional values. Further, the Court openly should examine whether this society's historic and philosophic commitment to those values requires it to bear the costs.

While the due process methodology seems difficult to develop, it is not beyond the capability of the Supreme Court. In the area of due process adjudication concerning deprivations of liberty or property unconnected to criminal procedure, the Court, in *Mathews v. Eldridge*,[33] specifically adopted a balancing test that approximates the proposed due process methodology. When someone whom the government deprives of life, liberty, or property disputes the facts or issues upon which the deprivation is based, the state must grant the dispossessed individual a fair procedure before an impartial decisionmaker. In determining the exact nature of the required procedure, the Court stated that it will consider three factors in deciding which procedural safeguards, if any, to give the effected individual. The three factors are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[34]

The balancing test used in the civil area is a purely utilitarian one which balances accuracy considerations against social cost. Professor Mashaw convincingly argued that the Court should use a more value-oriented approach in even the civil due process area because the utilitarian balancing process degrades the nature of due process rights and is not well suited to the judicial function.[35] A purely utilitarian approach to criminal procedure issues clearly is unacceptable because of our historic commitment to fairness in the criminal process. This commitment is reflected in the history of Supreme Court rulings on due process values in the criminal area, as well as in its concern for specific aspects of the process in the Bill of Rights. Judicial activity can only be justified here by asserting a judicial function which identifies fundamental constitutional values. Dean Wellington noted that the Court can justify its constitutional rulings only in terms of the judicial ability to define, through a rational process, fundamental constitutional principles. This is because the other branches of government are better suited to making policy determinations based upon utilitarian concerns than is the Court.[36] The due process model herein advocated adds value identification to the civil due process balancing test. The model requires the Court to consider this nation's historic and philosophic commitment to the values endangered by the allegedly unconstitutional practice. The model also requires the Court to consider whether there is a basis for asserting that our society is committed to protecting that value even if it must bear a significant social or economic cost.

It is worthwhile to note that the Court has been relatively successful in using the balancing test to determine the extent of process one is entitled to before being deprived of liberty or property.[37] In *Addington v. Texas*[38] the Justices unanimously determined that an adult cannot be involuntarily committed to a psychiatric institution unless the state, in a trial, has met the commitment standard with "clear and convincing" evidence. Mr. Chief Justice Burger's opinion for the Court found that the societal and constitutional value placed on individual freedom required a standard of proof beyond a mere preponderance of the evidence; however, the nature of the commitment proceedings, which are nonpunitive and concerned with issues upon which there cannot be factual certainty, did not

Three Factors in Search of a Theory of Value, 44 U. CHI. L. REV. 28 (1976). *See also* Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111 (1978).

[33] 424 U.S. 319 (1976).

[34] *Id.* at 335.

[35] *See* Mashaw, note 32 *supra*.

[36] *See* Wellington, note 27 *supra*.

[37] The cases in the area are examined in J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 16, at 498-514.

[38] 99 S. Ct. 1804 (1979).

require the states to adopt a standard of "beyond a reasonable doubt" or "unequivocal proof." In *Parham v. J.R.*[39] the Justices unanimously held that children committed to mental institutions by their parents were entitled only to an admissions screening procedure by a "neutral fact finder" to determine if the criteria for commitment were met in the individual case.[40] Chief Justice Burger employed the *Mathews* balancing test to determine that no formal hearing was required but, in so doing, the Chief Justice considered the value placed on individual freedom and the historic recognition of certain parental and state interest in the care of minor children.

Although one may disagree with the results in these cases, the Court's open analysis of the values at stake in each proceeding and its attempt to accommodate the competing values of liberty and efficient administrative procedures certainly is preferable to the masking of such decisions through vaguely worded opinions or formalistic interpretations of constitutional provisions. Indeed, in related decisions concerning the "extension" of due process safeguards, the Court avoided the open use of the due process model with a resultant inadequacy in the opinions.[41] For example, in *Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*,[42] where the Court decided that inmates of penal institutions were not entitled to due process protection in decisionmaking processes related to their possible release on parole, a majority of the Justices totally failed to analyze the basic due process question. The majority in *Greenholtz* found that there was no liberty interest meriting protection by the due process clause at issue in these proceedings. The four Justices who dissented, at least in part, found that the individual prisoners had a liberty interest at stake in this process. Accordingly, these Justices struggled openly with the problem of determining what, if any, procedural safeguards should be given to those prisoners,[43] while the majority simply asserted that it could distinguish cases granting some procedural safeguards to convicted defendants in parole or probation revocation proceedings because those persons had a conditional liberty interest which the inmate lacked.[44] Even if one agreed with the majority's conclusion that few, if any, procedural safeguards should be added to the parole process, the Supreme Court's decision would be more acceptable if the majority opinion openly considered the values of individual liberty and societal costs involved in the parole system. Thus, one finds it easier to accept the separate opinion of Justice Powell, which recognized that inmates had an interest worthy of protection by the due process clause and then found that the need of efficiently processing inmate files outweighed the interest in freedom preceding the expiration of a properly imposed criminal sentence. Justice Powell found that the prison's minimal procedural safeguards, except its practice of giving prisoners very short notice of their scheduled parole hearing, comported with due process standards. Powell's balancing approach is more satisfying than the majority's simple assertion that the possibility of parole is no more than a hope—"a hope which is not protected by due process."[45] By failing to adopt the Powell approach it was possible to avoid questions of fairness and value identification even in due process decisions.

Having examined the concept of due process methodology, it is appropriate to evaluate a sampling of recent Bill of Rights decisions in terms of our model.

Sixth Amendment Issues

Although the jurisprudence of the sixth amendment is not historically or philosophically uniform among its clauses, the pattern of sixth amendment adjudication in the areas of the right to jury trial, the right to counsel at pretrial identification pro-

[39] 99 S. Ct. 2493 (1979). This case was initially mistitled *Parham v. J.L.* in the original slip opinion of the Supreme Court. *See* 47 U.S.L.W. 4740 (U.S. June 20, 1979) (No. 75-1690).

[40] Three Justices dissented from the Court's refusal to grant additional precommitment safeguards to wards of the state who were to be committed to these facilities. Parham v. J.R., 99 S. Ct. 2493, 2515 (1979)(Brennan, J., joined by Marshall and Stevens, JJ., concurring in part and dissenting in part). The Court, by the same six-to-three vote, refused to grant any right to formal postadmission procedures to these juveniles, finding only that the postadmission procedures must be fair and independent. 99 S. Ct. at 2506. *See also* Secretary of Pub. Welfare v. Institutionalized Juveniles, 99 S. Ct. 2523 (1979).

[41] The cases in the area are concerned with the definition of "life," "liberty," and "property" interests which are protected by the due process clause. *See, e.g.*, Paul v. Davis, 424 U.S. 693 (1976)(reputation of individual is not protected); Board of Regents v. Roth, 408 U.S. 564 (1972)(untenured teacher's employment not protected). The cases are examined in J. Nowak, R. Rotunda & J. Young, *supra* note 16, at 476-97.

[42] 99 S. Ct. 2100 (1979).

[43] *See* 99 S. Ct. at 2111 (Marshall, J., joined by Brennan and Stevens, JJ., concurring and dissenting); *id.* at 2109-11 (Powell, J., concurring and dissenting).

[44] 99 S. Ct. at 2105.

[45] *Id.*

ceedings, and the right to appointed counsel at critical stages in the criminal prosecution demonstrate the negative effects of the Court's abandonment of a due process methodology during the 1970's.

In the area of right to jury trial, the decade began with the so called "sixth month-six person" decisions. While the rule limiting the right to a jury to cases involving crimes punishable by imprisonment for more than six months[46] may have been a necessary limiting definition in an age where the scope of criminal offenses has expanded far beyond that which could have been envisioned in the eighteenth century, *Williams v. Florida*,[47] which allowed the state and federal governments to use juries of six rather than twelve persons, ultimately vindicated the Justices who opposed the incorporation of the Bill of Rights into the concept of due process. The majority in *Williams* found that there was no historical or philosophical reason why the sixth amendment must be read to require juries of twelve persons. However, Justice Harlan devastated this argument by citing historical evidence that the phrase, as understood by Anglo-American lawyers in the eighteenth century, referred to a right to a jury of twelve persons.[48] Justice Harlan believed that a due process methodology should have been used to determine whether a jury of less than twelve persons was fair for criminal proceedings in the state systems, which had much greater workloads than did the federal system. Harlan also thought that the historic meaning of the jury-trial provision for the federal system should mean that the federal government could not be allowed to reduce the size of juries. Although Justice Black, concurring in the Court's ruling, argued that there was no deficiency in the incorporation doctrine, because the Court would have reached the same result under the due process clause,[49] he entirely missed Justice Harlan's point. The fact that the Court would have reached the same result regarding the state systems does not mean that it should have watered down the historic, literal commitment of the federal system to a jury of twelve persons. Additionally, open use of a due process methodology would have allowed the Court an intelligible basis for later decisions concerning unanimity among jurors and the precise size of juries. The failure to use a due process methodology in these initial jury cases resulted in the Court admitting that it will arbitrarily define the scope of the right to a jury trial. While it is true that the results of the cases required the federal government to use unanimous juries while allowing the states to have some degree of nonunanimity among jurors, this result was occasioned by a peculiar split in the voting of the Justices.[50] In the past two Terms the Court found that legislatures cannot reduce juries below six persons and that six-person juries cannot render nonunanimous verdicts, but, in so doing, the Court admitted that it has no principled basis for making these decisions. In *Ballew v. Georgia*[51] the Court required the states to use at least six persons in criminal trial juries, but it so held without opinion, even though all nine Justices believed that juries comprised of fewer than six persons were unconstitutional. For a variety of reasons, six of the Justices believed that a jury of less than six persons did not satisfy the sixth amendment's requirements, while three Justices believed that a jury of five members did not guarantee a fair process in a criminal case. In the past Term, in *Burch v. Louisiana*[52] the Court found that state convictions for nonpetty offenses rendered by nonunanimous six-person juries violated the sixth amendment jury-trial guarantee, but the Court could not explain the basis for its ruling other than by declaring that a line had to be drawn and that this practice was similar to the use of juries of less than six members which had been invalidated in *Ballew*. Perhaps these rulings must be dismissed as limited decisions concerning a relatively technical point in the Bill of Rights, concerned more with outdated notions of the function of a jury of one's peers than with any significant value in the criminal process. Unfortunately, other rulings in the area of the sixth amendment also have assumed an arbitrary quality as the Court failed to employ a due process methodology in its opinions.

