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Edward L. Barrett, Jr.: The Critic with 'that Quality of Judiciousness Demanded of the Court Itself'

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**TRIBUTE****Edward L. Barrett, Jr.: The Critic With
“That Quality of Judiciousness
Demanded of the Court Itself”****Yale Kamisar***

As might be expected, teaching and writing about criminal procedure in the 1960's, when the Warren Court was carrying out its "revolution" in criminal procedure, was quite exciting. But I for one found teaching and writing about the subject in the "prerevolutionary" days of the late 1950's, when I first took to the podium, equally stimulating. This was so largely because a remarkable group of criminal law teachers had preceded me to academe.

Most members of this group, for example, Francis Allen, Caleb Foote, and Monrad Paulsen, helped write the prologue for the Warren years. Before it became apparent that the Court was doing so, these law teachers, in their own way, fomented a revolution in criminal procedure. Not so Edward Barrett.

Barrett was as talented and as dedicated a law teacher as any of his distinguished (or soon-to-become-distinguished) contemporaries. But Barrett resisted the movement toward new rights in fields where none

*See *infra* text accompanying note 105.

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had existed before. At least, he was quite uneasy about the trend. To be sure, others in law teaching shared Barrett's concern that the clock was spinning too fast. Indeed, some others were quite vociferous about it.¹ But because his criticism was cerebral rather than emotional — because he fairly stated and fully explored the arguments urging the courts to increase their tempo in developing constitutional rights — Barrett was probably the most formidable skeptic in criminal law teaching ranks when the so-called revolution in criminal procedure unfolded.

Barrett shared the view that “the Court should not tell itself or the world that it draws decisions from a text that is incapable of yielding them.”² He remembered that time had proven the Court's judgment wrong on many burning issues upon which it had chosen to challenge the popular branches.³ He saw the pitfalls in single-minded thinking about great constitutional issues and the wisdom in declining to push principles to the limit of their logic⁴ — especially when that logic threatens the extinction of so basic a law enforcement function as police questioning.⁵ He reminded us that “law enforcement is not a game in which liberty triumphs whenever the policeman is defeated,”⁶ and he understood that if legal analysis takes on the quality of a game, “the solutions may have about as much relation to reality.”⁷

Allen, Paulsen, and other commentators inspired me. Barrett disconcerted me. Allen, Paulsen, and others fueled my desire to expand the rights of the accused. Barrett made me reexamine basic premises and underlying assumptions. I followed the lead of Allen, Paulsen & Co., but I admired (sometimes quite begrudgingly, I must admit) the probing mind of Barrett and his lucidity, directness, and fairmindedness.

At times Barrett was an advocate (even if one does not start out with a point of view, how can one think and write about criminal procedure for very long without acquiring one?), but he was never a partisan. He did not evade opposing arguments; he confronted them. And if an opposing argument had merit, Barrett was not reluctant to say so.

¹ Many of these critics are quoted in Kamisar, *On the Tactics of Police-Prosecution Oriented Critics of the Courts*, 49 CORNELL L.Q. 436 (1964).

² A. BICKEL, *THE LEAST DANGEROUS BRANCH* 96 (1962).

³ *Preface* to R. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* (1941).

⁴ P. FREUND, *Constitutional Dilemmas*, in *ON LAW AND JUSTICE* 23, 36-37 (1968).

⁵ See generally Barrett, *Panelists' Comments* [Symposium on Poverty, Equality and the Administration of Criminal Justice], 54 KY. L.J. 464, 509-14 (1966).

⁶ Barrett, *Exclusion of Evidence Obtained by Illegal Searches — A Comment on People v. Cahan*, 43 CALIF. L. REV. 565, 582 (1955).

⁷ H. FRIENDLY, *On Entering the Path of the Law*, in *BENCHMARKS* 22, 30 (1967).

