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Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?

CRAIG M. BRADLEY*

INTRODUCTION

The nomination of Justice William Rehnquist for the post of Chief Justice of the United States has aroused considerable consternation in liberal circles. Whereas the product of the Burger Court has aptly been termed "the counter-revolution that wasn't,"¹ it is feared that Chief Justice Rehnquist may bring the will, the intellect and, most importantly, the votes to make serious inroads into the structure of federally enforced constitutional rights that was erected by the Warren Court.

For example, at Justice Rehnquist's confirmation hearings, Senator Kennedy termed him an "extremist."² Similarly, Anthony Lewis, editorializing in the *New York Times*, strongly criticized the choice of Justice Rehnquist for Chief Justice. He termed Rehnquist an "activist" who is willing "to override precedent, [and] to reshape constitutional traditions in radical ways."³ He foresees "drastic limitation of the Court's role as the protector of American liberties" and a country "in which our freedoms are less secure, official power less restrained." He concludes that "the American public will not be happy with a Supreme Court reconstructed in President Reagan's image."⁴

Yet this same Anthony Lewis, in his foreword to *The Burger Court: The Counter-Revolution That Wasn't*, was sanguine about the current state of

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The term "Rehnquisition" first appeared in a Harvard Law School publication in the early 1970's.

1. *THE BURGER COURT: THE COUNTERREVOLUTION THAT WASN'T* (V. Blasi, ed. 1983) [hereinafter *THE BURGER COURT*].

2. *Nomination of William Rehnquist as Chief Justice of the United States: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2d sess. (1986) [hereinafter *Confirmation Hearings*] (statement of Edward Kennedy, Senator).

3. Lewis, *The Court: Rehnquist*, N.Y. Times, June 23, 1986, § A, at 15.

4. *Id.* Similarly, Professor Tribe stated that he "would be extremely surprised if over the next several years the effect [of the Rehnquist and Scalia appointments] is not to push the Court to the right considerably." *TIME*, June 30, 1986, at 25. The *New York Times* also averred that "the ideological balance is likely to shift perceptibly to the right if the Senate confirms President Reagan's selections [for the Supreme Court]". N.Y. Times, June 18, 1986, § A, at 1.

the law, expressing the view that the Warren Court doctrines "are more securely rooted now than they were in 1969." In the same book, Professor Kamisar, commenting on the state of criminal procedure law, similarly averred that "the intensity of the civil libertarian criticism of the Burger Court in the police practices area 'relates less to what the Court has done than to what the critics fear[ed] it [would] do.'"⁵

This Article will attempt to determine just what Justice Rehnquist's views on criminal procedure are,⁶ to consider how those views differ from the doctrine of the current majority and to assess the chances that, to the extent that those views differ substantially from current doctrine, they will become law in the future. It will conclude that, though he is unquestionably the most conservative member of the Court, that is, the most likely to vote against a criminal defendant, he cannot be considered an "extremist." There is a substantial body of cases in which he has voted for defendants and he has explicitly accepted most of the major Warren Court innovations in this area (though he has also generally refused to expand them). Even in cases

5. THE BURGER COURT, *supra* note 1, at 90 (quoting Israel, *Criminal Procedure, the Burger Court and the Legacy of the Warren Court*, 75 MICH. L. REV. 1319, 1408 (1977)). See also Saltzburg, *The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151 (1980):

The Burger Court has reaffirmed, explicitly or implicitly, nearly all of [the Warren Court criminal procedure] decisions . . . [T]he differences between the Warren and the Burger decisions tend to be more at the margin than at the heart of the constitutional principles for which the Warren Court is remembered.

Id. at 153.

6. There are a number of sources to which one may turn for such information. Of greatest value are published speeches, law review articles and sole dissents, since these will represent the pure views of their author, undiluted by any need to accommodate the opinions of others and unfiltered by the mind of a reporter of those views. Nearly as useful is *The New York Times Magazine* interview with the Justice, which, while subject to distortion by the reporter, provides insights into personal philosophy which cannot be found in opinions and speeches. See *infra* note 68. Of slightly diminished importance, but still useful, are dissenting and concurring opinions authored by Justice Rehnquist that are joined by others. In these, one cannot be totally confident that any given assertion, or reservation, is the pure view of the author or an accommodation to one of the joiners. Obviously, this reservation is even more true of majority opinions where the author is more anxious to attract others to join his actual opinion (as opposed to just voting the same way) than is the author of a dissent. Of least use, but not totally valueless, particularly where a consistent pattern has developed over the years, are mere votes to join the majority opinions of others. As I have previously indicated, the "tyranny of the majority opinion" is such that it cannot confidently be read as expressing any more than a general preference of the joining Justices, rather than their specific views. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 28 (1986). Nevertheless, it would be difficult for a Justice who has consistently accepted *Miranda v. Arizona*, 384 U.S. 436 (1966), for example, by joining a series of opinions that endorsed that decision, to suddenly denounce it. It would be even more difficult for the Justice to attract any supporters to that denunciation. When a Justice joins a concurring or dissenting opinion, it is more likely to express his views since writing a separate dissent is a less significant departure than writing separately from a majority opinion. Since Justice Rehnquist has not hesitated to write separate dissents, see, e.g., Nat'l L.J., June 30, 1986, at 48-49, when he has joined a dissent or concurring opinion I have tended, absent contrary evidence, to believe that such opinion does, at least generally, explicate his views.

where Justice Rehnquist has been a lone dissenter, his dissent has generally accepted the core concept of the majority opinion, differing only as to questions of application. Whether this acceptance is based upon philosophical agreement, expediency or resignation cannot be discerned from his opinions. Whatever the basis, his accession to the view of the majority of the Court and to most of the Warren Court cases suggests that the future of criminal procedure, even in a Court in which the views of Justice Rehnquist held greater sway than they do now, would not differ as radically from current law as his critics suggest.

I. THE BURGER COURT DECISIONS

Professors Israel, Saltzburg and Kamisar have all ably and thoroughly analyzed the work of the Burger Court in criminal procedure.⁷ I will not repeat these efforts, but rather will provide the briefest possible sketch of developments in the last decade and a half.

In general, these decisions can be seen as a retreat from, rather than a rout of, the Warren Court decisions. In the search and seizure area, the exclusionary rule and the (often excepted) warrant requirement were retained.⁸ However, the establishment of probable cause by the police was made easier⁹ and a good faith exception to the warrant requirement was created.¹⁰ Standing requirements were tightened¹¹ and fourth amendment claims were barred from collateral attack in federal courts.¹² Consent searches were made easier.¹³ The scope of warrantless automobile searches¹⁴ and searches incident to arrest¹⁵ (including automobile searches incident to arrest)¹⁶ was greatly expanded.

While the Court's major search decisions have been essentially uniform in favoring the police,¹⁷ the Court has taken a greater interest in the rights of defendants in cases involving seizure of the person. While in *United States v. Watson*¹⁸ the Court did hold that warrantless arrests of felony suspects

7. See *supra* note 5.

8. For an analysis of the problems with the warrant requirement and its many exceptions, see Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985).

9. *Illinois v. Gates*, 462 U.S. 213 (1983).

10. *United States v. Leon*, 468 U.S. 897 (1984).

11. *Rakas v. Illinois*, 439 U.S. 128 (1978). Only a person with a "legitimate expectation of privacy" in a particular premise has standing to raise a fourth amendment claim. *Id.* at 148.

12. *Stone v. Powell*, 428 U.S. 465 (1976).

13. *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973).

14. *United States v. Ross*, 456 U.S. 798 (1982).

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

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

17. One exception was *Franks v. Delaware*, 438 U.S. 154 (1978), in which the Court rejected the state's rule that under no circumstances may the defendant challenge the truthfulness of factual statements made in a police affidavit supporting a search warrant.