In the "right to counsel" decisions during the 1970's, the Court abandoned not only due process methodology, but also any attempt to rule on identifiable principles. The Court's decision in *Faretta v. California*,[53] requiring states to allow a defendant to represent himself at trial, reflected the historic value of allowing an individual to present

[46] Baldwin v. New York, 399 U.S. 66 (1970).
[47] 399 U.S. 78 (1970).
[48] *Id.* at 120-21 (Harlan, J., concurring in the result).
[49] *Id.* at 106-14 (Black, J., concurring and dissenting).
[50] *See* Apodaca v. Oregon, 406 U.S. 404 (1972) and Johnson v. Louisiana, 406 U.S. 356 (1972), noted in note 16 *supra*.
[51] 435 U.S. 223 (1978).
[52] 99 S. Ct. 1623 (1979).
[53] 422 U.S. 806 (1975).

his case to a jury of his peers.[54] But the failure to examine the value of counsel's role in light of due process values detrimentally affected the Court's decisions concerning the right to counsel at critical stages of a criminal prosecution. By 1970, virtually all such questions seemed to be answered by a history of decisions extending the right to counsel.[55] *Coleman v. Alabama*,[56] decided in 1970, extended the right to appointed or retained counsel to preliminary hearings. It appeared to evidence the Supreme Court's commitment to the concept that an individual defendant must be allowed to have counsel represent him at any stage in the process wherein his rights might be impaired significantly. But during the 1970's, the Court retreated from this position in two distinct areas: the right to counsel at pretrial identifications and the right of indigent defendants to appointed counsel.

Toward the end of the Warren Court era, in *United States v. Wade*[57] and *Gilbert v. California*,[58] the Supreme Court held that a defendant was entitled to the presence of counsel at postindictment lineups or showups and that counsel should be appointed for an accused who desired counsel but could not afford one for the lineup. Though the Court based its rulings on the sixth amendment, the analysis in Justice Brennan's majority opinions employed the due process methodology. While the sixth amendment's history and language might have little application to pretrial identification procedures, the need to protect the rights of the accused at trial, by allowing for meaningful confrontation of witnesses and by insuring fair, accurate identifications, required the majority to constitutionalize such a right.

But the Supreme Court in the 1970's had no time, or at least no desire, to analyze sixth amendment or due process principles as it limited the identification rulings to such a small group of cases that the original decisions easily might as well have been overruled. In *Kirby v. Illinois*[59] the Court found that there was no right to counsel at identifications which occur before a defendant is formally charged with an offense. According to the plurality opinion,[60] the right to counsel attached only after the initiation of adversary judicial proceedings; however, the plurality failed to consider whether counsel was essential to insuring fair identification procedures. Justice Powell, the fifth vote in *Kirby*, was more forthright; he admitted that he simply would not extend the *Wade-Gilbert* rule.[61] The next year in *United States v. Ash*,[62] the Court held that defendants were not entitled to the presence of retained or appointed counsel at photographic identifications. The majority opinion found that the historic values of the sixth amendment related to counsel representing the defendant only when he actually was confronted with government prosecutors or investigators following the initiation of adversary proceedings. Once again, the majority made no attempt to examine the fairness of the system as a whole. Even though the Warren Court might not have extended the *Wade-Gilbert* rule and although counsel is not always essential to the insurance of fair identification procedures,[63] the Court's failure to analyze the values of fairness and equality of treatment at issue in these cases cannot be excused. The Court's related decisions on due process safeguards against misidentifications exacerbated the effect of this failure.

In *Stovall v. Denno*[64] the Court held that testimony regarding a pretrial identification procedure, which was not covered by the *Wade-Gilbert* rule, and the identification of a defendant at a trial following such a pretrial confrontation would be improper where the confrontation was "unnecessarily suggestive and conducive to irreparable mistaken identification."[65] Unfortunately, Justice Brennan's majority opinion was unclear whether this was a single test for the admissibility of testimony regarding the prior identification and of testimony constituting an in-court identification of the defendant. However, the test resembled the test for determining when a witness may identify a defendant in court following a pretrial identifica-

[54] *See* Allen, *Foreword—Quiescence and Ferment: The 1974 Term in the Supreme Court*, 66 J. CRIM. L. & C. 391 (1975).

[55] *See, e.g.*, Mempa v. Rhay, 389 U.S. 128 (1967)(right to counsel at deferred sentencing hearing); Douglas v. California, 372 U.S. 353 (1963)(equal protection right to appointed counsel on appeal); Gideon v. Wainwright, 372 U.S. 335 (1963)(right to appointed counsel at trial).

[56] 399 U.S. 1 (1970).

[57] 388 U.S. 218 (1967).

[58] 388 U.S. 263 (1967).

[59] 406 U.S. 682 (1972)(plurality decision).

[60] Justice Stewart authored the opinion in which he was joined by Chief Justice Burger and Justices Blackmun and Rehnquist.

[61] 406 U.S. at 691 (Powell, J., concurring). Justice White dissented in *Kirby* even though he had dissented in *Wade* and *Gilbert* because he honestly recognized that the cases could not be distinguished. *Id.* at 705 (White, J., dissenting).

[62] 413 U.S. 300 (1973).

[63] *See* Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1372–73 (1977).

[64] 388 U.S. 293 (1967).

[65] *Id.* at 302.

tion which violated the sixth amendment. The in-court identification is permissible so long as there is an independent, reliable basis for the identification and so long as the out-of-court identification is not mentioned at trial.[66] In 1972 the Court, in *Neil v. Biggers*,[67] sidestepped some of the questions in this area as it found that an in-court identification, made under circumstances not conducive to irreparable mistake, was admissible despite possible suggestiveness in the pretrial identification process. The Court in *Neil* gave no answer to whether it would impose a stricter test regarding testimony concerning a pretrial identification procedure which was unnecessarily suggestive but not clearly conducive to irreparable mistake.

The *Neil* majority noted that the Supreme Court had found an identification procedure violative of due process in only one case.[68] This should have indicated that the Court would adopt a weak standard for testing the admissability of identifications which were not governed by earlier sixth amendment rulings. Thereafter, in *Manson v. Brathwaite*,[69] the Court found that testimony regarding pretrial identifications of the defendant was admissible, as was in-court identification of the defendant, so long as the pretrial identifications, when viewed in the totality of the circumstances, did not undermine the reliability of the witness' identification. But the Court's opinion failed to analyze whether this test would result in fair treatment of individual defendants. The Second Circuit position, formulated by Judge Friendly, was that testimony regarding out-of-court identification evidence should be excluded whenever it was obtained through unnecessarily suggestive procedures. In rejecting this attempt to insure fair procedures, the majority opinion in *Manson* simply assumed that reliability could be established despite suggestive procedures and that police would tend to avoid unnecessarily suggestive procedures for fear that their actions might violate even this more lenient test. The majority made no attempt to identify values in the adversary process regarding fair treatment of an accused or to insure reliability in individual cases involving admittedly unnecessary and suggestive police practices. The majority's position was made clear by a footnote in which it stated that "a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest."[70] This failure to recognize the existence of due process values in the identification process itself and in the use of testimony regarding unfair means of evidence acquisition is the result of the Court's abandonment of a due process methodology and its assertion of sixth amendment "rules" without considering the values of individual dignity, equality of treatment, and fairness.

Nowhere is the lack of due process methodology more apparent than in the cases concerning the right to appointment of counsel. In 1970, Supreme Court observers would not have believed that by 1980 the Court's decisions in this area would have them wistfully remembering the era of *Betts v. Brady*.[71]

In *Betts* the Court found that the sixth amendment right to counsel should not be incorporated into the fourteenth amendment because it was not, in all of its dimensions, fundamental to a fair system of justice, so long as the defendant's right to a fair trial was protected adequately by the use of the due process clause. Earlier, in *Johnson v. Zerbst*,[72] the Court held that the sixth amendment required that an attorney be provided for every defendant in a federal felony prosecution who could not afford to retain counsel. Considering not only the history of the amendment, but also the value of protecting individuals from arbitrary treatment, the majority in *Johnson* employed an absolute rule to insure fairness in federal proceedings. In *Betts*, the Court focused on the concept of due process in finding that a defendant was entitled to appointed counsel when the nature of the charge or other circumstances regarding the trial made counsel essential to the provision of a fair trial. The *Betts* Court did not hold that there was no right to appointed counsel in state proceedings, rather it held that counsel must be appointed only when necessary to insure a fair trial. Between 1942 and 1963 the Supreme Court applied this special-circumstances test to find a right to counsel in virtually every capital case and in most other prosecutions.[73] Then, in *Gideon v. Wainwright*,[74] the Court discarded the *Betts* approach and applied the sixth amendment

[66] United States v. Wade, 388 U.S. 218, 241 (1967). There is an absolute bar to testimony regarding the lineup identification that violated the sixth amendment. Gilbert v. California, 388 U.S. 263, 272–73 (1967).

[67] 409 U.S. 188 (1972).

[68] *See* Foster v. California, 394 U.S. 440 (1969).

[69] 432 U.S. 98 (1977).

[70] *Id.* at 113 n. 13.

[71] 316 U.S. 455 (1942).

[72] 304 U.S. 458 (1938).

[73] These decisions are reviewed in Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211, 242–61.

[74] 372 U.S. 335 (1963).

to the states through the fourteenth amendment in a manner identical to that which applied to the federal government. Justice Harlan concurred because he felt the special-circumstances rule, in fact, had been eroded into a generalized requirement of counsel. However, Harlan would have based the decision on a due process holding that fair trials required appointment of counsel in most, if not all, prosecutions of indigent defendants.[75]

As the 1970's began, it appeared that the Court was committed to insuring a fair trial process for indigent defendants. The Justices were unanimous in *Argersinger v. Hamlin*[76] in ruling that, at a minimum, the state must provide counsel to any indigent defendant it would incarcerate. The majority opinion of Justice Douglas carefully stated that the Court was not considering the question of a right to counsel where imprisonment was not involved.[77]

The first major change in this area of equal treatment of indigent defendants came not in the "critical stage" or trial cases, but in cases which raised the issue of an indigent's right to counsel and to a transcript on appeal. During the late 1950's, and throughout the 1960's, the Supreme Court consistently found that the equal protection guarantee entitled indigent defendants to transcripts without cost and to appointed counsel on appeal in order to insure them equal treatment in the appellate process.[78] Starting with *Griffin v. Illinois*[79] and culminating in *Mayer v. Chicago*,[80] the Court found that a defendant's inability to pay for a transcript could not constitutionally prohibit his access to an existing appellate system. In *Douglas v. California*[81] the Supreme Court held that the state must provide counsel to the defendant in his first appeal of right because fair, equal access to the appellate process was denied if a defendant was without counsel because of his indigency. Although Justice Harlan, in dissent, believed that other means could be used to insure fair treatment of the defendants on appeal, he noted that there could be no meaningful distinction between first appeals and discretionary review.[82] The United States Court of Appeals for the Fourth Circuit agreed with Justice Harlan and, in an opinion written by Chief Judge Haynsworth, found no logical basis for distinguishing between appeals of right and discretionary review.[83] However, the Supreme Court disagreed and reversed the court of appeals in *Ross v. Moffit*.[84] The *Ross* majority, in an opinion by Justice Rehnquist, found that a defendant was not entitled to appointed counsel after his first appeal of right. The majority opinion in *Ross* gave some consideration to due process principles, asserting that there was no unfairness to indigents seeking discretionary review so long as those who could not afford counsel were not "singled out by the State and denied meaningful access to the appellate system because of their poverty."[85] After describing the preparation of papers for discretionary review as a "somewhat arcane art,"[86] the majority concluded that the quantum of fairness to which an indigent defendant is entitled under due process is met by granting that individual a transcript and counsel during his first appeal. But there was no substantive analysis of why the concept of fairness and equal access to existing decisionmaking entities should be so limited, particularly in light of sixth amendment and equal protection values. Not surprisingly, the Court then went on to restrict the right to a free transcript in collateral-attack proceedings when a defendant failed to request one on direct appeal.[87] It is at least possible that the Warren Court would have refrained, for practical reasons, from granting counsel to all persons seeking certiorari.[88] However, the Court soon

[75] *Id.* at 349 (Harlan, J., concurring). The different approaches of the Justices to the problem are analyzed in Israel, note 73 *supra*.