This is amply demonstrated by his reflections on *People v. Cahan*,⁸ the 1955 case that saw the California Supreme Court overturn its long standing rule permitting the use of illegally seized evidence.⁹ The *Cahan* case rekindled the controversy over the exclusionary rule, a controversy that was to blaze six years later when the United States Supreme Court made the rule binding on the states.¹⁰ Barrett shared the view that "[t]here must be a better method for stopping police oppression than freeing the guilty,"¹¹ but he recognized the strong case for the exclusionary rule. Indeed, Barrett articulated some of the justifications for the *Cahan* decision better than any of its *proponents*:

[P]rior to the *Cahan* decision the police were under no substantial pressure to seek clarification of [the rules governing arrest, search, and seizure]. The issue of legality became crucial so seldom that the police had, in effect, broad discretion in determining the procedures to follow, subject only to community pressures, particularly those by the press, which rarely focused upon any but the most obvious abuses¹²

Clearly it is undesirable to leave the determination of the reasonableness of police procedures within the almost unchecked discretion of law enforcement officials who generally tend to value the necessities of law enforcement above the claims of individual liberty.¹³

* * *

We may reject any right of the defendant to have the evidence excluded. We may decide that the issue cannot be decided in terms of a moral duty of the court to avoid condoning the lawless activities of the policeman. But still the exclusionary rule may be justified on the ground that it is the only effective method of curbing police illegality in its impact on citizens generally, the innocent as well as the guilty. The theory here is that the inherent limitations on the direct remedies [*e.g.*, civil suits for damages] are so great that they will never act as a sufficient deterrent to police illegality. Hence, the only way that the police can be forced to act more generally in conformity with the law is to permit defendants, however reprehensible and undeserving they may be in their own right, to raise the issue on behalf of all. They have a strong motive to challenge the police. If police illegality will result in failures of conviction, allowing them to make the challenge will affect police activities in a manner, and on a scale, that the direct remedies can never hope to do.¹⁴

* * *

In the short run there is even more to be said for the *Cahan* decision.

⁸ 44 Cal. 2d 434, 282 P.2d 905 (1955) (Traynor, J.).

⁹ See Barrett, *supra* note 6 (discussing *Cahan*).

¹⁰ Mapp v. Ohio, 367 U.S. 643 (1961).

¹¹ Breitell, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427, 435 (1960).

¹² Barrett, *supra* note 6, at 577.

¹³ *Id.*

¹⁴ *Id.* at 582.

. . . [T]he California situation was most unsatisfactory [and the possibilities that it would improve appeared slight] Law enforcement groups preferred the ambiguity of [ill-defined and] seldom-litigated rules and had no real incentive to take the risks involved in seeking legislative action. And there was little evidence that other groups would take the initiative Hence, the record in California could fairly be read as suggesting that only the adoption of the exclusionary rule by the court would force a clarification, judicially or legislatively, of the applicable rules, and provide a mechanism for their enforcement [But this] is not necessarily an argument for the desirability of the rule as a permanent matter — a full scale legislative consideration of the problem might end up with the elimination of the exclusionary rule. But even should this happen, the decision would have served a useful purpose.¹⁵

Nevertheless, using a cost-benefit analysis, a way of thinking about the exclusionary rule that has since gained ascendancy,¹⁶ Barrett came out against the rule. He was unpersuaded that the only alternative to the exclusionary rule is no sanction at all.¹⁷ Barrett concluded that legislative action, along the lines of a summary type of civil proceeding, for a substantial money judgment in favor of the wronged individual and against the political subdivision whose police violate the person's rights, "gives promise of providing a more adequate solution than the exclusionary rule at a smaller social cost."¹⁸ Along the way, Barrett launched a powerful attack against the exclusionary rule, advancing arguments that many critics of the rule have used since, and demonstrating that he has a way with words:

Is not the court which excludes illegally obtained evidence in order to avoid condoning the acts of the officer by the same token condoning the illegal acts of the defendant? Suppose a policeman by an illegal search has

¹⁵ *Id.* at 587.