18. 423 U.S. 411 (1976).

may be effected on probable cause, it required an arrest warrant to arrest a suspect in his home¹⁹ and a *search warrant* to arrest him in the home of another.²⁰ In *Dunaway v. New York*,²¹ the Court made it clear that detention of a suspect for custodial questioning by the police must be justified by probable cause, whether or not the police considered their act an "arrest." In *Dunaway* and in *Brown v. Illinois*²² the Court would not allow *Miranda* warnings alone to "purge the taint" of such an illegal arrest such that a confession made by the arrestee could be used. Rather, the confession must, on all the facts, be found to be an act of "free will."²³ Thus a possible incentive to the police to perform illegal arrests in hopes of gaining an incriminating statement from the suspect was largely dispelled.

Further, the Court limited the application of *Terry v. Ohio*²⁴ by forbidding frisks of those present at premises that were being searched pursuant to a search warrant, absent the individualized suspicion as to dangerousness required by *Terry*.²⁵ In *Delaware v. Prouse*²⁶ it similarly forbade random stops of automobiles for drivers' license and registration checks. Finally, in *Gerstein v. Pugh*²⁷ it forbade "extended" detention of an arrestee unless he is brought before a judicial officer for a determination of probable cause.

In the interrogation area the Court's decisions have been similarly balanced, not allowing *Miranda v. Arizona*²⁸ to be expanded, but showing some sensitivity to the rights of criminal suspects, even rights that were never recognized until *Miranda* itself.

In the early seventies, it appeared that the Court, as Professor Stone observed,²⁹ was paving the way to overrule *Miranda*. The Court allowed statements obtained from a suspect in violation of *Miranda* to be used to impeach him at trial,³⁰ and allowed requestioning by police even after the defendant had asserted his right to silence.³¹ It permitted the prosecution to use evidence which was the "fruit" of an unwarned statement³² and termed

19. *Payton v. New York*, 445 U.S. 573 (1980).

20. *Steagald v. United States*, 451 U.S. 204 (1981).

21. 442 U.S. 200 (1979).

22. 422 U.S. 590 (1975).

23. *Id.* at 603-04. "[T]he temporal proximity of the arrest and the confession, the presence of intervening circumstances and, particularly, the purpose and flagrancy of the official misconduct are all relevant factors to be considered." *Id.*

24. 392 U.S. 1 (1968).

25. *Ybarra v. Illinois*, 444 U.S. 85 (1979).

26. 440 U.S. 648 (1979).

27. 420 U.S. 103 (1975).

28. 384 U.S. 436 (1966).

29. Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 123.

30. *Harris v. New York*, 401 U.S. 222 (1971). And in *Oregon v. Hass*, 420 U.S. 714 (1975), it even allowed the defendant to be impeached with statements given after he was warned and asserted his right to silence, thus providing police with an incentive to ignore the assertion of the *Miranda* rights.

31. *Michigan v. Mosley*, 423 U.S. 96 (1975).

32. *Michigan v. Tucker*, 417 U.S. 433 (1974).

the *Miranda* warnings merely “prophylactic standards” designed to protect the constitutional right against self-incrimination rather than constitutional rights themselves.³³

On the other hand, while concluding that a suspect had not been subject to interrogation in a police car when he told police where to find a murder weapon, the Court extended *Miranda* to any custody (not just station house custody) and defined “interrogation” rather broadly as including “any words or actions on the part of the police [other than those normally attendant to custody] that the police should know are reasonably likely to elicit an incriminating response.”³⁴ In *Edwards v. Arizona*³⁵ the Court distinguished between assertion of the right to silence by a suspect and of right to counsel, holding that after the latter assertion, interrogation must (really) cease until counsel has been made available. No second tries by police will be permitted unless the defendant “initiates” further conversation.³⁶ Also, in *Estelle v. Smith*³⁷ the Court held that a psychiatric interview (which led to testimony against a defendant at the “death phase” of his murder trial) required a *Miranda* warning and notification of counsel. Recently, in *Berkemer v. McCarty*,³⁸ the Court extended the *Miranda* requirement to all crimes, including misdemeanor traffic offenses. The other significant pro-defendant interrogation case, *Brewer v. Williams*,³⁹ did not involve *Miranda* at all but, instead, resurrected the pre-*Miranda* decision in *Massiah v. United States*⁴⁰ in holding that once adversary proceedings had begun against a defendant the police could not “deliberately . . . elicit” incriminating statements from him in the absence of counsel.⁴¹

Recent cases have not all favored defendants. In *New York v. Quarles*⁴² the Court established a “public safety” exception to the requirement that

33. This, despite express language to the contrary in *Miranda*. *Miranda* held that the warnings are required by the fifth amendment “unless we are shown other procedures which are at least as effective in apprising accused persons of their rights.” 384 U.S. at 467. See also *id.* at 476 (“The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege . . .”). See generally Stone, *supra* note 29, at 118-19.

34. *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980) (footnotes omitted).

35. 451 U.S. 477 (1981).

36. *Id.* at 484-85. In *Oregon v. Bradshaw*, 462 U.S. 1039, 1045 (1983), the Court held that a suspect had “initiated . . . conversation” with the authorities by asking, “what is going to happen to me now?” See also *Smith v. Illinois*, 105 S. Ct. 490, 495 (1984) (holding that after an *Edwards* request, the defendant’s responses to further reading, or discussion of, the *Miranda* warnings, “may not be used to cast retrospective doubt on the clarity of the initial request itself”).

37. 451 U.S. 454, 467 (1981).

38. 468 U.S. 420 (1984).

39. 430 U.S. 387 (1977).

40. 377 U.S. 201 (1964).

41. *Brewer*, 430 U.S. at 1240. In *Brewer* the police appealed to the defendant’s religious feelings in urging him to lead them to the body of his victim so that she could have a “Christian burial.” See also *United States v. Henry*, 447 U.S. 264 (1980) (extending *Brewer* to “deliberate elicitation” of statements, not by police but by a fellow prisoner who was a police “plant”). But see *Kuhlman v. Wilson*, 54 U.S.L.W. 4809 (1986) (holding that a fellow prisoner who merely hears and reports defendant’s statements does not violate *Massiah*).

the police give *Miranda* warnings. In *Oregon v. Elstad*⁴³ it held that the "fruit of the poisonous tree doctrine" did not operate to exclude a second, warned statement by a suspect that followed a prior unwarned one. Finally, in *Moran v. Burbine*⁴⁴ it enforced a suspect's waiver of his *Miranda* rights, despite the police's failure to tell him that a counsel retained for him by a third party was attempting to reach him, and their assurance to his counsel that he would not be interrogated.

In the third major area of pretrial rights, involving identification procedures, the Burger Court, in *Kirby v. Illinois*,⁴⁵ effectively gutted the 1967 requirement of *United States v. Wade*⁴⁶ that counsel must be present at a lineup by limiting that holding to *post-indictment* lineups. Since most lineups are for the purpose of finding out if the police have the right person, they are, of necessity, *pre-indictment*.⁴⁷

II. JUSTICE REHNQUIST'S VIEWS

In all but two of the cases discussed above,⁴⁸ Justice Rehnquist either voted against the defendant, or, concurring in the result, expressed serious reservations about a pro-defendant opinion (though, as will be discussed, he has subsequently acceded to the majority view in many of these cases). No other Justice approached him in maintaining such a consistent stance in favor of the views advanced by law enforcement. Does this mean that Rehnquist, admittedly the most conservative member of the Court, is accurately termed an "extremist" who would, if he had the votes, return criminal procedure law to its pre-Warren Court state?⁴⁹ Although I disagree with many of his positions, my answer is "no."

42. 467 U.S. 649 (1984).

43. 105 S. Ct. 1285 (1985).

44. 54 U.S.L.W. 4265 (1986).

45. 406 U.S. 682 (1972).

46. 388 U.S. 218 (1967). See also *United States v. Ash*, 413 U.S. 300 (1973) (holding that right to counsel does not apply to photographic identifications whether conducted before or after the filing of formal charges). See Kamisar in *THE BURGER COURT*, *supra* note 1, at 68-72, for a detailed criticism of the pretrial identification cases.

47. In fact, neither *Wade* nor *Kirby* represents the most sensible approach to lineups, which is to require them to be either photographed and tape recorded or videotaped if they are to be used in court. As anyone who has actually been to a lineup knows, there is nothing for defense counsel to do there except to see if the procedure is unfairly suggestive of counsel's client as the criminal, and complain about it later to the court. This can be better achieved by recording the proceedings.