[76] 407 U.S. 25 (1972).

[77] We must conclude, therefore, that the problems associated with misdemeanor and petty offenses often require the presence of counsel to insure the accused a fair trial. MR. JUSTICE POWELL suggests that these problems are raised even in situations where there is no prospect of imprisonment.... We need not consider the requirement of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here petitioner was in fact sentenced to jail.

Id. at 36-37 (footnote omitted).

[78] These cases are based on the equal protection clause of the fourteenth amendment and the implied equal protection guarantee of the due process clause of the fifth amendment. In reviewing a classification that limits the ability of indigent persons to exercise a fundamental right the Court will closely examine the law to determine if it relates to an important government interest. Where no fundamental right is at stake the Court will not review wealth classifications seriously. *See generally* J. NOWAK, R. ROTUNDA & J. YOUNG, *supra* note 16, at 517-27, 619-23, 676-87 (1978 & Supp. 1979-1980).

[79] 351 U.S. 12 (1956).

[80] 404 U.S. 189 (1971).

[81] 372 U.S. 353 (1963).

[82] *Id.* at 366 (Harlan, J., dissenting).

[83] Moffit v. Ross, 483 F.2d 650 (4th Cir. 1973), *rev'd*, 417 U.S. 600 (1974).

[84] 417 U.S. 600 (1974).

[85] *Id.* at 611.

[86] *Id.* at 616.

[87] United States v. MacCollum, 426 U.S. 317 (1976).

[88] Israel, *supra* note 63, at 1336-39.

proved that it indeed was following a new path, not determined by practical considerations, in describing the parameters of indigents' rights.[89]

During the past Term the Court, in *Scott v. Illinois*,[90] ruled that a defendant who could not afford counsel need not be given appointed counsel under any circumstances if the defendant in fact was not sentenced to a term of imprisonment. That "rule" is outrageous; nothing in *Betts* indicated that there was a class of cases in which a right to appointed counsel might never attach under the concept of due process. None of the opinions in the *Johnson-Betts* period indicated that the Court would deny a class of indigent defendants the right to counsel in specific cases where counsel might be necessary to a fair trial.[91] But the majority opinion in *Scott*, by Justice Rehnquist, was even more surprising than the result. Justice Rehnquist had the audacity to claim that *Argersinger* decided the issue in *Scott* because the *Argersinger* petitioner, in his petition for certiorari, sought a ruling concerning the right to counsel in all cases where imprisonment was a possibility.[92] Although Justice Rehnquist mentioned the portion of the *Argersinger* opinion which stated that the Court "need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved ... for here petitioner was in fact sentenced to jail,"[93] he never mentioned the fact that this passage explicitly left the question open. At the end of the *Scott* opinion Justice Rehnquist does find that the earlier opinion was not "unmistakably clear," but he concludes that *Argersinger* did "delimit the constitutional right" and that "[e]ven were the matter *res nova*," actual imprisonment should be the limit for a right to appointed counsel.[94]

Without considering sixth amendment or due process values, and with some vague references to the social costs involved in appointment of counsel and the creation of confusion for lower courts if the appointment rule were to be extended to any other cases, the majority in *Scott* simply eliminated all claims for appointed counsel in any case where actual incarceration is not imposed. This decision means that an indigent, regardless of his individual capability to represent himself, will never have a right to counsel in any case where actual incarceration is not imposed; not even if the sanction involves a severe fine with major impact on the individual's life, the loss of a license necessary for his employment, or the creation of a criminal record which may damage the individual in a variety of ways. Additionally, this rule will apply to every stage of the criminal process; if an indigent is not to be sentenced to imprisonment, he has no right to appointed counsel during questioning, at a postindictment identification, at the preliminary hearing, at trial, at the sentencing hearing, or on any appeal. While many state courts may require counsel in cases where there is a possibility of imprisonment in order to avoid foreclosing the possibility of imprisonment prior to trial,[95] *Scott* eliminates the federal claim for counsel at all critical stages. That such a serious result should come about with absolutely no consideration of due process values is shocking. Even if the Court were to find the sixth amendment irrelevant, it should have examined due process values. Were this a civil case where a party was asking for some procedural safeguard, the Court, employing the *Mathews* balancing test,[96] would have examined the worth of the safeguard to the individual and its value in insuring a reliable fact determination. It would then have weighed these benefits against the societal cost imposed by the requirement. The *Scott* majority engaged in no such analysis. Use of the suggested due process methodology model would have required the Court to examine the value in a fair criminal process to both the individual and society, the chance that individual rights were endangered by the absence of counsel, and the societal worth of having the added assurance of systemic fairness and equality of treatment in the adversary process.[97] Instead, the Court simply asserted that the sixth amendment did not require

[89] The Court in 1974 upheld a statute requiring convicted indigent defendants, under certain circumstances, to repay to the state the costs of the "free" legal defense as a condition of probation. Fuller v. Oregon, 417 U.S. 40 (1974).

[90] 440 U.S. 367 (1979).

[91] The pre-*Gideon* cases are reviewed in Israel, *supra* note 73, at 246-61.

[92] Scott v. Illinois, 440 U.S. 367, 369, 373 (1979).

[93] *Id.* at 370. The quoted passage is reprinted more fully in note 77 *supra*.

[94] 440 U.S. at 373.

[95] Several states considered the problems of implementing the *Argersinger* ruling and chose to grant counsel to those defendants charged with an offense punishable by imprisonment, regardless of the actual sentence. A listing of these state decisions, court rules, and statutes is contained in Scott v. Illinois, 440 U.S. at 386 n.18 (Brennan, J., dissenting). *See* UNIFORM RULE OF CRIMINAL PROCEDURE 321(b) commentary. *See also* Duke, *The Right to Appointed Counsel: Argersinger and Beyond*, 12 AM. CRIM. L. REV. 601 (1975).

[96] *See* notes 33-35 and accompanying text *supra*.

[97] *See* note 32 and accompanying text *supra*.

counsel in such cases. There is no excusing the failure to consider the relevance of due process values to this issue. It is hard to believe that the Supreme Court issued an opinion that significantly altered the ability of a class of people to achieve a fair trial in cases which may have a substantial, detrimental impact on their lives without ever considering the values of the due process clause or even indicating that fairness was a concern in the decision.[98]

The most surprising vote in *Scott* was that of Justice Powell.[99] He concurred in the majority opinion because he believed that lower courts needed a definitive ruling on this issue. However, Powell concurred "with the hope that in due time a majority will recognize that a more flexible rule is consistent with due process and will better serve the cause of justice."[100] In his concurring opinion in *Argersinger*, Justice Powell noted the problem inherent in trying to anticipate a defendant's sentence and urged a case-by-case due process approach to the problem.[101] It is unclear why he hesitated to "split his vote" in this case and write a single judge opinion announcing the result that would have employed his *Argersinger* analysis. This would have required courts to make a *Betts*-type determination in "minor" cases, where there was a possibility but no actual sentence of imprisonment. Predictably, Justices Brennan, Marshall, Blackmun, and Stevens, dissented.[102] They noted that prior decisions such as *Argersinger* assumed that serious criminal prosecutions where there was a possibility of imprisonment for six months or more required the presence of counsel to equalize the position of the state and defendant.

Unless Justice Powell once again focuses on due process methodology, there may be further inroads on the previously established rights of indigents to free transcripts and appointed counsel. Once the majority has gotten to the position of issuing opinions like *Scott*, which do no more than announce a ruling under the sixth and fourteenth amendments with no attempt at value analysis, there is nothing to stop it from announcing more and more restrictive rules. Perhaps the Court will achieve the result to which Justice Frankfurter sarcastically referred in his opinion in *Griffin v. Illinois*:

> To sanction such a ruthless consequence, inevitably resulting from a money hurdle erected by a State, would justify a latter-day Anatole France to add one more item to his ironic comments on the "majestic equality" of the law. "The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread."[103]

CONFESSIONS

Despite the continuing swirl of public interest around *Miranda v. Arizona*,[104] the basic rules of that decision continue to live peacefully at the eye of the storm. Nothing remarkable has happened to the rules regarding the questioning of defendants that are based on the fifth amendment, although it appears that the sixth amendment may emerge as the most significant protection for the defendant regarding questioning in the adversarial process.[105] The Court has placed some limits on the *Miranda* ruling, such as finding that the IRS need not give full *Miranda* warnings to taxpayers who are not in custody[106] and that the police need not give warnings to a defendant who volunteers to go to a police station for questioning.[107] The Court also has indicated the full set of warnings need not be given to grand jury witnesses.[108] Clearly, the Burger

[98] The *Scott* opinion only mentions "fairness" as it describes the *Betts* rule. Scott v. Illinois, 440 U.S. at 371.

[99] Justice Powell usually takes some cognizance of due process values and the Court's duty to evaluate the fairness of the criminal proceeding. *Compare* Scott v. Illinois, 440 U.S. at 374 (Powell, J., concurring) *with* County Court v. Allen, 99 S. Ct. 2213, 2230 (1979)(Powell, J., dissenting to Court ruling that presumption of possession and handgun in an automobile justifies a guilty verdict in that case).

[100] 440 U.S. at 375 (Powell, J., concurring).

[101] Argersinger v. Hamlin, 407 U.S. 25, 44 (1972)(Powell, J., concurring).

[102] Scott v. Illinois, 440 U.S. at 375 (Brennan, J., joined by Marshall and Stevens, JJ., dissenting). Justice Stevens appears to be joining with Justices Brennan and Marshall more frequently in criminal cases; the reader may find it interesting to examine the voting patterns in the cases noted in this issue of the *Journal* with that observation in mind.

[103] Griffin v. Illinois, 351 U.S. 12, 23 (1956)(quoting J. COURNOS, A MODERN PLUTARCH 27 (1928)) (Frankfurter, J., concurring).

[104] 384 U.S. 436 (1966).

[105] *See* Brewer v. Williams, 430 U.S. 387 (1977), examined at notes 132–34 and accompanying text *infra*. Although the public views the *Miranda* rule, based on the fifth amendment, as the defendant's greatest safeguard, the sixth amendment may emerge as a more significant protection.

[106] Beckwith v. United States, 425 U.S. 341 (1976).

[107] Oregon v. Mathiason, 429 U.S. 492 (1977).

[108] Four Justices of the Court took this position in United States v. Mandujano, 425 U.S. 564 (1976) (plurality opinion by Burger, C.J., joined by White, Powell, and Rehnquist, JJ.). Regarding the merit of the competing argument on this *Miranda* issue, see Stone, *supra* note 3, at 154–67.