¹⁶ See *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984); *United States v. Leon*, 468 U.S. 897 (1984); *Stone v. Powell*, 428 U.S. 465 (1976); *United States v. Janis*, 428 U.S. 433 (1976); *United States v. Calandra*, 414 U.S. 338 (1974). For commentary, see Cannon, *Ideology and Reality in the Debate Over the Exclusionary Rule: A Conservative Argument for Its Retention*, 23 S. TEX. L.J. 559 (1982); Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 627-77 (1983); Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 MINN. L. REV. 251 (1974); Wasserstrom & Mertens, *The Exclusionary Rule on the Scaffold: But Was It a Fair Trial?*, 22 AM. CRIM. L. REV. 85, 87-130 (1984); White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273 (1983).

¹⁷ Barrett, *supra* note 6, at 592 (rejecting Justice Murphy's view that "there is but one alternative to the rule of exclusion" and "[t]hat is [to have] no sanction at all." *Wolf v. Colorado*, 338 U.S. 25, 41 (1949) (Murphy, J., joined by Rutledge, J., dissenting)).

¹⁸ Barrett, *supra* note 6, at 595.

obtained evidence which establishes the defendant as a peddler of narcotics to juveniles. Where lies the duty of the judge? Can we assume from any general social point of view that the policeman's conduct is so much more reprehensible than the defendant's, that the duty of the judge is to reject the evidence and free the defendant?

Law enforcement is not a game in which liberty triumphs wherever the policeman is defeated. Liberty demands that both official and private lawlessness shall be curbed. And in any specific instance it is hard to say that, put to the choice between permitting the consummation of the defendant's illegal scheme and the policeman's illegal scheme, the court must of necessity favor the defendant.¹⁹

* * *

[I]t should be emphasized that excluding evidence and freeing criminals does not punish "evil" policemen. The exclusionary rule cannot be expected to improve a police force which is generally corrupt, inefficient and lawless. It is not a magic wand which will solve the complex problems which constitute the "police problem" in so many of our communities. . . . In fact, there is some evidence that the rule assists a corrupt police department in making a false public impression of its attempts to enforce the law. One way to extend protection to favored criminals is to make periodic raids and arrests, knowing that the prosecution will be quashed after a successful motion to exclude the evidence thus obtained.²⁰

¹⁹ *Id.* at 582; see also Barrett, *Police Practices and the Law — From Arrest to Release or Charge*, 50 CALIF. L. REV. 11, 15 (1962) (some footnotes omitted):

[The task of determining in detail just what law enforcement powers should be entrusted to the police] cannot be properly accomplished if we start with the assumption that "law enforcement is forever at odds with civil liberty" [A. BARTH, *THE PRICE OF LIBERTY* 19 (1961)]. Liberty is equally lost whether the citizen is left to the mercy of an overzealous policeman or a trigger-happy hoodlum. Nor can we safely regard the problem of private lawlessness as secondary to that of public lawlessness on the assumption that the "basic political problem of a free society is the problem of controlling the public monopoly of force" [Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 255, 264 (1961)]. History has too often demonstrated that a direct route to loss of freedom — to dictatorial government — may be that of failure to curb private lawlessness.

²⁰ Barrett, *supra* note 6, at 584-85; see also Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 54-55: "Illegal arrests which are designed to harass rather than to prosecute, physical abuse of suspects or persons in custody, unnecessary destruction of property, illegal detentions which are not motivated by a desire to secure confessions, and similar serious forms of police illegality are not affected by the [exclusionary] rule"

Eight years later the Court upheld police authority to stop and question a person in the absence of sufficient information to make an arrest. *Terry v. Ohio*, 392 U.S. 1 (1968). The Court noted that the exclusionary rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other

* * *

[I]t is important to realize that [at least in the short run] the cost of using the exclusionary rule as a means of spelling out the rules to govern the police is to permit substantial numbers of narcotics peddlers, bookmakers, prostitutes, and so forth, to escape punishment. The spectacle of such criminals being freed because of "legal technicalities" may itself be a substantial breeder of public disrespect for law.²¹

* * *

Even in the long run there are bound to be substantial social costs involved in the exclusionary rule. The rules governing police searches can never be precise But policemen are not lawyers. In the best police departments they will make mistakes — a fully-trained police officer is a product of years of experience. We must not forget that [unlike federal agents, who are not charged with maintaining law and order in large cities, the local police officer] is performing his duties under emergency situations where rapid judgments must be made.²²

Thirty years later the exclusionary rule is still with us — and not only in California. Nevertheless, Barrett has good reason to be encouraged.