48. *Berkemer v. McCarty*, 468 U.S. 420 (1984); *Gerstein v. Pugh*, 420 U.S. 103 (1975).

49. An interesting example of the impact of *Mapp v. Ohio*, 367 U.S. 643 (1961), can be found by consulting criminal law and procedure textbooks written just before *Mapp* was decided. In one of the leading casebooks, PERKINS, *CRIMINAL LAW AND PROCEDURE: CASES AND MATERIALS* (2d ed. 1959), the author states, remarkably, that the fourth amendment "applies to the federal government and is not a limitation upon the powers of the state." *Id.* at 860. *Wolf v. Colorado*, 338 U.S. 25 (1949), which had held precisely the opposite ten years before, is not mentioned. The failure of the Court in *Wolf* to apply the *exclusionary rule* (as opposed to the fourth amendment itself) to the states meant that, as a practical matter, the amendment had no impact. Indeed, it had so little impact that Perkins did not even realize it applied. See

One measure of "extremism" is how often and to what extent a Justice differs from the rest of the Court. Much has been made of the fact that Justice Rehnquist has authored fifty-four sole dissents in his term on the court.⁵⁰ Fifty-four sole dissents out of some 2,100-2,200 decisions in which he has participated in fifteen years is not an overwhelming statistic. Moreover, as I discuss, many of those sole dissents accept much of the majority's opinion. More significant in assessing "extremism," or whether Justice Rehnquist is "a loner . . . out at the edge of the Court" as Anthony Lewis avers,⁵¹ is how frequently he disagrees with his colleagues. Over the last two years for which statistics are available, Justice Rehnquist has dissented an average (mean) of 31.5 times out of about 150 opinions—slightly less than the average of 31.8 for the Court as a whole. In this respect he is far less of a "loner" than Justices Brennan (58.5), Marshall (55.5) and Stevens (52).⁵²

In assessing the substance of Justice Rehnquist's views of criminal procedure it is important to recognize those aspects of the Warren Court innovations with which he does *not* disagree. In my view the most significant decisions by the Warren Court were *Gideon v. Wainwright*,⁵³ extending the sixth amendment right to counsel to state felony defendants, and *Douglas v. California*⁵⁴ and *Griffin v. Illinois*⁵⁵ according indigent defendants the rights to counsel and a free transcript on appeal. Without counsel to represent a defendant at trial and without the opportunity to bring an effective appeal, other constitutional rights, such as that of proof beyond a reasonable doubt, as well as pretrial rights, could be ignored. Justice Rehnquist has never expressed any disagreement with these cases,⁵⁶ nor with other key cases that ensure criminal defendants a fair trial in state and federal courts.⁵⁷ Indeed,

Kamisar, *infra* note 102, at 71-72, for further evidence that, before *Mapp*, state and local police ignored the fourth amendment but after *Mapp* they attempted to conform to it.

50. Nat'l L.J., *supra* note 6, at 48-49. (A follow-up article set the up-to-date total at 54.)

51. N.Y. Times, *supra* note 3.

52. *The Supreme Court, 1984 Term*, 99 HARV. L. REV. 322 (1985); *The Supreme Court, 1983 Term*, 98 HARV. L. REV. 307 (1984).

53. 372 U.S. 335 (1963).

54. 372 U.S. 353 (1963).

55. 351 U.S. 12 (1956).

56. Justice Rehnquist did, however, author the majority opinion in *Ross v. Moffitt*, 417 U.S. 600 (1974), limiting the right to counsel on appeal to the first appeal as of right and not to subsequent discretionary appeals. See also *Evitts v. Lucey*, 105 S. Ct. 830 (1985) (opinion of Rehnquist, J., dissenting), arguing that there is no due process (as opposed to equal protection) right to counsel on appeal, but agreeing that "the States must provide an attorney to those who can't afford one [on the first appeal as of right] . . ." *Id.* at 843.

57. These include *Griffin v. California*, 380 U.S. 609 (1965) (forbidding the prosecutor to comment adversely on the defendant's failure to testify) and *Bruton v. United States*, 391 U.S. 123 (1968) (upholding the defendant's right to confront adverse witnesses, including co-defendants). See also *Tennessee v. Street*, 105 S. Ct. 2708 (1985) (Justice Rehnquist joined a unanimous opinion reaffirming *Bruton* but carving out a limited exception to it).

In *Carter v. Kentucky*, 450 U.S. 288, 309 (1981), Justice Rehnquist did grumble about "the mysterious process of transmogrification by which [the Fifth] Amendment was held to be 'incorporated' and made applicable to the States by the Fourteenth Amendment" but his dissent accedes to that development. He disagrees, rather, with the Court's reading of *Griffin* to allow a defendant to insist on a "no inferences from silence" instruction from the trial judge.

he joined Justice Powell concurring in the result in *Argersinger v. Hamlin*⁵⁸ which extended the right to counsel to misdemeanor cases. Powell and Rehnquist agreed that an indigent should have appointed counsel at least whenever he is entitled to a jury trial. "If there is no accompanying right to counsel, the right to trial by jury becomes meaningless."⁵⁹ They would have extended the right to counsel beyond jury trials to "whenever [it] is necessary to assure a fair trial"⁶⁰ but not necessarily to every case where the defendant might be imprisoned, as the majority held.⁶¹

In his dissenting opinion in *Taylor v. Louisiana*,⁶² Justice Rehnquist further explicated his basic agreement with the application of fundamental trial rights to the states through the fourteenth amendment, quoting from *Duncan v. Louisiana*:⁶³

"The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,' *Powell v. Alabama*, 287 U.S. 45, 67 (1932); whether it is 'basic in our system of jurisprudence,' *In re Oliver*, 333 U.S. 257, 273 (1948); and whether it is 'a fundamental right, essential to a fair trial,' *Gideon v. Wainwright*, 372 U.S. 335, 343-344 (1963); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964); *Pointer v. Texas*, 380 U.S. 400, 403 (1965). . . . *Because we believe that trial by jury in criminal cases is fundamental to the American scheme of justice*, we hold that the Fourteenth Amendment guarantees a right of jury trial in all criminal cases"⁶⁴

Justice Rehnquist described this as "a sturdy test."⁶⁵ The cases cited in the above passage from *Duncan* provided for right to counsel first in capital (*Powell*) and then all felony (*Gideon*) cases, extended the fifth amendment

58. 407 U.S. 25, 44 (1972). As Professor Israel has pointed out, the practical impact of the *Argersinger* decision has been greater than *Gideon*. Not only are many more cases presented at the misdemeanor level, but there also were many more states that had not been appointing counsel in misdemeanor cases involving jail sentences prior to *Argersinger* than there were states that had not been appointing counsel in felony cases before *Gideon*. Israel, *supra* note 5, at 1337-38.

59. *Argersinger*, 407 U.S. at 46 (Powell, J., concurring in result).

60. *Id.* at 47.

61. In *Scott v. Illinois*, 440 U.S. 367, 369 (1979), the Court, per Justice Rehnquist, limited *Argersinger* to cases where imprisonment is "actually imposed."

62. 419 U.S. 522, 538 (1975).

63. 391 U.S. 145, 148-49 (1968).

64. *Taylor*, 419 U.S. at 540-41 (emphasis Justice Rehnquist's).

65. *Id.* at 541. By "sturdy" Justice Rehnquist evidently meant both "good" and "not easy to meet" since he continued that the *Duncan* tests were "not readily satisfied by every discrepancy between federal and state practice."

He then argued that the Court's holding that a male defendant was entitled to be tried by a jury from the venire of which women were, in effect, excluded was not "necessary to guard against oppressive or arbitrary law enforcement, or to prevent miscarriages of justice and to assure fair trials." *Id.*

right against self-incrimination to the states (*Malloy*), extended the sixth amendment confrontation right to the states (*Pointer*) and forbade secret criminal proceedings (*Oliver*).