Court has kept the *Miranda* doctrine in check; the Court has not excluded any testimony from evidence because of *Miranda* since the Chief Justice took office.[109] In one respect the Court undercut the effectiveness of *Miranda* when it held that statements gained in violation of that ruling could be used for impeaching a defendant's testimony at trial, so long as the statements used for impeachment were not obtained in a manner that violated the basic fifth amendment prohibition of compelled testimony.[110]

In recent years the Court has examined the underlying basis of *Miranda's* exclusionary rule and found it to be justifiable, if at all, only as a means to deter police from subverting the principles underlying the fifth and sixth amendments. This view differs from the Warren Court rationale for *Miranda*, which relied upon both the deterrence of certain police activities and the belief that a state's use of evidence gathered from defendants who did not fully understand their fifth and sixth amendment rights violates the principle of fundamental fairness.[111] This redefinition of the *Miranda* values makes it unlikely that the defendant complaining of a violation of the *Miranda* rule will obtain relief.[112] More importantly, the Court's redefinition of the value of *Miranda's* exclusionary rule has diverted its attention from developing standards for determining the type of police practices that may be used when questioning a defendant outside the presence of counsel. The ultimate question in developing these standards is not one of waiver in a technical sense; instead, it is a question concerning the permissibility of particular investigatory practices in a society with a historic commitment to the values represented by the self-incrimination, the right to counsel, and the due process clauses. Attention paid to the *Miranda* rule has distracted the Court from defining the basic fifth amendment values concerning compulsion, the sixth amendment right to counsel values, and the due process values regarding individual dignity and fairness. The Court also has failed to define the scope of permissible police practices in procuring a waiver of rights after the *Miranda* warnings or in obtaining a confession from the defendant after the *Miranda* warnings are given and a waiver is executed.[113] Consequently, these practices are evaluated by the old voluntariness test, developed by the Court in pre-*Miranda* years under the concepts of due process and the fifth amendment's prohibition of compelling testimony. The test is two pronged. To be admissible under the test, the confession must be gained in a manner that does not undermine the defendant's will to the point that the statement is unreliable,[114] and, even if the confession is reliable, it will not be admissible if it was obtained in a manner which violates accepted societal standards for police practices and respect for individual dignity.[115] While it is hoped that *Miranda* warnings will deter coercive police activity, it is the voluntariness test which protects a defendant against police brutality, trickery, or "the third degree." The Court should once again focus its attention on respect for individual dignity and fairness, through the use of a due process methodology, in the context of examining interrogation practices.

The Court appeared to give some consideration to basic due process values in *North Carolina v. Butler*[116] when it held that the government did not need to obtain an explicit waiver of a defendant's fifth and sixth amendment rights in order to use his statements so long as the defendant received proper *Miranda* warnings. Justice Stewart's majority opinion found that "[t]he question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case."[117] Previously the Court held that a defendant's silence following the warn-

[109] Stone, *supra* note 3, at 100-01.

[110] Oregon v. Hass, 420 U.S. 714 (1975); Harris v. New York, 401 U.S. 222 (1971).

[111] *Compare* Miranda v. Arizona, 384 U.S. 436, 442-43, 460-63 (1966) *with* Michigan v. Tucker, 417 U.S. 433, 439-44 (1974).

[112] Professor Stone has noted that the shifted focus from protection of individual rights to the effectiveness of a deterrence device may foreshadow the demise of *Miranda*. Stone, *supra* note 3, at 123-25. Professor Israel believes that the *Miranda* doctrine is not in significant danger. Israel, *supra* note 63, at 1383, 1387.

[113] The Court avoided one such issue in Michigan v. Mosley, 423 U.S. 96 (1975), wherein it held that a defendant could be questioned following his invocation of his right to silence, if there was sufficient break in questioning, he received new warnings, and his invocation of right was scrupulously honored. The Court did not consider the defendant's claim, raised in the lower court, that he had been tricked by the police falsely telling him that he had been implicated by the testimony of another person.

[114] *See, e.g.*, Ashcraft v. Tennessee, 322 U.S. 143 (1944); Brown v. Mississippi, 297 U.S. 278 (1936).

[115] *See, e.g.*, Spano v. New York, 360 U.S. 315 (1959); Watts v. Indiana, 338 U.S. 49 (1949). *See also* Allen, *The Supreme Court, Federalism and State Systems of Criminal Justice*, 8 DE PAUL L. REV. 213, 235 (1959). *See generally* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 510-18 (4th ed. 1974).

[116] 99 S. Ct. 1755 (1979).

[117] *Id.* at 1757.

ing could not be used against him since to do so would subvert the worth of the warning.[118] Thus, the Court's consideration of the totality of the circumstances, rather than use of a per se rule, was not a rejection of *Miranda*. Instead, the Court explored the circumstances to insure that the defendant's will was not overborn in violation of the fifth amendment, that the right to counsel was not subverted by extracting evidence from the defendant in an unfair manner in violation of the sixth amendment, and that the confession was both reliable and was gained in a manner conforming to the traditional notions of human dignity and worth. The Court in *Butler* was willing to allow lower courts to determine, on a case-by-case basis, if these basic values were violated. This willingness contrasts with Warren Court rulings concerning exclusionary rules which sought to control the investigatory process by per se rules that could be enforced by a reviewing court.[119] A court cannot accept a truly value-oriented due process methodology if it is intent upon having decisions which can turn upon a single objective factor, so that the decisions of the lower courts may quickly be reviewed by Justices reading certiorari memos. Thus, *Butler* represents a step in a right direction by its focus upon fairness and voluntariness. The Court's decisions in this area will be clearer if it pays less attention to *Miranda* and seeks to define the values of the fifth and sixth amendments and the concept of due process, so as to clarify the voluntariness test. Such an approach might lead to renewed interest in other means for protecting defendants during interrogation, such as conducting the questioning before a judicial law officer, a suggestion made by the late Professor Kauper, Justice Schaefer, and others across the past forty years.[120]

The Supreme Court also shifted its focus from technical interpretations of the *Miranda* rule to questions of voluntariness and respect for the individual in *Fare v. Michael C.*[121] In *Fare*, the Court found that a juvenile's request to see his probation officer was not equivalent to a request for counsel. Therefore, the request did not require a cutoff of questioning under *Miranda* or the exclusion of the juvenile's subsequent statements, so long as the juvenile was properly advised of his fifth and sixth amendment rights and so long as the statements were truly voluntary. Justice Blackmun's majority opinion found that since the probation officer was not the equivalent of counsel, the request was not an invocation of sixth amendment rights.

However, the important issue in the case should not have been whether the juvenile's waiver was proper under *Miranda*, but whether the juvenile's rights to be free from compelled testimony, to be represented by counsel, and to be treated fairly in the adversary process were honored by the investigating authorities. Whether the juvenile defendant signed a waiver of rights should make no difference to his claim that his will was overborn by the investigatory practices that were conducted outside of the presence of any adult concerned with his interests. While the majority opinion noted that the individual circumstances regarding the questioning of a juvenile must be closely scrutinized to insure that the juvenile understood his rights and that the voluntariness/fair treatment test was met in the particular case,[122] the opinion spent too little time examining the circumstances of that case.

Justice Powell filed a strong dissent questioning whether the police overbore the will of the juvenile and whether the young defendant was a fair match for the police questioners outside of the presence of an adult concerned with the minor's interest. He also questioned whether the police acted in a fundamentally unfair manner when they refused to contact the juvenile's probation officer.[123]

Justice Marshall, joined by Justices Brennan and Stevens in dissent, would have employed a per se rule to exclude statements made by a juvenile after he requested to consult with an adult who would represent his interests.[124]

The Court's seeming adversity to excluding confessions from trial[125] continued this past Term in *Parker v. Randolph*.[126] There the Court upheld the admission into evidence of confessions of codefendants when none of them took the stand, but when each of them had confessed implicating himself and some or all of the nontestifying codefendants.

[118] Doyle v. Ohio, 426 U.S. 610 (1976).

[119] Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 532.

[120] *See, e.g.*, W. SCHAEFER, THE SUSPECT AND SOCIETY 76-81 (1966); Kamisar, *Kauper's "Judicial Examination of the Accused" Forty Years Later—Some Comments on a Remarkable Article*, 73 MICH. L. REV. 15, 32 (1973); Kauper, *Judicial Examination of the Accused—A Remedy for the Third Degree*, 30 MICH. L. REV. 1224, 1239 (1932), *reprinted in* 73 Mich. L. Rev. 39, 54 (1974); Pound, *Legal Interrogation of Persons Accused or Suspected of Crime*, 24 J. CRIM. L.C. & P.S. 1014, 1017 (1934).

[121] 99 S. Ct. 2560 (1979).

[122] *Id.* at 2572.

[123] *Id.* at 2575-77(Powell, J., dissenting).

[124] *Id.* at 2574 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting).

[125] *See generally* Stone, note 3 *supra*.

[126] 99 S. Ct. 2132 (1979)(plurality decision).

Although there was no majority opinion, a plurality of the Justices[127] found that there was no significant confrontation clause problem because the jury was cautioned to consider each statement against only the particular defendant who made that statement and because each defendant had confessed and, thereby, indicated his guilt. While this ruling may be a correct conclusion regarding the meaning of the confrontation clause, the opinion spends little time examining the concept of fairness in the adjudicatory system, which should be the key issue in any confession case. Justice Blackmun recognized this in his concurring opinion where he examined the question of whether or not the defendants were harmed significantly by the admission of the statements into evidence.[128]

Despite the Court's reluctance during the past decade to strike down the use of confessions at trial, it has limited police interrogation practices by means of the sixth amendment right to counsel. Fifteen years ago, in *Massiah v. United States*,[129] the Supreme Court invalidated the use of testimony gained from a defendant by a government agent-informant outside the presence of his retained counsel since the adversary process had begun prior to this activity. In *Brewer v. Williams*[130] the Court resurrected the *Massiah* rule and extended it to prohibit the use of evidence police obtained from a defendant after he had conferred with counsel because the defendant had not clearly waived his right to counsel.

After Professor Kamisar's 140-page analysis of the record, opinion, and implications of *Brewer*[131] there is little reason to trouble the reader with the details of the case. But it is interesting to note how *Brewer* demonstrates the need for the adoption of a due process methodology in resolving the Bill of Rights questions. The case involved the abduction and murder of a ten-year-old girl in Des Moines, Iowa. After taking the young girl from a local YMCA in Des Moines, the defendant disposed of her body in the countryside and went to Davenport, Iowa. The police searched unsuccessfully for the girl. Later, the defendant, while in Davenport, called a Des Moines lawyer who advised him to turn himself in to the Davenport police. The defendant did so, and the Davenport police and arraigning judge advised him of his *Miranda* rights. The defendant talked to a lawyer in Davenport and to his Des Moines lawyer by telephone. The police officers refused to allow counsel to accompany the defendant on the ride back to Des Moines, but they promised the defendant's lawyers that they would not question the defendant during the trip. Despite that promise, and the defendant's indication of an unwillingness to discuss matters with the police until he could meet with counsel in Des Moines, the officers asked him about the location of the girl's body. One officer played upon the defendant's religious beliefs by asking him to help them provide a "Christian burial" for the little girl. The defendant then told the police the location of the body.