Although, at the time he first wrote about the exclusionary rule, much language in various Supreme Court opinions indicated that a defendant had a right — and the court a moral and a constitutional duty — to exclude unconstitutionally obtained evidence,²³ Barrett emphatically rejected that view.²⁴ So, it has turned out, has the Supreme Court.

Embracing Barrett's way of thinking about the exclusionary rule, the Court has left no doubt that the rule's application "presents a question, not of rights, but of remedies"²⁵ — a question to be answered by

goal." *Id.* at 14. Consider 1 W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* 295 (1984):

[The *Terry* language quoted above] has been criticized in some quarters as saying that the police can set the limits of the exclusionary rule by ignoring it under certain circumstances [But, in light of other language in *Terry*,] the Court's quite valid point is really this: If exclusion of the fruits of *all* street encounters by declaring them all to be in violation of the Fourth Amendment would somehow put a stop to those engaged in for harassment and other improper purposes, it could at least be argued that the benefits derived would be worth the cost, but no such argument can be made here because the illegal encounters are usually motivated by objectives other than conviction and thus cannot be influenced by the exclusionary rule.

²¹ Barrett, *supra* note 6, at 589.

²² *Id.* at 590.

²³ See cases discussed in Kamisar, *supra* note 16, at 594-606, 614-15. *But see generally* Westen, *The Rueful Rhetoric of "Rights,"* 33 UCLA L. REV. 977 (1986).

²⁴ See Barrett, *supra* note 6, at 579-82.

²⁵ *United States v. Calandra*, 414 U.S. 338, 354 (1974) (exclusionary rule not ex-

weighing the likely costs of the rule against its likely benefits.²⁶ The pragmatization — some would say deconstitutionalization — of the rule has had important consequences. It has not only led to the narrowing of the rule's thrust in peripheral or collateral settings,²⁷ but in its central application as well: the prosecution's case-in-chief against the direct victim of a fourth amendment violation. Thus, in *United States v. Leon*,²⁸ the case culminating (to date) the cost-benefit approach to the exclusionary rule, the Court "conclude[d] that the marginal or non-existent benefits produced by suppressing evidence obtained in objectively reasonable [but mistaken] reliance on a subsequently invalidated search warrant cannot justify the substantial cost of exclusion."²⁹

Restricting the circumstances in which illegally seized evidence must be kept out is not the only way to reduce the impact of the exclusionary rule. Another way is to shrink the scope of the fourth amendment itself. If the guarantee against unreasonable search and seizure is interpreted

tended to grand jury proceedings).

²⁶ See *id.* at 349.

²⁷ See, e.g., *Stone v. Powell*, 428 U.S. 465 (1976) (federal habeas corpus proceedings); *United States v. Janis*, 428 U.S. 433 (1976) (federal civil tax proceedings); *United States v. Calandra*, 414 U.S. 338 (1974) (grand jury proceedings). The Court has also narrowed the thrust of the exclusionary rule by shortening the reach of the fruit of the poisonous tree doctrine, see *United States v. Ceccolini*, 435 U.S. 268 (1978), and by stiffening the standing requirements for suppressing the products of fourth amendment violations, see *Rawlings v. Kentucky*, 448 U.S. 98 (1980); *United States v. Salvucci*, 448 U.S. 83 (1980); *Rakas v. Illinois*, 439 U.S. 128 (1978).

²⁸ 468 U.S. 897 (1984).

²⁹ *Id.* at 922. The *Leon* opinion misleadingly characterized the decision as little more than a routine application of the cost-benefit approach used in earlier cases. As pointed out in LaFave, "*The Seductive Call of Expediency*": *U.S. v. Leon, Its Rationale and Ramifications*, 1984 U. ILL. L. REV. 895, 902, earlier cases such as *Stone*, *Calandra*, and *Janis* reasoned that the exclusionary rule — then fully applicable in the government's case-in-chief against a direct victim of a fourth amendment violation — need *not* also be applied in certain collateral or peripheral contexts because no significant *additional* increment of deterrence was deemed likely.