Of course, the mere fact that Justice Rehnquist quoted this passage from *Duncan* in a dissent does not necessarily mean that, if he had the votes, he would not, for example, decide to overrule *Malloy v. Hogan*. However, Justice Rehnquist has not been shy about expressing his disagreement with key Warren Court decisions, even though he knew he lacked the votes to change them.⁶⁶ Even if, when he came on the Court fifteen years ago, he might have been inclined to overrule a case such as *Malloy*, it would be truly extraordinary for him, after fifteen years of *explicit* acceptance of such cases, to subsequently overrule them. In addition, he has recognized, as did Chief Justice Burger, that in the years since he joined the Court the police have learned to live with the Warren Court innovations and it would be disruptive to now overrule them.⁶⁷ Finally, he has stated that he considers the Court's stance on criminal procedure issues to be "more even handed now than it was when I came on the Court."⁶⁸ Accordingly, I shall assume throughout this Article that, when Justice Rehnquist expresses acceptance of a given doctrine, he means what he says.

In addition to acceptance of the fundamental precepts discussed above, Justice Rehnquist has agreed that a state cannot compel a defendant to stand trial in prison clothes⁶⁹ and that a defendant cannot be prevented from consulting with counsel during a recess in the trial.⁷⁰ Similarly, he authored the unanimous opinion in *Burch v. Louisiana*⁷¹ holding that the conviction of a defendant for a non-petty offense by a non-unanimous six member jury violates the defendant's right to trial by jury and joined *New Jersey v. Portash*⁷² (despite a dissent by Justice Blackmun joined by the Chief Justice) which held that testimony given before a grand jury under a grant of immunity could not be used to impeach the defendant at trial. He also

66. He disagreed most notably with *Mapp*, 367 U.S. 643, in his dissent from denial of a stay of the mandate of the Supreme Court of California in *California v. Minjares*, 443 U.S. 916 (1979), discussed *infra*, text accompanying note 99. See also *United States v. Henry*, 447 U.S. 264, 289 (1980) (Rehnquist, J., dissenting) (urging that *Massiah v. United States*, 377 U.S. 201 (1964) be reexamined).

67. See *infra* text accompanying note 92.

68. *Jenkins, The Partisan*, N.Y. Times, March 3, 1985, (Magazine), at 34.

69. *Estelle v. Williams*, 425 U.S. 501 (1976). However, the majority further held that this claim was negated by failure of counsel to object. Justices Brennan and Marshall disagreed with this latter point.

70. *Geders v. United States*, 425 U.S. 80 (1976). See also *Strickland v. Washington*, 466 U.S. 688 (1984) (Justice Rehnquist agreed that the issue of ineffective assistance of counsel should be available to defendants on federal habeas corpus).

71. 441 U.S. 130 (1979). To be sure, *Burch* merely stopped the progression of earlier cases in which the jury trial rights of defendants had been constricted. See *Williams v. Florida*, 399 U.S. 78 (1970)(six person jury constitutional); *Apodaca v. Oregon*, 406 U.S. 404 (1972)(Non-unanimous guilty verdicts constitutional).

72. 440 U.S. 450 (1979). Justice Blackmun's dissent was based on jurisdictional grounds.

joined a unanimous opinion in *Burks v. United States*⁷³ holding that double jeopardy barred retrial of a defendant whose conviction had been reversed by an appellate court based on insufficiency of evidence. He even joined Justice Brennan's opinion in *Goldberg v. United States*⁷⁴ taking a rather expansive view of the defendant's right to receive the prosecutor's notes of a witness interview under the Jencks Act despite the fact that four other Justices expressed reservations about the scope of the opinion.⁷⁵

More recently, Justice Rehnquist further demonstrated his adherence to the notion that the federal Constitution (and the federal courts) should guarantee fundamental *trial* rights when he joined a unanimous Court in *Crane v. Kentucky*,⁷⁶ reversing the Kentucky Supreme Court's holding. In *Crane*, the Court held that a defendant at trial must be allowed to introduce evidence as to the circumstances under which a confession was given in an effort to show that the confession was unworthy of belief.

None of the above is designed to show that Justice Rehnquist is the "defendant's pal" when it comes to trial rights. Indeed, many decisions could be mustered to make the opposite case. Rather, the point is that he is not a "knee jerk conservative," ready to vote against the defendant no matter what the circumstances and unconcerned about the possibility of a defendant not being allowed to make an adequate defense. Instead, the cases just discussed show that he, like all of the other Justices, weighs the interests of the state in convicting the guilty against the interests of the defendant and is committed to reaching a conclusion that comports with his understanding of the Constitution.

In 1976, Professor Shapiro wrote an article about Justice Rehnquist in which he averred that the three "basic propositions" that "guid[e] his votes" are:

1. Conflicts between an individual and the government should, whenever possible, be resolved against the individual;
2. Conflicts between state and federal authority . . . should, whenever possible, be resolved in favor of the states; and
3. Questions of the exercise of federal jurisdictions . . . should, whenever possible, be resolved against such exercise.⁷⁷

73. 437 U.S. 1 (1978). See also *Hudson v. Louisiana*, 450 U.S. 40 (1981) (unanimous opinion). But see *Tibbs v. Florida*, 457 U.S. 31 (1982) (Justice Rehnquist joined a 5-4 opinion which weakened *Burks* by holding that reversal of the defendant's conviction based on the *weight*, rather than the sufficiency, of the evidence does not bar retrial, a distinction that I find unconvincing).

74. 425 U.S. 94 (1976).

75. Justice Stevens, joined by Justice Stewart, concurred in the opinion but made it clear that certain of the prosecutor's notes were exempt from disclosure. *Id.* at 112-16.

Justice Powell, joined by Chief Justice Burger, concurred in the result but disagreed with the majority as to what prosecutorial notes were appropriate for disclosure. *Id.* at 116-29.

76. 106 S. Ct. 2142 (1986).

77. Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293, 294 (1976).

While these propositions are more likely than not to characterize Justice Rehnquist's votes, they can hardly be considered a guiding philosophy to which he adheres "whenever possible," at least in criminal procedure. To cite but a few examples, in *Burch v. Louisiana*⁷⁸ he wrote the unanimous opinion striking down a Louisiana constitutional provision that allowed non-unanimous six-member jury verdicts. In *Crane v. Kentucky*,⁷⁹ he voted to reverse the Kentucky Supreme Court (and the defendant's conviction) on sixth amendment grounds. In *United States v. Yermian*,⁸⁰ he authored the dissenting opinion, urging that the rule of lenity must be applied to reverse a defendant's conviction under a federal false statement charge. In *Smalis v. Pennsylvania*,⁸¹ he joined a unanimous Court in reversing the Pennsylvania Supreme Court and holding that double jeopardy barred a retrial after the trial court granted the defendant's demurrer.

As Justice Rehnquist stated in his majority opinion in *Illinois v. Gates*:⁸²

"Fidelity" to the commands of the Constitution suggests balanced judgment rather than exhortation. The highest "fidelity" is achieved neither by the judge who instinctively goes furthest in upholding even the most bizarre claim of individual constitutional rights, any more than it is achieved by a judge who instinctively goes furthest in accepting the most restrictive claims of governmental authorities. The task of this Court, as of other courts, is to "hold the balance true" and we think we have done that in this case.

As to confession law, while Justice Rehnquist has rather consistently voted not to expand the scope of *Miranda v. Arizona*⁸³ and has also urged that *Massiah v. United States*⁸⁴ be overruled⁸⁵ it is nevertheless clear that he now accepts the *Miranda* decision as well as certain of the key subsequent decisions that give it added significance.

Early in his career on the Court, Justice Rehnquist seemed hostile to *Miranda*. In 1974, he wrote the Court's opinion in *Michigan v. Tucker*⁸⁶ which, in deeming the *Miranda* warnings merely "prophylactic rules" rather

78. 441 U.S. 130.

79. 106 S. Ct. 2142.

80. 468 U.S. 63 (1984). See also *Ball v. United States*, 105 S. Ct. 1668 (1985) (defendant cannot be convicted for separate counts of receiving and possessing a firearm under federal statutes); *Dowling v. United States*, 105 S. Ct. 3127 (1985) (Rehnquist voted to reverse a defendant's conviction on the ground that the federal statute did not reach his conduct over a dissent by Powell, Burger and White); *Liparota v. United States*, 53 U.S.L.W. 4530 (1985) (joined Brennan opinion holding that, in order to convict for food stamp fraud, government must show that the defendant knew the applicable regulations; White and Burger dissented).