The exclusion of the testimony in this case appears to be a severe sanction for police practices which seem neither unfair nor contrary to generally accepted notions of respect for the individual. However, the record was unclear and the interrogating officer apparently gave several versions of the events. It is difficult to determine the extent to which the officers actively sought to undermine the decision of the defendant not to talk to them. This problem is compounded by the fact that the defendant recently had escaped from a mental hospital and that he had intense religious beliefs. It may be that the Supreme Court, after employing the totality-of-the-circumstances test, felt that the record simply failed to demonstrate that the defendant had waived his previously asserted right to counsel. Indeed, the *Brewer* majority may not have intended to do anything other than to show disapproval of what might have been a deliberate attempt to subvert the role of counsel by police officers who intentionally broke their promise to counsel. In two footnotes at the end of the majority opinion, the Justices indicated that they would give the state additional time to reindict the defendant so that he would not be set free, and that they would not overturn a finding that the child's body and evidence regarding the body could be admitted into evidence because it inevitably would have been discovered.[132] Nevertheless, Justice Stew-

[127] Justice Rehnquist wrote an opinion which was in part a majority opinion and, in part, a plurality opinion joined by Chief Justice Burger and Justices Stewart and White.

[128] Parker v. Randolph, 99 S. Ct. at 2141(Blackmun, J., concurring).

[129] 377 U.S. 201 (1964).

[130] 430 U.S. at 387, 398-400 (1977).

[131] *See* Kamisar, *Foreword: Brewer v. Williams—A Hard Look at a Discomfiting Record*, 66 GEO. L.J. 209 (1977) and Kamisar, *Brewer v. Williams, Massiah and Miranda: What is "Interrogation"? When Does it Matter?*, 67 GEO. L.J. 1 (1978), for a complete analysis of the record, opinion, and implications of *Brewer*.

[132] Brewer v. Williams, 430 U.S. 387, 406 n.12, 407 n.13 (1979). On retrial, evidence regarding the body was admitted and Williams was convicted again. Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 192 (4th ed. Supp. 1979).

art's majority opinion also seemed to establish a much stricter rule for the waiver of the right to counsel once adversary proceedings have been initiated than was true for the waiver of rights under *Miranda*. The opinion emphasized that judicial proceedings against Williams commenced at the arraignment in Davenport.[133] The opinion then found that "the clear rule of *Massiah* is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him."[134] Justice Stewart concluded that it was "incumbent upon the State to prove 'an intentional relinquishment or abandonment of a known right or privilege.' "[135] It may be that the Court intended to establish a rule which would require an explicit waiver of the right to counsel for any interrogation following the initiation of adversary proceedings against the defendant. Yet this possibility must be contrasted with the *Butler* ruling that an explicit waiver was not required following the giving of the *Miranda* warning. It makes little sense to have the strictness of waiver rules regarding fifth and sixth amendment rights depend on the determination of whether formal proceedings have been initiated against the defendant, unless the Court feels that such a distinction is justified by the historic commitment to the principle that an accused shall not stand alone against the government once he has been charged with a crime.

It is hoped that the Court would not make such a distinction based simply upon an arguable view of the history of the sixth amendment, nor upon a policy determination concerning the feasibility of providing counsel for persons either before or after the initiation of judicial proceedings. Regardless of whether the Court will bring the sixth amendment waiver rule into line with the *Butler* approach, or whether it will enforce the *Massiah-Brewer* rule with strictness, its ruling will not be justifiable unless the Court considers the need to have counsel before and after the initiation of formal procedings as a means of insuring a fair adversarial process and protecting the defendant's right to remain silent. The benefit of a strict waiver rule must be weighed against the cost of eliminating any possibility of questioning in many cases—a cost that may be quite high if it involves situations where the questioning seems necessary to the solution of a particularly serious crime or necessary to prevent the loss of human life.

[133] 430 U.S. at 399.

[134] *Id.* at 401 (footnote omitted).

[135] *Id.* at 404 (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

With a due process analysis the Court may demonstrate a willingness to tolerate some discussions with the defendant outside the counsel's presence where the police are not engaging in unfair tactics to compel testimony by the defendant and where there is some need for prompt questioning shortly after the detention of a defendant. The ultimate question in this area is what should be required of an officer in the *Brewer* situation if there exist reasonable grounds to believe that the child might still be alive when the defendant is first seized and that the failure to question the defendant promptly, outside of the presence of counsel, effectively will preclude finding the child.[136] Professor Kaplan suggested tempering the use of exclusionary rules to permit the use of evidence gained in violation of fourth amendment rulings when the exclusionary rule would prevent prosecution of the most serious cases or where the police have honestly attempted to meet their responsibility to adhere to a constitutional command.[137] Such impact considerations, as well as the value considerations, should play a part in determining the strictness of the rules that will be used to regulate police discussions or interrogations of defendants under a due process methodology approach to the sixth amendment issue.

Privacy

The Court's rulings on the fourth amendment since *Mapp v. Ohio*,[138] which imposed an exclusionary rule on the states,[139] have made this subject the darling of criminal procedure classes. Although the numerous types of searches may necessitate a series of limited holdings, it is unfortunate that the Supreme Court has not attempted to develop a framework for its decisions. A beneficial side product of the Court's technical approach to the area has been the production of a truly excellent treatise on this subject[140] and a host of excellent articles by judges and law professors who have attempted to stitch the Court's patchwork rulings into a quilt that suits their individual tastes.[141] While I will not attempt

[136] The record in *Brewer* indicated that the police knew that the child was dead before the interrogation. *See* text accompanying note 131 *supra*.

[137] Kaplan, *The Limits of the Exclusionary Rule*, 26 Stan. L. Rev. 1027, 1050 (1974).

[138] 367 U.S. 643 (1961).

[139] The fourth amendment had been held to require exclusion of evidence gained in violation of its principles in Weeks v. United States, 232 U.S. 383 (1914).

[140] W. LaFave, Search and Seizure: A Treatise on the Fourth Amendment (1978)(three volumes).

[141] Citations to many of these articles may be found in Y. Kamisar, W. LaFave & J. Israel, Modern Criminal

to join in that quilting bee, I would like to examine a few of the Court's rulings to show that the focus in fourth amendment cases has been so narrow as to endanger protection of privacy interests that fall outside of the fourth amendment.

Let us first consider the problem of car searches. In two of the three cases decided last Term involving automobile stops and searches, the defendants prevailed. In *Delaware v. Prouse*[142] the Court held that police could not randomly stop automobiles to check driver licenses, just as the police are not allowed to stop a person without cause.[143] In *Arkansas v. Sanders*[144] the Court ruled that a search of luggage found within an automobile could not be conducted without a warrant. However, the majority opinion in *Sanders* explicitly endorsed a car-search exception to the warrant requirement,[145] which was implied by a number of earlier rulings by the Court, whereby a car could be searched on the existence of probable cause alone even though a warrant would have to be obtained to search containers within the vehicle. The state was able to prevail in *Rakas v. Illinois*,[146] where the Court took a more limited view of privacy and held that a nonowner (passenger or driver) in an automobile did not have standing to challenge a search of the automobile unless he could establish an expectation of privacy in the automobile which went beyond his legitimate presence in the vehicle at the time. The majority opinion by Justice Rehnquist found that traditional notions of standing were irrelevant to this problem because the nonowner lacked a privacy interest that was protected by the fourth amendment.

In each of the three cases, the Justices examined the privacy interest of citizens only if the police activity constituted a seizure that fell within the scope of the fourth amendment (a formal stop or seizure of property). In addition, the Court held that only persons with a specific expectation of privacy in the car or the property (and no one else) could complain if the police made such an intrusion without either a reasonable suspicion of criminal activity (for a stop), probable cause for a seizure (for an arrest or a search of the car), or probable cause and a search warrant (for a search of containers within a car).

The fourth amendment expectation of privacy standing requirement and the social cost of excluding reliable information from a criminal trial apparently have precluded the Court from defining privacy values that might be protected by the due process clauses. Because the Court has not examined privacy interests apart from fourth amendment cases, one might consider these decisions irrelevant to that issue. But these fourth amendment cases might be relevant to a civil suit brought against police officers for putting electronic tracking devices ("beepers") on many cars in order to keep track of the movements of those cars. They also might be determinative of a civil suit against the police for installing cameras at intersections of public streets in the business district of a major city. The police might assert that following the cars may lead them to evidence in cases in which they suspect a crime will take place, but lack probable cause for that belief. The television cameras arguably might be an aid to the reduction of street-corner crime in the city.

However, the Court's limited approach to fourth amendment cases should be irrelevant to these hypothetical problems for two reasons. First of all, they do not entail a search practice that is the equivalent of any practice traditionally associated with the investigation of crime that has been examined in fourth amendment cases. Secondly, individual and governmental interests in these "non-crime" cases are different from those previously examined by the Court. The real problem will arise with the claims of people who assert that they have not engaged in any criminal activity and that the government is monitoring their movements either for no identifiable reason or because they have opposed certain government policies. Will courts seriously examine the claim that television cameras and "beepers" will inhibit the freedom to act and speak in manners that are protected by the first amendment? It is easy enough to consider a generalized privacy interest in these cases and then inject fourth amendment language into the discussion, but that will only distort the analysis necessary to examine the privacy rights of the general

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PROCEDURE chs. 5, 11, 12 (4th ed. 1974 & Supp. 1979). Two of the recent articles which, in the view of the author, are particularly helpful in trying to construct an analytic framework for these cases have appeared in this journal. Grano, *Foreword—Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, and the Warrant Requirement*, 69 J. CRIM. L. & C. 425 (1978); Haddad, *Well-Delineated Exceptions, Claims of Sham and Fourfold Probable Cause*, 68 J. CRIM. L. & C. 198 (1977).

[142] 99 S. Ct. 1391 (1979).

[143] Brown v. Texas, 99 S. Ct. 2637 (1979).

[144] 99 S. Ct. 2586 (1979).

[145] *Id.* at 2591.

[146] 439 U.S. 128 (1978).

public in these cases.[147] Unfortunately, the Court has left open the question of whether it will seriously examine such privacy problems under the due process clauses.

In *Whalen v. Roe*[148] the Court upheld a statute which required doctors and pharmacists to report to the state the names of persons receiving medicines containing certain narcotic drugs. The majority opinion upheld the statute because of the importance of the government interest in limiting the usage of dangerous drugs and because of the restrictions placed on the use of data gained from the medical reports. The majority opinion in *Whalen* did note that the collection of data on individuals normally has been accompanied by a duty to avoid unwarranted disclosure of that information and, in addition, that this restriction "arguably has its root in the Constitution."[149]

Justice Brennan, in a separate opinion, stated his belief that government data collection practices were limited by the existence of a constitutionally protected privacy interest.[150] This point was contested by Justice Stewart, in a separate opinion, who found that the Constitution did not establish any right to privacy apart from the fourth amendment.[151] While these Justices spoke only for themselves, their opinions give an indication that the Court's rulings in the fourth amendment area may one day be critical to an examination of problems concerning generalized data collection practices such as our "beeper" and television camera hypotheticals.