Will the "reasonable good faith" exception of *Leon* be confined to the warrant setting? There is much to be said for doing so and some language in *Leon* supports this limited reading of the case. See the discussion in LaFave, *supra*, at 927-29. But *Leon* must be read against the backdrop of the previous ten years, which saw the Court become increasingly hostile to the exclusionary rule and voice growing doubts that "the extreme sanction of exclusion," as the Court twice called it in *Leon*, 468 U.S. at 916, 926, can "pay its way" in any setting, let alone one in which the fourth amendment violations are neither deliberate nor substantial. It is hard to believe that, after many years of talk about a good faith or reasonable mistake exception to the exclusionary rule, the Court would finally adopt such an exception only to limit it to the small percentage of searches conducted pursuant to warrants.

to afford the police more flexibility, the guarantee is violated less often and there is less illegally obtained evidence to exclude. As many Supreme Court decisions illustrate, in the last decade and a half the Court has reduced the effect of the exclusionary rule in both respects.

Not only has the Court weakened the remedies for proven violation of the fourth amendment, but it has also — and how one puts this depends on one's viewpoint — (a) significantly lightened the heavy burden that the fourth amendment once imposed on police officers who want to proceed lawfully or (b) substantially diminished the security against unreasonable search and seizure guaranteed by the fourth amendment (I cannot deny that this development may have occurred largely for a reason Barrett foresaw — the exclusionary rule puts pressure on the courts to water down the probable cause standard and to weaken other rules governing arrest, search, and seizure).³⁰

“The easiest, most propitious way for the police to avoid the myriad problems presented by the Fourth Amendment” is to obtain consent to what would otherwise be an unconstitutional invasion of privacy.³¹ In *Schneckloth v. Bustamonte*,³² the Court made it easy (in my opinion, too easy). According to the *Schneckloth* majority, a suspect may effectively consent to a search even though she was never informed — and the government has failed to demonstrate that she was aware — that she had the right to refuse the officer's request. A person need not be protected from loss of her protection against unreasonable search and seizure through *ignorance* or *confusion*, only from loss through *coercion*.³³

³⁰ Barrett, *supra* note 20, at 55, 65-66. In the exclusionary rule context, observes Barrett, “the issue of probable cause to arrest cannot avoid being colored by the fact that evidence of guilt was discovered” *Id.* at 55; *see also* C. WHITEBREAD & C. SLOBOGIN, *CRIMINAL PROCEDURE* 16 (2d ed. 1986). *But see* Paulsen, *supra* note 19, at 256 (emphasis added):

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

³¹ Zion, *A Decade of Constitutional Revision*, N.Y. Times, Nov. 11, 1979, § 6 (Magazine), at 26, 106; *see also* 1 W. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* 612 (1978).

³² 412 U.S. 218 (1973).

³³ After *Schneckloth*, the criminal justice system, in some important respects at least, can (to borrow a phrase from *Escobedo*) “depend for its continued effectiveness on the citizens' abdication through unawareness of their constitutional rights.” *Escobedo v. Illinois*, 378 U.S. 478, 490 (1964).

Although the Court has taken a relaxed view of what constitutes a consent to an otherwise illegal search or seizure, it has taken a grudging view of what constitutes a search or seizure within the meaning of the fourth amendment. Thus, because, according to the Court, a depositor who reveals her affairs to a bank "assumes the risk" that they will be conveyed to the government, she has no legitimate expectation of privacy as to the checks and deposit slips she exposes to bank employees in the ordinary course of business.⁸⁴ Similarly, because, we are told, one who uses the phone "assumes the risk" that the telephone company will reveal the numbers she dialed to the police, the government's use of a pen register (a device that records all numbers dialed from a given phone and the times they were dialed, but does not overhear oral communications) is not a search or seizure either⁸⁵ (and thus the police need neither a warrant to use such a device nor, presumably, probable cause or any cause whatsoever).