81. 106 S. Ct. 1745 (1986).

82. 462 U.S. 213, 241 (1983).

83. 384 U.S. 436 (1966).

84. 377 U.S. 201.

85. *Henry*, 447 U.S. at 290 (Rehnquist, J., dissenting). See also Saltzburg, *supra* note 5, at 206-08 (criticizing *Massiah's* "doctrinal emptiness").

86. 417 U.S. 433 (1974).

than a constitutional right of the defendant,⁸⁷ seemed, as Professor Stone has observed, "certainly to have laid the groundwork to overrule *Miranda*."⁸⁸ Moreover, he dissented in *Doyle v. Ohio*⁸⁹ when the majority held that a defendant's post-warning silence could not be used against him. He agreed with the majority in *Oregon v. Haas*⁹⁰ that a defendant could be impeached with statements made after he had asked for a lawyer and been wrongly questioned further and joined a majority in *Michigan v. Mosley*⁹¹ holding that a defendant who had asserted his right to silence could be questioned later as to another offense.

However, whatever his initial reservations about *Miranda*, in recent years he has accepted the decision. He has recognized that *Miranda* has "afforded police and courts clear guidance on the manner in which to conduct a custodial investigation: if it was rigid, it was also precise."⁹² In *Wainwright v. Greenfield*,⁹³ concurring in the result, Justice Rehnquist "agree[d] . . . that our opinion in *Doyle v. Ohio*, . . . shields from comment by a prosecutor a defendant's silence after receiving *Miranda* warnings, even though the comment be addressed to the defendant's claim of insanity."⁹⁴ In *Edwards v. Arizona*⁹⁵ he joined Justice Powell concurring in the result but agreeing with the majority that Edwards's interrogation "clearly was questioning under circumstances incompatible with a voluntary waiver of the fundamental right to counsel."⁹⁶ Finally, in *Berkemer v. McCarty*,⁹⁷ he joined, without reservation, a Court opinion that applied *Miranda* to any custodial interrogation "regardless of the nature or severity of the offense for which [the defendant] is suspected or for which he was arrested" (but that "roadside questioning" of a motorist pursuant to a traffic stop does not constitute "custodial interrogation").⁹⁸

In the fourth amendment area, Justice Rehnquist has been much more consistent in voting against defendants. This is because of his belief that "the so-called 'exclusionary rule' created by this Court imposes a burden

87. *Id.* at 439.

88. Stone, *supra* note 29, at 123.

89. 426 U.S. 610 (1976).

90. 420 U.S. 714 (1975).

91. 423 U.S. 96 (1975).

92. *Fare v. Michael C.*, 439 U.S. 1310, 1314 (1978) (Rehnquist, J., Opinion in Chambers).

93. 106 S. Ct. 634 (1986).

94. *Id.* at 641. However, he disagreed that the defendant's request for counsel could not be so used. While silence may be "insolubly ambiguous," as *Doyle* held, "a request for a lawyer may be highly relevant where the plea is based on insanity." *Id.* at 642 (Rehnquist, J., concurring, joined by Burger, C.J.).

95. 451 U.S. 477 (1981).

96. *Id.* at 490. However, Powell and Rehnquist did not agree that a defendant could only be further interrogated if he "initiated further conversation." Rather, the question should have been "whether there was a free and knowing waiver of counsel before interrogation commenced." *Id.* at 491.

97. 468 U.S. 420.

98. *Id.* at 434, 442.

out of all proportion to the Fourth Amendment values which it seeks to advance."⁹⁹ This belief is shared by Chief Justice Burger,¹⁰⁰ as it was by Justices Harlan, Frankfurter and Whittaker who dissented in *Mapp v. Ohio*,¹⁰¹ and many others.¹⁰²

Given Justice Rehnquist's view that it is irrational to "let the criminal go free because the constable blundered," it is not surprising that he is generally inhospitable to claims of criminal defendants that their convictions should be reversed because of the trial court's failure to suppress evidence that has allegedly been illegally seized. Rehnquist believes that whatever the appropriate remedy, it includes neither the suppression of evidence at trial nor the reversal of convictions for failure to suppress.¹⁰³ Having failed to convince his colleagues that illegally seized evidence should not be excluded, he tends to argue in each case that the evidence in question was not illegally seized. Sometimes he is successful in the endeavor, as in *United States v. Robinson*¹⁰⁴ where the Court, per Justice Rehnquist, held that a search incident to any custodial arrest (even for a traffic offense) was appropriate as long as the arrest was based on probable cause, even though there was no additional justification for the search.¹⁰⁵ Other times he fails, as in *Ybarra v. Illinois*¹⁰⁶ where a 6-3 majority held, over a dissent by Justice Rehnquist,¹⁰⁷ that police,

99. *Robbins v. California*, 453 U.S. 420, 437 (1981) (Rehnquist, J., dissenting). For a fuller exposition of Justice Rehnquist's opposition to the exclusionary rule, see *California v. Minjares*, 443 U.S. 916 (1977) (dissenting from denial of stay) (joined by Chief Justice Burger). At the Senate hearings on his nomination as Chief Justice, Justice Rehnquist, in response to a question from Senator Specter, acknowledged that *Mapp v. Ohio* is "a well established" precedent, implying that he no longer seeks to overrule it. *Confirmation Hearings*, *supra* note 2.

At least one of Justice Rehnquist's reasons for disfavoring the exclusionary rule, his belief that "the United States is the only nation in the world in which the most relevant, most competent evidence as to the guilt or innocence of the accused is mechanically excluded because of the manner in which it may have been obtained," *Minjares*, 443 U.S. at 919, is wrong. Bradley, *The Exclusionary Rule in Germany*, 96 HARV. L. REV. 1032, 1033 (1983) ("German law may require the exclusion from criminal prosecutions of otherwise relevant and competent evidence solely because the use of such evidence would violate the constitutional rights of the accused."). See also MacDougall, *The Exclusionary Rule in Canada and its Alternatives—Remedies for Constitutional Violations in Canada and the United States*, 76 J. CRIM. L. & CRIMINOLOGY 608 (1985) (discussing the recently enacted Canadian constitutional rule based on the American model).

100. See Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 10 (1964).

101. 367 U.S. at 672.

102. See, e.g., Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214 (1978), and sources cited therein. For the opposite position see, e.g., Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66 (1978), and sources cited therein.

103. See generally *Minjares*, 443 U.S. at 927.

104. 414 U.S. 218 (1973).

105. Other significant opinions written by Justice Rehnquist which take a relatively narrow view of what constitutes a fourth amendment violation are *Gates*, 462 U.S. 213, in which the definition of "probable cause" is broadened, and *Adams v. Williams*, 407 U.S. 143 (1972), in which a "frisk" was allowed despite the fact that the policeman who performed it had seen no illegal activity (he had been "tipped" by "a person known" to him).

106. 444 U.S. 85 (1979).

107. *Id.* at 98. The dissenters argued that such a confrontation was so inherently dangerous that individualized suspicion was not required.

in executing a search warrant at a bar could not frisk the patrons found therein without reasonable individualized suspicion that they were armed and dangerous.

Another approach taken in the fourth amendment area by Justice Rehnquist and the more conservative Justices is to argue that, whether or not a search was illegal, the defendant is foreclosed from raising the issue. The most significant opinion by Justice Rehnquist in this regard is the majority opinion in *Rakas v. Illinois*¹⁰⁸ in which the Court took a rather narrow view of a defendant's standing to raise fourth amendment claims in holding that a passenger of a car may not raise the issue of the illegality of the search of that car. Similarly, in *Stone v. Powell*¹⁰⁹ the Court per Justice Powell held that fourth amendment claims could not be entertained on federal habeas corpus. In *United States v. Havens*,¹¹⁰ a 5-4 majority per Justice White allowed the government to use illegally seized evidence to impeach the defendant's testimony, even as to matters first raised by the prosecutor on cross-examination.¹¹¹ A related approach is, having failed in case A to persuade a majority that a given police search was appropriate under the fourth amendment, to argue in case B that case A is not retroactive. This Justice Rehnquist did successfully in *United States v. Peltier*¹¹² in which the Court held that *Almeida-Sanchez v. United States*¹¹³ was not retroactive.¹¹⁴

There are, however, limits to the police behavior that Justice Rehnquist will countenance under the fourth amendment. In *Lo-Ji Sales, Inc. v. New York*,¹¹⁵ Justice Rehnquist joined a unanimous Court in striking down an open-ended search warrant and the participation of the judge who issued the warrant in the search. In *Brown v. Texas*¹¹⁶ he again joined a unanimous Court in striking down a state statute that required people to identify themselves to the police. In *Mincey v. Arizona*¹¹⁷ he explicitly agreed with the majority that there should be no murder scene exception to the fourth

108. 439 U.S. 128 (1978).