The Court has restricted the right of individuals to bring private actions, such as those in our examples, on the basis of the first amendment by requiring that individual plaintiffs show tangible injury to their own first amendment activities in order to demonstrate the necessary ripeness and standing to maintain the suit, regardless of the constitutionality of the government data collection practice.[152] To date, the Court has granted "privacy" protection to first amendment interests only in those cases holding that associations need not disclose their membership to the government except in those circumstances where the government has a compelling need for that information,[153] and in a few cases placing some limits on required disclosures for governmental employees and candidates for government licensed occupations.[154] Thus it would be difficult, if not impossible, for private persons to prevail in an action challenging the government practices in the "beeper" and television hypotheticals on the basis of the first amendment. If the fourth amendment rulings indicate that there is no additional constitutionally recognized privacy interest contained in the concept of liberty as protected by the due process clauses, then the plaintiffs would have no possible basis for their suit, absent a claim that the government is improperly distributing information gained from its "beepers" and cameras. A constitutional claim regarding improper distribution of information also seems unlikely to prevail given the Court's ruling that a person's interest in his or her reputation is not constitutionally protected by the due process clause.[155]

If the Court would take a technical approach to the definition of privacy interests, fourth amendment rulings such as *Rakas* indicate that it certainly would fail to consider the more generalized constitutional value and privacy that is endangered by the television or "beeper" practices in the hypotheticals. Those practices do not constitute searches in a traditional sense, for they disclose information that could be gained by a police officer simply by following the car or by observing the street corner. Although the street corner television example presents a classic "plain view" situation, one might argue that the "beeper" practice constitutes a search because the police must attach a device to a privately owned car. Yet, if we consider the problem in terms of the fourth amendment alone,

[147] One federal appellate court has examined the "beeper" problem under a strict fourth amendment analysis with the predictable result that the judges were unable to come to grips with the privacy interest of the general public to be free from unjustifiable data collection practices. United States v. Holmes, 521 F.2d 859 (5th Cir. 1975), *aff'd per curiam on rehearing*, 537 F.2d 227 (5th Cir. 1976) (8-8 vote).

[148] 429 U.S. 589 (1977).

[149] *Id.* at 605.

[150] Whalen v. Roe, 429 U.S. 589, 606 (1977)(Brennan, J., concurring).

[151] *Id.* at 607-09 (Stewart, J., concurring).

[152] *See* Laird v. Tatum, 408 U.S. 1 (1972); Fifth Ave. Peace Parade Comm. v. Gray, 480 F.2d 326 (2d Cir. 1973), *cert. denied*, 415 U.S. 948 (1974).

[153] Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); NAACP v. Alabama, 357 U.S. 449 (1958). *See also* Talley v. California, 362 U.S. 60 (1960).

[154] These rulings have been based on vagueness and overbreadth grounds. *See, e.g.*, Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154 (1971); Shelton v. Tucker, 364 U.S. 479 (1960). However, these rulings have not expanded first amendment "privacy" to any significant degree. *See* Baird v. Arizona, 401 U.S. 1 (1971).

[155] Paul v. Davis, 424 U.S. 693 (1976).

it is difficult to envision the current Court finding that such a practice so invades a traditionally recognized expectation of privacy that it should result in the suppression of reliable evidence, as long as there was cause to suspect that the "beeper" would produce evidence of a crime.[156] The aversion to using the exclusionary rule in the television and "beeper" hypotheticals should not result in a total failure to consider the privacy interest of the general public, but the fourth amendment rulings of the Court in recent years indicate that such a result is likely. For example, during the past Term the Supreme Court held that there was no limit on the government's ability to make covert entries to install electronic devices once the government had a proper warrant if it used a "reasonable" means of making the entry.[157] The Court focused its attention on the warrant requirement and entirely failed to consider whether other liberty interests of the individual were endangered by such practices. Similarly, the Court has held that a search warrant can be executed at anytime, as a result of which there is no limit on the ability of government agents to show up in the middle of the night to execute a warrant, even though they could wait until daylight hours when they would have less impact on the privacy interests of the searched individuals.[158] As a result of these decisions, if the government has a properly executed search warrant, it can execute covert entries into the homes of innocent third parties, or it can execute search warrants in the middle of the night at the homes of innocent people who may not be aware of the evidence in their residences. In *Zurcher v. Stanford Daily*[159] the Court found that third parties had no greater privacy interests than people suspected of a crime when it came to the execution of search warrants. The ruling was made in a case wherein the police sought to search the offices of a newspaper, a fact which indicates that one cannot assume that the arguable existence of first amendment interests in our television or "beeper" examples would inhibit the Court from using its strict fourth amendment approach in those cases. The fact that the government's use of audio-visual cameras on each street corner might gain information about and from private persons that could be described as "testimonial" will also be of no relevance to the fourth amendment privacy determination, since the Supreme Court has held that the government is free to search for and seize testimonial information in compliance with the fourth amendment requirement.[160]

It seems difficult to believe that the Court would focus so narrowly on the fourth amendment that it would fail to consider the privacy interest of the general public—until one examines the Court's ruling last Term in *Smith v. Maryland*.[161] In *Smith* the Court found that there was no fourth amendment violation in placing pen registers, *i.e.*, devices which record the numbers dialed from a telephone, on the telephone line of a specific person suspected of threatening a witness. Such a technique was permissible without probable cause or a warrant if the device was installed at the telephone company offices. Because there was no invasion of a traditionally recognized privacy interest, either in installing a monitoring device in the home or in listening to the information in a private telephone conversation, the majority found no search; that is, there was no intrusion into a privacy interest protected by the fourth amendment. *Smith* appears to give the government the right to install pen register devices on the telephone of every person in this country, since no one has a recognized right of privacy in the numbers which he dials from his telephone. *Smith* falls on the heels of the Court's decisions holding that there is no fourth amendment interest invaded by a federal law which requires banks to record detailed information regarding their customer accounts and then allows the government to subpoena and examine the bank records without identifying a specific set of records in which it has probable cause to believe there is evidence of crime.[162] It would appear that the Court's limited fourth amendment approach to privacy interests may have already given sanction to the television camera, if not the "beeper," hypotheticals. Thus, it is critical that the Court shift its focus to a due process methodology so that it does not sanction wholesale invasion of the privacy of the members of the general public.

The extent of governmental intrusions into the privacy of individuals that might be justified by a narrow fourth amendment approach merits some

[156] *See* Cardwell v. Lewis, 417 U.S. 583 (1974) (upholding warrantless seizure of car to examine exterior of vehicle).

[157] Dalia v. United States, 99 S. Ct. 1682 (1979).

[158] Gooding v. United States, 416 U.S. 430 (1974). It is possible that *Gooding* does not resolve this issue. *See* W. LAFAVE, *supra* note 140, at § 4.7.

[159] 436 U.S. 547 (1978).

[160] Andresen v. Maryland, 427 U.S. 463 (1976).

[161] 99 S. Ct. 2577 (1979).

[162] *See* United States v. Miller, 425 U.S. 435 (1976); California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974).

consideration. Consider the problem presented by a government agency that bribes or coerces family members into gathering information about other members of the family by carrying electronic transmitting devices which record or transmit the substance of family conversations. Assuming that the family members find out about the informer, it appears that they would lose a case challenging the government's practice under the Court's current rulings. The first amendment will offer little basis for challenging the practice unless those monitored can show that they had some specific injury to their first amendment associations endangered by this practice. This seems unlikely if the informing family member agreed to the practice, thereby indicating that the first amendment privacy-association interest never really existed. If the government is not dispensing the information to other private persons in a way that severely intrudes upon the monitored individuals' liberty or property interests, there is no procedural due process issue. The Court's rulings in the area of the fourth amendment might be seen as endorsing such a practice, even if it is undertaken on a wide scale without any suspicion that the monitored persons are engaging in criminal activity.

The last major fourth amendment ruling in this area was *United States v. White*,[163] in which the Court upheld the use of informers carrying concealed transmitting devices on the theory that there was no intrusion into fourth amendment privacy interests. Justice Harlan issued a forceful dissent in *White* centering not only on the fourth amendment interest in limiting police intrusions into private conversations, but also on the need to protect the freedom of individuals to speak and act without a fear that will limit their substantive liberty interests.[164] Some fourth amendment scholars have thought the Harlan approach was improper because of his concern over a first amendment and due process freedom to act.[165] But a strict fourth amendment approach would fail to provide any limit on the wholesale use of informers to gain information about private citizens in whom the government had some interest, political or otherwise. Because the use of the informer, whether with or without the use of an electronic transmitter, only verifies the occurrence which the defendant voluntarily shared with him, there is no fourth amendment search or seizure in a traditional sense. In *Hoffa v. United States*,[166] the Court held that an individual's fourth amendment privacy interests were not invaded by the use of a government informant because the informant's activities were known to that individual, who merely misplaced his trust in the informer by assuming that the informer would not convey evidence to the government. Under the limited approach of *Hoffa* and *White*, no significant fourth or fifth amendment interest would be endangered by a government practice of bribing the spouses or children of an individual to provide information or to transmit conversations concerning the individual, who may or may not be suspected of criminal activity. Of course, it is hard to believe that the Supreme Court would permit a practice such as this, but in *Hoffa* only Chief Justice Warren took the position that the principle of fairness in the adversary process and the need to protect the integrity of the criminal justice system placed any limit on the government's ability to procure and use informants.[167] Perhaps the reader considers this example to be overly dramatic, but if fourth and fifth amendment analysis is incapable of resolving a problem so clearly antithetical to our democratic system, how can it possibly be useful in resolving lesser intrusions into the general privacy interest of the public such as occurred in the "beeper" or television examples?

The danger to privacy presented by generalized government data collection practices is both procedural and substantive. It is procedural since it often relates to investigations which result in prosecution and thereby implicates both fourth amendment interests and the interest of fairness to an individual in the adversary process. It is also substantive since the existence of such practices will, as Justice Harlan incisively noted, affect the ability of persons to act freely and to rely on their individual privacy in their day to day lives. In order to protect these substantive and procedural policy interests the Court, in data collection cases, must return to a due process methodology. This ap-

[163] 401 U.S. 745 (1971). The *White* plurality opinion was written by Justice White and joined by Chief Justice Burger, and Justices Stewart and Blackmun. However, the addition of Justice Rehnquist to the Court effectively makes the ruling one of the majority; Mr. Justice Rehnquist, in recent terms, has not voted to reverse a criminal conviction except in those cases where the Justices were unanimous in such an action.

[164] *Id.* at 768 (Harlan, J., dissenting).

[165] *See* Grano, *supra* note 141, at 434.

[166] 385 U.S. 293 (1966).

[167] *Id.* at 313 (Warren, C.J., dissenting). The Chief Justice based his dissent on the Supreme Court's power and duty to insure the fair administration of justice in the federal system.

proach requires evaluating the procedural privacy interest reflected in the fourth amendment, the substantive privacy interest reflected in the first amendment, and the generalized right of privacy inherent in the concept of liberty. The Supreme Court has already recognized a limited substantive right to privacy based on the value of private decisionmaking in family-unit decisions:[168] an individual's freedom to engage in traditional forms of marriage,[169] a married couple's decision to use contraceptives,[170] and a woman's decision to have an abortion.[171] It should be easier to justify judicial examination of the privacy value endangered by data-collection practices, as the Court can rely on the fact that the first and fourth amendments reflect an historic respect for a private individual's sense of security in being free from governmental knowledge of his activities. But narrow focus on the amendments will not resolve these issues; this privacy interest can be defined and evaluated only through a due process methodology. This methodology was reflected in the opinion of Justice Harlan in *White*:

> The critical question, therefore, is whether under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.
>
> This question must, in my view, be answered by assessing the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement.[172]

The Supreme Court may or may not wish to formally justify its analysis under the fourth amendment; what is important is not the verbalization of the basis for the inquiry into the government practices, but the use of a due process methodology in Court decisionmaking. Our due process model would require the Court to evaluate the philosophic and historic values concerning the privacy of individual actions and the data concerning one's life, the extent of the infringement on that freedom caused by a governmental practice, and the ability of the government to demonstrate some need to use the program in order to achieve an important societal interest. This methodology may not result in a ruling that adequately protects privacy interests, but it at least will force the Court to face the question, as opposed to using a technical reading of the fourth amendment to avoid the problem.

There is no doubt that a majority of the current Justices believe that the exclusionary rules have no value beyond the possibility of deterring egregious fourth amendment violations; additionally, they believe that the exclusion of evidence engenders an extraordinarily high social cost for an arguably small amount of deterrence. This attitude is apparent not only in the decisions concerning fifth and fourth amendment rulings discussed in the previous two sections of this article, but also in the exclusion of fourth amendment claims from federal habeas corpus proceedings.[173] But the Justices must not allow a dislike of the exclusionary rule to alter the basic meaning of the fourth and fifth amendments. While this article does not propose to join the exclusionary rule debate,[174] it must be recognized that it would clearly be better for the Court to face this question openly rather than to narrowly define the constitutional value of personal privacy so as to avoid the impact of the rule.[175]

Due Process and the Reasonable Doubt Standard

Having examined Supreme Court decisions concerning the most litigated provisions of the Bill of Rights, it is time to examine the Court's use of due process principles in rendering recent decisions. Since the area of due process adjudication is too

[168] Pierce v. Society of Sisters, 268 U.S. 510 (1925)(freedom to send children to private schools); Meyer v. Nebraska, 262 U.S. 390 (1923)(family and teacher freedom to teach foreign languages to children in private schools).

[169] Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967). The right does not appear to involve a right to disregard traditional government regulations prohibiting marriages between certain relatives or persons of the same sex. *See* J. Nowak, R. Rotunda & J. Young, *supra* note 16 (Supp. 1979).

[170] Griswold v. Connecticut, 381 U.S. 479 (1965). The Court has struck down strict laws prohibiting sales of contraceptives to unmarried persons, including persons under 18 years of age, but at the same time has indicated that it will uphold laws prohibiting sexual activity by those persons. *See* Carey v. Population Servs. International, 431 U.S. 678 (1977); J. Nowak, R. Rotunda & J. Young, *supra* note 16 (Supp. 1979).

[171] Bellotti v. Baird, 99 S. Ct. 3035 (1979); Roe v. Wade, 410 U.S. 113 (1973).

[172] United States v. White, 401 U.S. 745, 786 (1971)(Harlan, J., dissenting).

[173] Stone v. Powell, 428 U.S. 465 (1976).

[174] *Compare* Kamisar, *The Exclusionary Rule in Historical Perspective*, 62 Judicature 337 (1979) *with* Wilkey, *A Call for Alternatives to the Exclusionary Rule*, 62 Judicature 351 (1979).

[175] Kaplan, note 137 *supra*.

large to detail in a single article,[176] this analysis shall focus upon the Court's recent decisions concerning the standards which due process imposes upon a state's burden of proof in a criminal prosecution.

The development of due process principles regarding the reasonable doubt standard has involved a more value-oriented process than was evidenced in the opinions regarding Bill of Rights issues which we examined previously. For example, in *Jackson v. Virginia*[177] the Court held that, in a federal habeas corpus proceeding, a state defendant can always request a determination as to whether there was sufficient evidence to justify the factfinder's verdict of guilt beyond a reasonable doubt. The majority, in using the due process methodology, went from evaluating the practical and historic values underlying the reasonable doubt standard to evaluating the ability of modern judicial systems to enforce the reasonable doubt standard on a case-by-case basis.

Justice Stewart, speaking for the *Jackson* majority, found the value of the reasonable doubt standard tied to the fundamental constitutional principle that

> a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend.... A meaningful opportunity to defend, if not the right to a trial itself, presumes as well that a total want of evidence to support a charge will conclude a case in the favor of the accused.[178]

The Court had utilized this principle to establish the rule that a conviction can be based only upon the charge made by the prosecution and upon which the defendant was tried. Thus, when the state charges and tries a defendant for a specific crime, a reviewing court may not uphold the defendant's conviction for an uncharged crime. Even if the government proved an uncharged crime beyond a reasonable doubt, the defendant's conviction on the charged crime must be reversed.[179]

The principles of fair notice and opportunity to defend are basic due process values which also apply to the penalty-determination phase of the criminal process. Thus, during the past Term, the Court overturned a death sentence when the government failed to prove the basis for the death penalty which it charged, although evidence in the record supported a different basis for imposing the death penalty.[180] This fair-prosecution principle underlies the historic commitment to the reasonable doubt standard, and it lead Justice Stewart to evaluate the functional, as well as the historic, value of the reasonable doubt standard.

The *Jackson* majority found that the reasonable doubt standard serves at least two functions. First, it gives meaning to the presumption of innocence and, thereby, protects against errors in the factfinder's guilt determination. Second, it symbolizes the significance of the criminal sanction and the value that society places on individual liberty.[181] Thus Justice Stewart's opinion followed the due process methodology in explaining the functional value of the standard and its historic value as a part of our conception of liberty.

Much earlier, in *Thompson v. Louisville*,[182] the Court found that when there was no evidence to support a state conviction, that conviction violated due process. However, as noted by Justice Stewart, *Thompson* addressed only the problem of totally arbitrary convictions. It would have been dishonest, as well as erroneous, to claim that *Thompson* resolved the issues regarding the means of enforcing the reasonable doubt standard through a habeas corpus proceeding. Consequently, the *Jackson* Court found that merely adopting a federal rule that overturned convictions based upon no evidence of guilt would not adequately protect the reasonable doubt standard and the values which it reflected.

Justice Stewart also employed a due process methodology in considering whether the social cost of the new procedural safeguard outweighed the value of rigorously enforcing the due process principle. While it was argued that the use of a meaningful standard would both increase the workload of the federal district courts and create unwarranted tension with state courts, the majority did not accept either argument. First, the Court felt that the workload of the federal courts would not be increased significantly because the written record in most cases would disclose whether or not there was an adequate basis for the verdict and preclude the need for additional evidentiary hear-

[176] The cases touch upon subjects as diverse as death penalty procedures, physical conditions in prisons, and procedural rights at parole hearings. *See respectively* Green v. Georgia, 99 S. Ct. 2150 (1979) and Presnell v. Georgia, 439 U.S. 14 (1978); Bell v. Wolfish, 99 S. Ct. 1861 (1979); Greenholtz v. Inmates of the Neb. Penal & Correctional Complex, 99 S. Ct. 2100 (1979).

[177] 99 S. Ct. 2781 (1979).

[178] *Id.* at 2786-87.

[179] Dunn v. United States, 99 S. Ct. 2190 (1979).

[180] Presnell v. Georgia, 439 U.S. 14 (1978) (per curiam).

[181] Jackson v. Virginia, 99 S. Ct. 2781, 2789 (1979).

[182] 362 U.S. 199 (1960).

ings.[183] Secondly, the problem of federal-state comity was a false one. It is the duty of federal courts to enforce federal constitutional principles, and the supremacy clause provides the historic basis for federal review of state proceedings.[184] Additionally, the majority in *Jackson* adopted a standard that did not substitute the judgment of a federal district judge for that of the judges and factfinders in state proceedings because the standard is not whether the federal judge believes that the defendant is guilty beyond a reasonable doubt, but whether the record discloses evidence upon which a reasonable factfinder might have found guilt beyond a reasonable doubt.[185]

Justice Stewart found that the possible costs of the *Jackson* ruling did not outweigh the value of habeas corpus enforcement of this due process principle. In so doing, he distinguished *Stone v. Powell*[186] wherein the Court excluded most fourth amendment claims from federal habeas corpus review. The fourth amendment cases involved situations where defendants admittedly were guilty and convicted upon reliable evidence. So long as the state gave the individual defendant an opportunity to contest fourth amendment issues, the principles of the fourth amendment and the policy of the exclusionary rule were protected by the possibility of Supreme Court review. In *Jackson*, the principle to be enforced was "central to the basic question of guilt or innocence,"[187] and the federal due process requirement of proof beyond a reasonable doubt would be a meaningless safeguard if there was no system for reviewing the records in these cases. Given the importance of the due process values at stake, Justice Stewart correctly found that the problems of comity should not preclude habeas corpus relief. Our greatest state judges in recent years have welcomed federal review of state criminal proceedings in order to insure that the constitutional rights of defendants are protected.[188]

Related to the definition and enforcement of the reasonable doubt standard are questions concerning the use of presumptions, and inferences which have plagued the Court in recent years. In *Mullaney v. Wilbur*[189] the Court overturned a Maine statutory and common-law rule which required a defendant charged with murder to prove that he was acting under the "heat of passion" in order to reduce his homicide liability to manslaughter. *Mullaney* seemed to establish a requirement that the government prove every element of a charge and disprove every affirmative defense beyond a reasonable doubt.

Patterson v. New York[190] involved a statute which defined second-degree murder as the intentional killing of another person but which permitted the defendant to establish a defense of "extreme emotional disturbance" by a preponderance of the evidence. New York had retained first-degree murder and the separate manslaughter crime. The Supreme Court upheld the affirmative defense element of the second-degree murder provisions because the state had created a new class of offense, with a lesser penalty than first-degree murder, through an expanded definition of mitigating factors. The Court would not make the state choose between requiring that any new mitigating factor be disproved beyond a reasonable doubt and refusing to recognize the mitigating factor. The state would have been able to eliminate these defenses and allow the defendant to be convicted with no reference to such mitigating factors. Thus it appears that the Court will allow some shifting of the burden of proof regarding affirmative defenses where a statute requires the state to prove the basic elements of an offense but requires the defendant to prove the existence of a mitigating factor. So long as the state does not redefine the traditional elements of the crime in a manner that either presumes guilt or subverts the reasonable doubt standard, it can place this type of affirmative defense burden on the accused.

Patterson may be attacked for failing to require a procedure where the prosecution must prove every element of a crime beyond a reasonable doubt.[191] Two recent commentators, John Jeffries and Paul Stephan, have noted that such a strictly procedural view, which focuses only on the formal burden of proof, avoids the ultimate questions of substantive justice and due process.[192] In an affirmative defense case, the Court should be concerned with the government's ability to punish someone for a specific crime, with a designated penalty, while disregard-

[183] Jackson v. Virginia, 99 S. Ct. 2781, 2791 (1979).

[184] The principle dates back to Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821).

[185] Jackson v. Virginia, 99 S. Ct. 2781, 2789 (1979).

[186] 428 U.S. 465 (1976).

[187] 99 S. Ct. at 2792.

[188] *See* R. TRAYNOR, THE DEVILS OF DUE PROCESS IN CRIMINAL DETECTION, DETENTION, AND TRIAL (1966); Schaefer, *supra* note 15, at 25-26.