109. 428 U.S. 465 (1976).

110. 446 U.S. 620 (1980). *Walder v. United States*, 347 U.S. 62 (1954) had previously held that a defendant's direct testimony could be impeached with illegally seized evidence.

111. For a criticism of this holding, see Bradley, *Havens, Jenkins and Salvucci, and the Defendant's "Right" to Testify*, 18 AM. CRIM. L. REV. 415 (1981).

112. 422 U.S. 531 (1975).

113. 413 U.S. 266 (1973). *Almeida-Sanchez* held that warrantless roving patrol searches for illegal aliens were unconstitutional.

114. Finally, even if the fourth amendment violation and defendant's capacity to raise it are conceded, the Court may find the error harmless. However, while Justice Rehnquist has written harmless error opinions in cases involving error at trial, *Delaware v. Van Arsdall*, 106 S. Ct. 1431 (1986), and in the grand jury, *United States v. Mechanik*, 106 S. Ct. 938 (1986), to date the only case to find a fourth amendment violation harmless, *Chambers v. Maroney*, 399 U.S. 42 (1970), did so without discussion and before Justice Rehnquist joined the Court.

115. 442 U.S. 319 (1979).

116. 443 U.S. 47 (1979). However, he joined Justice White in dissent in *Kolender v. Lawson*, 461 U.S. 352 (1983), when the majority struck down a somewhat similar California statute.

117. 437 U.S. 385 (1978).

amendment warrant requirement and that warrantless searches were generally disfavored.¹¹⁸ In the recent case of *New York v. P.J. Video*¹¹⁹ he recognized, in writing the majority opinion, that "police may not rely on the 'exigency' exception to the fourth amendment's warrant requirement in conducting a seizure of allegedly obscene materials, under circumstances where such a seizure would effectively constitute a 'prior restraint.'" ¹²⁰ In *Hayes v. Florida*,¹²¹ he joined a unanimous Court in reversing the Florida courts and holding that in the absence of probable cause or consent, it was an unconstitutional seizure for police to take a suspect to the station for fingerprinting and the fingerprints must be suppressed.¹²² In *United States v. Place*¹²³ he joined the majority in striking down the seizure of a drug courier's luggage on the ground that the ninety-minute seizure of that luggage to await a "dog-sniff" was an unreasonable seizure under *Terry v. Ohio*.¹²⁴ Finally, and most significantly, in *Gerstein v. Pugh*¹²⁵ he joined a unanimous Court decision that required, under the fourth amendment, a judicial determination of probable cause as a prerequisite to extended restraint on a suspect's liberty following an arrest.

Some might argue, as did Senator Kennedy at Justice Rehnquist's confirmation hearing,¹²⁶ that merely joining a unanimous opinion does not count for much since the result was "obvious" or there was no real dispute. I disagree. In many of these cases the Court overruled the decision of a state supreme court and in virtually all of them there was a substantial issue which generated strong arguments on both sides. Had this not been so, the Supreme Court would not have granted certiorari.¹²⁷ Certainly an extremist could have found a colorable position to argue.

Three decisions of the Burger Court from which Justice Rehnquist dis-

118. *Id.* at 405. Justice Rehnquist dissented from the majority opinion on the separate issue of the admissibility of certain statements made by the defendant.

119. 106 S. Ct. 1610 (1986). However, the majority refused to adopt a "higher" probable cause standard for searches implicating first amendment issues. It was from this holding that Justice Marshall, joined by Justices Brennan and Stevens dissented. *Id.* at 1621.

120. *Id.* at 1614. Also, in *Haring v. Prosis*, 462 U.S. 306 (1983), Justice Rehnquist, consistently with his view that there should be other remedies than evidentiary exclusion for fourth amendment violations, joined a unanimous Court in allowing a defendant who plead guilty to pursue a 42 U.S.C. § 1983 action against the police based on an alleged illegal search and seizure.

121. 470 U.S. 811 (1985).

122. Justices Brennan and Marshall concurred only in the result because the majority further offered the dictum that on-site fingerprinting of the suspect would have been constitutional. *Hayes*, 470 U.S. at 818-19.

123. 462 U.S. 696 (1983).

124. 392 U.S. 1 (1968). Justices Brennan, Marshall and Blackmun concurred in the result arguing that the Court should not have approved the "dog-sniff" in this case.

125. 420 U.S. 103 (1975). However, four Justices refused to join that portion of the Court's opinion that held that the question of probable cause to hold the defendant can be determined without an adversary hearing. *Id.* at 126 (Stewart, J., concurring).

126. *Confirmation Hearings*, *supra* note 2 (statement of Edward Kennedy, Senator).

127. *See, e.g.*, R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE 259 (5th ed. 1978) (discussing why the Supreme Court grants certiorari).

sented have been cited by Professor Kamisar as being of particular significance in showing that the Court was not "bent on dismantling the criminal justice revolution forged by its predecessor."¹²⁸ It might seem that, by siding with the government in all of those cases Justice Rehnquist was "willing and eager to dismantle the work of the Warren Court in the search and seizure area" as Kamisar says of him.¹²⁹ While, as discussed, Justice Rehnquist has been, at least until recently,¹³⁰ bent on overruling *Mapp v. Ohio*, still, an analysis of his opinions in these cases suggests that his views are not so extreme as Kamisar suggests.

The three cases are *Dunaway v. New York*,¹³¹ *Delaware v. Prouse*¹³² and *Franks v. Delaware*.¹³³ In *Dunaway*, the Court held that "picking up a suspect for questioning" constituted an "arrest" which must be justified by probable cause and that subsequent *Miranda* warnings could not alone be considered to have "purged the taint" of such a non-probable cause arrest. Rather, as *Brown v. Illinois*¹³⁴ held, additional factors must be considered to determine whether a confession is admissible in these circumstances.¹³⁵

Justice Rehnquist (joined by Chief Justice Burger) began his dissent by agreeing with both of the aforesaid holdings of the case:

If the Court did no more in this case than it announced in the opening sentence of its opinion—"decide . . . the question reserved ten years ago in *Morales v. New York*, 396 U.S. 102 (1969), namely, 'the question of the legality of custodial questioning on less than probable cause for a full fledged arrest'"—I would have little difficulty joining its opinion. . . . [T]he Court goes on to conclude that petitioner *Dunaway* was in fact "seized" within the meaning of the Fourth Amendment, and that the connection between *Dunaway's* purported detention and the evidence obtained therefrom was not sufficiently attenuated as to dissipate the taint of the alleged unlawful police conduct. . . . I cannot agree with either conclusion, and accordingly, I dissent.¹³⁶

As the dissent makes clear, Justice Rehnquist accepted the fundamental innovation of *Dunaway*—that an involuntary seizure is an "arrest" regardless of what the police call it, and also accepted the reaffirmation of *Brown v.*

128. THE BURGER COURT, *supra* note 1, at 81.

129. *Id.* at 82.

130. See *Confirmation Hearings*, *supra* note 2, concerning Rehnquist's statement at his confirmation hearings.

131. 442 U.S. 200, 221 (1979). Kamisar discusses *Dunaway* along with *Brown v. Illinois*, 422 U.S. 590 (1975) and *Taylor v. Alabama*, 457 U.S. 687 (1982). Since *Dunaway* is the only one of these cases in which Justice Rehnquist wrote an opinion, I have confined myself to a discussion of that case.

132. 440 U.S. 648, 664 (1979).

133. 438 U.S. 154, 180 (1978).

134. 422 U.S. 590.

135. Those factors are: the temporal proximity of the arrest and the confession, the presence of intervening circumstances and the purpose and flagrancy of the official misconduct. *Id.* at 603.

136. *Dunaway*, 442 U.S. at 221.

*Illinois*¹³⁷ that more than *Miranda* warnings were generally required to render a confession admissible after such an illegal arrest. His disagreement was as to whether, on the facts of this case, Dunaway's seizure was in fact involuntary and, again on the facts, whether the requirements of *Brown* for purging the taint of the arrest had been met. As to the first point, he noted that:

Petitioner was not told he was under arrest and was not warned not to resist or flee. No weapons were displayed and petitioner was not handcuffed. Each officer testified that petitioner was not touched or held during the trip downtown; his freedom of action was not in any way restrained by the police. In short, the police behavior in this case was entirely free of "physical force or show of authority."¹³⁸

As to the second point, Justice Rehnquist noted that *Miranda* warnings had been given to the defendant and that the police had acted in good faith (i.e., their misconduct was not "purposeful or flagrant," factors the *Brown* Court considered particularly significant). He advanced the view that when the police made an illegal arrest in good faith, the giving of *Miranda* warnings should be enough to purge the taint, a view that is arguably consistent with the subsequent holding in *United States v. Leon*¹³⁹ establishing a "good faith exception" to the exclusionary rule in the case of illegal, but warranted, searches. Thus, his dissent in *Dunaway* shows acceptance, not rejection, of the fundamental rules advanced by the Court and disagreement only as to how broadly these rules should be applied.

In *Prouse*, Justice Rehnquist's dissent was even more limited than in *Dunaway*. The majority held that automobiles may not be stopped by police without "reasonable suspicion" of wrongful activity. However, they would allow roadblocks to check all cars and drivers for proper driver's licenses and registration.¹⁴⁰

Justice Rehnquist began by chiding the majority for allowing all cars, but not individual cars, to be stopped. "The Court thus elevates the adage 'misery loves company,' to a novel role in fourth amendment jurisprudence."¹⁴¹ He then agreed with the majority as to the major holding of the case: stops of cars to investigate *criminal* (as opposed to traffic) violations cannot be made at random.¹⁴² His only disagreement with the majority was whether random stops, as opposed to roadblocks where all motorists are stopped, are the best way to strike the balance between the motorist's interest

137. 422 U.S. 590. Justice Rehnquist had previously joined Justice Powell concurring in part in *Brown, id.* at 606, in which they agreed with the rule announced by the majority but disagreed with its application to the facts presented in that case. *Id.* at 607.

138. *Dunaway*, 442 U.S. at 223.

139. 468 U.S. 897 (1984).

140. *Prouse*, 440 U.S. at 663.

141. *Id.* at 664.

142. *Id.* at 665.

in proceeding freely down the highway and the state's interest in discovering traffic violations.¹⁴³

The third case cited by Professor Kamisar is *Franks v. Delaware*.¹⁴⁴ In that case the majority struck down a state rule that prevented a defendant from challenging the truthfulness of police allegations in a search warrant affidavit under any circumstances.

Justice Rehnquist's dissent (joined by Chief Justice Burger) reflects a subtle balancing. While society has an interest in accurate affidavits, it also has an interest in the finality of judgments, particularly judgments as to the search and seizure issues which are collateral to the main issue of guilt or innocence. While Justice Rehnquist concedes that an adversary hearing before a judge is more likely to produce a valid judgment as to the accuracy of the affidavit, he also correctly observes that even such an adversary determination will hardly be infallible.¹⁴⁵ In his view, the additional light shed on affidavits by allowing their factual accuracy to be litigated is not worth the candle of what he foresees as a great increase in litigation, with its attendant uncertainty and delay.¹⁴⁶

While I disagree with Justice Rehnquist's views in all three of these cases, I think that a thoughtful person would have to concede that there is merit in his arguments. While some may read an eagerness to "dismantle the work of the Warren Court" between the lines of these dissents, such eagerness certainly does not appear on their face.¹⁴⁷ What does appear is the thoughtful exposition of a judge who, like the rest of the Court, is attempting to strike the proper balance between the interests of the state in convicting the guilty and of the individual in not being unfairly treated by the state.

The question is whether these appearances accurately reflect Justice Rehnquist's motives. The dissent in *Franks* is simply a further explication of his frankly stated opposition to the exclusionary rule. If one disagrees with the rule then one naturally wants to limit the defendant's ability to take advantage of it. The other two dissents are harder to understand. As noted, they do not disagree with the major thrust of the majority's holdings. Rather, they raise minor issues. *Dunaway* concerns the application of the facts to the Court's rule (with which Rehnquist purportedly agrees) and *Prouse* involves how to best discover traffic violations. If these expressed reasons are really all that Justice Rehnquist disputes in the majority opinion, one wonders why he bothered to dissent at all. One possible explanation might

143. *Id.* at 667. One might argue that if random "traffic" stops are allowed, police would use this as a pretense to investigate other violations. However, no rule can effectively guard against police prevarication. Under the majority's position, the police need merely aver that the defendant was "driving erratically" in order to justify a stop.

144. 438 U.S. 154.

145. *Id.* at 186.

146. *Id.*

147. It is true, of course, that it means little to accept a liberal rule if one will not then agree that any particular defendant's case is covered by the rule. However, I can see little reason for Justice Rehnquist to accept the rules in these cases if he was not prepared to apply them to some significant class of defendants.

be that these narrow dissents are strategic; not wanting to give the defendant anything, Justice Rehnquist chose a narrow ground of argument in hopes of attracting a majority to his position. If this narrow ground, for example, "no involuntary detention" in *Dunaway*, became precedent, it would make it difficult for a defendant to take advantage of the more liberal rules which would only come into play once it was determined that an involuntary detention had occurred. Thus, arguably, Rehnquist's position in *Dunaway* is essentially a "standing" argument which seeks to disqualify substantial classes of litigants from the benefits of a holding that he purports to accept but in fact dislikes. Similarly, in *Prouse*, one might construe Justice Rehnquist's dissent as a veiled endorsement of random stops of motorists for *all* purposes (including criminal investigations) rather than simply traffic investigations as he purported since, if police can stop cars at random for traffic violations then there is no real check on their ability to stop them for any purpose. Indeed, his "misery loves company" argument ignores the attempt of the majority to prevent that kind of abuse since roadblocks where driver's licenses are checked are not, unlike random stops, likely to be a cover for criminal investigations.

Whether Justice Rehnquist's motive in these cases was simply to raise the narrow points he made or to advance a deeper, more strongly pro-law enforcement purpose, cannot be discerned from reading the cases. One hopes that when he becomes Chief Justice he, like Hughes, will forbear from dissenting in as many cases¹⁴⁸ and, when he does dissent, one can be confident that an important principle is at stake.

Justice Rehnquist clearly recognizes that too much power in the hands of the police can be dangerous. In general, however, his fourth amendment jurisprudence has been informed by the view that the Warren Court went too far in the other direction, according the criminal defendant too many rights and allowing the crime problem to threaten the civil liberty of the people. In a speech at the University of Kansas¹⁴⁹ he observed that:

No thinking person would suggest that we are precisely where we want to be in the process of balancing claims for privacy against other governmental interest or that every new claim of privacy should be rejected simply because it might marginally impair the efficiency of law enforcement. In Hitler's Germany and Stalin's Russia, there was very efficient law enforcement, there was very little privacy, and the winds of freedom did not blow.¹⁵⁰

However, he also noted that:

If the claim to privacy may be idealized in terms of individual human

148. Chief Justice Hughes is discussed *infra* notes 159 and 161 and accompanying text.

149. Rehnquist, *Is an Expanded Right of Privacy Consistent With Fair and Effective Law Enforcement*, 23 U. KAN. L. REV. 1 (1974).