[189] 421 U.S. 684 (1975).

[190] 432 U.S. 197 (1977).

[191] For the basis of such an analysis and attack, see Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977).

[192] Jeffries & Stephan, *Defenses, Presumptions, and Burden of Proof in the Criminal Law*, 88 YALE L.J. 1325 (1979).

ing the accused's mitigatory defense. If it is fair to punish the defendant even if the defense exists, then the question of who must establish the affirmative defense is irrelevant. For example, if it is fair to sentence a defendant to death for killing another human being, regardless of his mens rea, then it is unimportant who must prove the state of mind of the defendant. However, the procedural approach should not be disregarded, as it may initiate legislative action. The striking of affirmative defenses on a procedural basis will force the legislature to reexamine the affirmative defense and to question whether it wishes to punish persons regardless of mitigating factors.[193] If legislators do not want to punish someone when there is a likelihood that mitigating factors exist, they merely will shift the burden of proof to the prosecutor. If, however, the legislature seeks to eliminate the affirmative defense, the state's ability to punish the defendant for the new offense, which does not recognize the affirmative defense, can be tested under either the cruel and unusual punishment clause[194] or the due process clauses.[195]

When the prosecution seeks to use a mandatory presumption which only requires the state to establish an underlying fact, it really is shifting the burden of proof to the defendant. A law establishing a mandatory presumption must be tested "on its face" because it alters the basis for finding a defendant guilty of a charged crime. Last year the Supreme Court invalidated a presumption which established the mental element necessary to sustain a price-fixing charge upon proof that the defendants exchanged price information. The presumption criminalized the underlying act of exchanging information except in cases where the defendant could prove an absence of inculpating motives.[196]

During the past Term, in *Sandstrom v. Montana*,[197] the Court invalidated the use of a jury instruction in homicide cases which stated that "the law presumes that every person intends the ordinary consequences of his voluntary act." In *Sandstrom* the defendant admitted killing another person, but contended that he was unable to form the intent required for the statutory offense of "deliberate homicide." Conviction under the statute required the state to prove that the defendant acted purposely or knowingly in causing the victim's death. The majority viewed the instruction as requiring the jury to find that the defendant was guilty unless the defendant could prove that he did not have the requisite mental state. Consequently, the statute created a mandatory presumption which shifted the burden of proving an essential element of the crime to the defendant.

The majority opinion in *Sandstrom*, by Mr. Justice Brennan, noted that the threshold inquiry was whether the instruction involved a mandatory presumption or a permissible inference. A mandatory presumption concerning a traditional element of an offense will be invalid unless the existence of the proved fact (*i.e.*, the killing in *Sandstrom*) leads a factfinder to conclude, beyond a reasonable doubt, that the presumed fact (the mens rea) also existed. Without rigorous application of the reasonable doubt standard to the mandatory presumption, the role of the factfinder would be undercut because the factfinder would not be free to determine whether the ultimate fact existed.

The use of inferences, sometimes called permissive presumptions, presents different questions than does the use of mandatory presumptions or affirmative defenses.[198] The factfinder's use of an inference merely recognizes that some facts can be proved without direct evidence. An inference allows the factfinder to conclude that the inferred fact exists based upon the proof of related facts or conditions. A jury instruction employing only an inference or permissive presumption informs the jurors that they may find that the presumed fact was established by another proven fact. If the instruction indicates that the jury must find the presumed facts from the proved fact it is a mandatory presumption that must be tested by the reasonable doubt standard because it eliminates the jury's judgment on the ultimate fact and allows punishment on the basis of the proved fact alone. Where the presumption or inference is truly permissive there is no reason to examine the presumption to determine if it meets the reasonable doubt standard as a hypothetical matter for all cases. With inferences, the relevant issue is whether the

[193] *See* Underwood, note 191 *supra*.

[194] This change might be used, in theory, to test the relation of the sentence to the offense although the Supreme Court has not often indicated that it would review sentences on this basis. *See* Weems v. United States, 217 U.S. 349 (1909). *See also* Badders v. United States, 240 U.S. 391 (1918).

[195] This due process/substantive justice test is the essence of the Jeffries-Stephan analysis of burden shifting defenses. *See* Jeffries & Stephan, note 192 *supra*.

[196] United States v. United States Gypsum Co., 438 U.S. 422, 435 (1978).

[197] 99 S. Ct. 2450 (1979).

[198] The nature of these inferences and presumptions is explained and analyzed in Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187 (1979).

record in the particular case would allow a reasonable finder of fact to conclude beyond a reasonable doubt that the state had established all elements of the offense. In other words, the question is whether it would have been reasonable for the jury to infer guilt based upon the indirect or circumstantial evidence presented at a trial.

During the past Term the Supreme Court adopted this analysis in *County Court v. Allen*.[199] The Court upheld the conviction of three adult males charged with illegal possession of guns when those guns were, in fact, in the open handbag of a minor female passenger riding in a car with them. The trial court instructed the jurors that they could employ a statutory presumption that all persons riding in a vehicle possessed any handguns contained in the passenger area of the vehicle. A majority of the Justices found that the instructions did not establish a mandatory presumption which would have shifted the burden of proof regarding the issue of possession to the defendants. Instead, the Court viewed this instruction as merely informing the jury of a permissible inference which would allow them to return a verdict of guilty if the jurors believed that the defendants were in possession of the guns. There is nothing objectionable about the inference if the instructions in *County Court* are understood as only informing the jurors that they need not acquit a defendant because the guns were not on the person of the defendant.

In prior cases the Court failed to explain whether an inference had to meet the reasonable doubt test.[200] In *County Court* the Court addressed this issue. The majority found that a permissive presumption should not be tested on its face; that is, the relationship between the proven fact and the presumed fact need not be one that is always true beyond a reasonable doubt. In fact, the relationship need not always be reasonable. Because the inference allows the jury to reach an independent conclusion on the presumed fact in the individual case rather than eliminating the state's burden of proof in an element of the crime, the issue to be resolved is whether the jury could have found the defendant guilty beyond a reasonable doubt in light of the proven fact and all other facts presented at trial. In *County Court* the majority found that a jury could have concluded, beyond a reasonable doubt, that the defendants possessed the handguns. The Supreme Court's approach is reasonable so long as it is clear that the instructions left the jury free to determine whether or not they should give any weight to the circumstantial evidence and to the inference. Unfortunately, the Court did not enunciate a rule for differentiating permissive and mandatory presumptions. Consequently, the threshold inquiry referred to in *Sandstrom* will remain a difficult one.

The Court should have followed the advice of Professor Nesson and required that jury instructions on permissible inferences state the possible inference, that the defendant is presumed innocent, and that the jury is not free to find guilt solely upon the existence of the proved fact.[201] Such a rule would require the state to differentiate inferences from mandatory presumptions more clearly, and thereby insure the factfinder is free to reach an independent judgment in inference cases.

During the past two Terms the Court also has considered the value of a presumption of innocence instruction in protecting the reasonable doubt standard. In *Taylor v. Kentucky*[202] the Court invalidated a conviction because the trial judge had refused to instruct the jury on the presumption of the defendant's innocence. The majority opinion recognized that the presumption of innocence is not a true presumption; it is really a means of describing the basic principle of the reasonable doubt standard: that the state either must prove the defendant guilty beyond a reasonable doubt or free the defendant as "innocent." The rationale of *Taylor* indicated that the presumption of innocence instruction was necessary to protect the reasonable doubt standard, but the majority opinion stated only that the instruction was necessary in the particular case to insure that the state proved the defendant guilty beyond a reasonable doubt.

During the past Term, in *Kentucky v. Whorton*,[203] the Court held that the presence or absence of such an instruction was only one factor to consider in determining whether a particular defendant received a constitutionally fair trial. In *Whorton* the majority found that the constitutional values of a fair trial and proof beyond a reasonable doubt required a case-by-case analysis rather than a per se rule requiring a presumption of innocence instruction in all cases. Justice Stewart, who had written the opinion in *Taylor*, dissented in *Whorton*. He argued that the presumption of innocence instruction was a vital component of the reasonable

[199] 99 S. Ct. 2213 (1979).

[200] *See* Barnes v. United States, 412 U.S. 837, 843 (1973).

[201] Nesson, *supra* note 198, at 1215, 1222–25.

[202] 436 U.S. 478 (1978).

[203] 99 S. Ct. 2088 (1979).

doubt standard.[204] This mirrored his analysis in *Jackson*, where he examined the functional and historic values of the reasonable doubt standard.[205]

Although the *Whorton* majority did not engage in open use of a due process methodology in rejecting Justice Stewart's position, the *Whorton* ruling may be rationalized in light of the affirmative defense and presumption cases. The constitutionally required standard of proof beyond a reasonable doubt has a functional value in aiding an accurate guilt determination as well as an historic, philosophic value related to our societal conception of liberty. Any formal shifting of the burden of proof to the defendant must relate to an item not traditionally part of the charged crime. This principle enforces the reasonable doubt standard as to the charged crime and requires the legislature to face openly the question of whether it wishes to punish the defendant for a different form of offense. When the state seeks to use a mandatory presumption regarding a traditional element of an offense, the state must establish the presumed fact beyond a reasonable doubt; this is necessary to avoid undercutting the jury's function of independently applying the reasonable doubt standard to all elements of the alleged offense. When the state seeks to use an inference, all of the factors in the case must be considered to determine if the reasonable doubt standard was met. When all the instructions and the burden-allocating devices require the state to prove guilt beyond a reasonable doubt and require the jury to consider the evidence independently, the additional presumption of innocence instruction may be superfluous. When the factfinder's other instructions or guidelines are unclear, the presumption of innocence instruction may be critical to insuring that the reasonable doubt standard was met.

[204] *Id.* at 2090 (Stewart, J., joined by Brennan and Marshall, JJ., dissenting).

[205] See notes 177–88 and accompanying text *supra*.

Conclusion

In examining the Court's recent decisions regarding the reasonable doubt standard, we have seen that the Court has come much closer to using a due process methodology in this area than in its Bill of Rights decisions. When openly examining questions of due process, the Court has inquired into the functional and historic values reflected in the concepts of liberty and due process. This approach is in stark contrast to the Bill of Rights decisions wherein the Court's opinions fail to explore the nature of the values at stake in the proceedings while manifesting a disregard for the basic due process values of individual dignity, equality, and fairness. At the end of each Term it may often appear that the results of the cases are the most important aspect of the Court's work. However, it is the decisionmaking process, as reflected in the opinions of the Court that is most important. While today's rulings may be limited or overturned tomorrow, if the Court indicates that it will form constitutional rules based on fiat rather than on reason, its authority inevitably will be called into question.[206] Adoption of the due process methodology model for decisions in both due process and Bill of Rights cases would focus the Court's attention, in all criminal procedure decisions, on its basic function of defining constitutional values. The Court's ability to define and fulfill an independent judicial role in the criminal procedure decisions of the 1980's may depend on its ability to adapt Dean Kadish's due process model to these postincorporation problems.[207]

[206] *See generally* E. Levi, An Introduction to Legal Reasoning (1949); Fuller, *Reason and Fiat in Case Law*, 59 Harv. L. Rev. 376 (1946).

[207] Kadish, note 18 *supra*.