150. *Id.* at 21. In that same speech, Justice Rehnquist noted his agreement with *Menard v. Saxbe*, 498 F.2d 1017 (D.C. Cir. 1974) in which the court ordered the expungement of the arrest record of a suspect who had been wrongly arrested and never charged from the FBI's *criminal* (but not identification) files. *Id.* at 6-8.

dignity, the claim of fair and efficient administration of the law may be idealized in terms of the *sine qua non* of a self-governing society. To the extent that a society is unable to enforce the laws it has enacted, it is not a self-governing society. Nor is it a society in which civil liberties and privacy are secure.¹⁵¹

The "constitutionality of a particular search" in Justice Rehnquist's opinion, "is a question of reasonableness and depends on 'a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers.'" ¹⁵² Given Justice Rehnquist's view of the exclusionary rule and his view that the Warren Court had gone overboard in guaranteeing the rights of criminal defendants,¹⁵³ it is not surprising that he has consistently endeavored to cut back on those rights. However, as illustrated above, he has his limits.

III. REHNQUIST AS CHIEF JUSTICE

Heretofore the discussion has centered on Rehnquist's views as an Associate Justice. However, there is reason to believe that he may moderate some of the views expressed heretofore in an effort to lead the Court as the Chief Justice. In the first place, he considers the "law dealing with the constitutional rights of criminal defendants . . . more evenhanded now than it was when I came on the Court."¹⁵⁴ Obviously, then, the sense of mission that he had when he joined the Court, to "call[] a halt to a number of the sweeping rulings of the Warren Court"¹⁵⁵ in the criminal procedure area has now been fulfilled. He now recognizes that "there probably are things to be said on both sides of issues that perhaps I didn't think there were"¹⁵⁶ when he came on the Court in 1972.

He views one's "major contribution" on the Court as "putting something together yourself or joining something someone else puts together that commands a Court opinion."¹⁵⁷ In a speech entitled "Chief Justices I Never Knew"¹⁵⁸ he described the role of the Chief Justice:

Although his vote carries no more weight than that of his colleagues, the chief justice undoubtedly influences the Court and its decisions. When a new chief accedes to the bench, newspaper editorials often suggest that by either his "executive" or his "administrative" ability he will somehow "bring the Court together" and eliminate the squabbling and bickering

151. *Id.* at 22.

152. *Mincey*, 437 U.S. at 406 (Rehnquist, J.) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975)).

153. In an interview with the *New York Times Magazine* he expressed the view that: "[A]t the time I came on the Court the boat was kind of keeling over in one direction. . . . I felt that my job was . . . to kind of lean the other way." *N.Y. Times*, *supra* note 68, at 35.

154. *Id.* at 34.

155. *Id.* at 35.

156. *Id.* at 31.

157. *Id.* at 101.

158. Rehnquist, *Chief Justices I Never Knew*, 3 HASTINGS CONST. L. Q. 637 (1976).

thought to be reflected in decisions of important issues by a sharply divided Court. The power to calm such naturally troubled waters is usually beyond the capacity of any mortal chief justice. He presides over a conference not of eight subordinates, whom he may direct or instruct, but of eight associates who, like him, have tenure during good behavior, and who are as independent as hogs on ice. He may at most persuade or cajole them.¹⁵⁹

To the extent that Justice Rehnquist's positions have been extreme compared to those of the other Justices, it is reasonable to expect that he will moderate them. It is one thing to be a maverick¹⁶⁰ as an Associate Justice, quite another to be one as Chief. Indeed, Justice Rehnquist has endorsed Hughes' practice as Chief Justice of modifying his opinions in order to attract additional votes:

Hughes believed that unanimity of decision contributed to public confidence in the Court. . . . Except in cases involving matters of high principle, he willingly acquiesced in silence rather than expose his dissenting views. In such cases he thought it was better to have the law settled one way or another than to express his own position in a dissenting opinion.

Hughes was also willing to modify his own opinions to hold or increase his majority and if that meant that he had to put in disconnected thoughts or sentences, in they went.¹⁶¹

This is not to say, as Justice Rehnquist discussed above, that he will cause the Court to suddenly become harmonious and produce unanimous decisions. It does mean that, rather like Anna and the King of Siam, in the process of "cajoling" the people he may cajole himself as well.

159. *Id.* at 637. Justice Rehnquist also described how he believed the Chief should run the conference:

By virtue of his own preparation and economy of statement, Charles Evans Hughes presided magisterially and yet without offending the brethren. Stone, on the other hand, though an extraordinarily able lawyer and excellent writer of opinions, had less sensitivity for the different kinds of responsibilities associated with presiding over the conference. If the chief justice conceives his role to be akin to that of the presiding officer at a political convention, who can always grab the microphone away from the opposition when necessary, he will create resentment without actually advancing the cause that he champions. Justice Cardozo has written that "the sovereign virtue for the judge is clearness," and most members of the profession would agree with him. The chief justice has a notable advantage over his brethren: he states the case first, and analyzes the law governing it first. If he cannot, with this advantage, maximize the impact of his views, subsequent interruptions of colleagues or digressions on his part or by others will not succeed either. Theodore Roosevelt described the presidency as a "bully pulpit." The chief justice, as president of the conference, occupies no such position.

Id. at 647 (footnote omitted).

160. See *supra* text accompanying notes 50-52.

161. D. DANELESKI & J. TULCHIN, *THE AUTOBIOGRAPHICAL NOTES OF CHARLES EVANS HUGHES* at xxvi (1973). In his article *Chief Justices I Never Knew*, *supra* note 158, at 643, Justice Rehnquist quoted a passage from another book on Hughes that said virtually the same thing as the second paragraph quoted above.

CONCLUSION

A consistent theme can be found throughout Justice Rehnquist's criminal procedure decisions: a strong (some would say "blind") trust in the adversary jury trial as the vehicle of criminal justice. He supports a rather expansive right to counsel and is generally supportive of the Warren Court decisions in the trial rights area.

One of the reasons he does not support the exclusionary rule is that it deprives the adversary process of relevant, possibly critical, evidence.¹⁶² In the area of pretrial rights, he believes that the "reasonableness" of a search, rather than the police's ability to discern and follow confusing court-created rules, should be the cornerstone inquiry under the fourth amendment.¹⁶³ Yet, despite his feeling that the Warren Court had tilted the balance too far in favor of criminal defendants, he has been willing to accede in most of the criminal procedure decisions of that Court and to strike down police conduct under the fourth and fifth amendments when, in his view, it ran afoul of those holdings.

While readers of this article may have been surprised to find that Justice Rehnquist has voted for criminal defendants as often as he has, nothing presented here will convince Rehnquist's liberal opponents that he is not an extremist who would dismantle the structure of criminal procedure protections if he had the votes to do so. Ultimately, I suppose, the conclusion that he would not stems from knowledge of the man himself. In the context of current law, where "conscience shocking"¹⁶⁴ abuses of rights by the police are rare, Justice Rehnquist has voted against defendants' claims with relative consistency. However, I, at least, am confident that he has no desire to return to a system where the police are encouraged or allowed to violate constitutional rights of criminal suspects with impunity. If the public concern about the seriousness of the crime (particularly drug) problem increases, as it seems to be doing,¹⁶⁵ political pressure may result in a renaissance of harsh and intrusive law enforcement practices reminiscent of the years before the Warren Court. In such a climate, appointees to the federal bench might be even more conservative than they have in the past. While, even in such a harsh regime, Justice Rehnquist will never be enthusiastic about reversing criminal convictions, he also will have the strength to uphold the core protections of the Constitution against official invasion.

162. *California v. Minjares*, 443 U.S. 916, 919 (1977).

163. *Florida v. Royer*, 460 U.S. 491, 520 (1983) (Rehnquist, J., dissenting). ("Analyzed simply in terms of its 'reasonableness,' as that term is used in the Fourth Amendment, the conduct of the investigating officers toward Royer would pass muster with virtually all thoughtful, civilized persons not overly steeped in the mysteries of this Court's Fourth Amendment jurisprudence").

164. See *Rochin v. California*, 342 U.S. 165 (1952).

165. For example, a recent CBS poll found that 75% of the population favored harsher penalties for drug offenses. *48 Hours on "Crack" Street* (CBS television broadcast, Sept. 2, 1986).