Although one takes sufficient precautions (for example, erects a fence, posts warning signs) to render entry on his private land a criminal trespass under state law, police entry on, and examination of, that land is beyond the curtilage.⁸⁶ Moreover, even land admittedly within the curtilage (for example, a fenced-in backyard) may not be subject to fourth amendment protection. Thus, the Court recently informed a marijuana-growing defendant that the Constitution failed to protect him against police aerial surveillance because, even though he had completely enclosed his backyard with *two* high fences, he had "knowingly exposed" his yard to the public.⁸⁷ (Evidently he should have put an opaque dome over his backyard.)

The automobile may be celebrated in song and literature,⁸⁸ but it

Schneekloth has been called "[t]he most prominent illustration of the lowly position the [Fourth] Amendment occupies in the hierarchy of rights" because the Court ruled "that one who is not aware of his prerogatives under the Fourth Amendment can still 'voluntarily' waive them; such is not the case with other rights." C. WHITEBREAD & C. SLOBOGIN, *supra* note 30, at 4.

⁸⁴ *United States v. Miller*, 425 U.S. 435, 442-43 (1976).

⁸⁵ *Smith v. Maryland*, 442 U.S. 735 (1979).

⁸⁶ *Oliver v. United States*, 466 U.S. 170 (1984) (expansively reading the "open fields" exception to fourth amendment restraints).

⁸⁷ *California v. Ciraolo*, 106 S. Ct. 1809 (1986); *see also* *Dow Chemical Co. v. United States*, 106 S. Ct. 1819 (1986) (aerial photography of industrial manufacturing complex not fourth amendment search). These cases are ably discussed in LaFave, *The Forgotten Motto of Obsta Principiis in Fourth Amendment Jurisprudence*, 28 ARIZ. L. REV. ____ (1986) (forthcoming).

⁸⁸ *See* Katz, *Automobile Searches and Diminished Expectations in the Warrant Clause*, 19 AM. CRIM. L. REV. 557, 571 n.79 (1982).

does not occupy a high place in fourth amendment law. Indeed, if, as has been suggested, the reason Americans "go into hock to buy a car," "sweat out traffic jams," and "groan over repair bills" is "the blessed orneriness called privacy,"³⁹ they have not been reading recent Supreme Court decisions. As understood originally and for most of its life, the *Carroll* doctrine,⁴⁰ often called the "automobile exception" to the search warrant requirement,⁴¹ allowed the police to search a car without a warrant on the basis of *both* probable cause to believe the car contained evidence of crime *and* the presence of exigent circumstances making it impractical to obtain a warrant.⁴² But in the 1970's the Court virtually eliminated the exigent circumstances requirement.⁴³ Thus, although such an approach had once been stoutly resisted,⁴⁴ the word "automobile" has become a talisman in whose presence the search warrant requirement fades away and disappears.

Moreover, even though the police lack any belief that a car contains contraband or other evidence of crime, if they have adequate grounds to make a lawful custodial arrest of the car's occupant, even though the occupant is handcuffed and standing outside the car, the police may conduct a warrantless search of the entire passenger compartment of the car, including closed containers found within that zone.⁴⁵ Furthermore, if they proceed on an inventory search theory (if pursuant to routine "community caretaking functions" they itemize property in an impounded car or one otherwise in their lawful custody), the police

³⁹ *Id.* at 571-72 n.79 (quoting columnist William Safire).

⁴⁰ The genesis of the *Carroll* doctrine was *Carroll v. United States*, 267 U.S. 132 (1925).

⁴¹ I share Judge Charles Moylan's view that "automobile exception" is a sloppy term for this doctrine because many valid warrantless searches of automobiles are not based on the *Carroll* doctrine at all, but rather on some other exception to the warrant clause, e.g., searches incident to arrest or inventory searches. See Moylan, *The Automobile Exception: What It Is and What It Is Not — A Rationale in Search of a Clearer Label*, 27 MERCER L. REV. 987, 1012-15 (1976).

⁴² See generally *id.*

⁴³ See *Texas v. White*, 423 U.S. 67 (1975) (per curiam); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Chambers v. Maroney*, 399 U.S. 42 (1970). In *United States v. Ross*, 456 U.S. 798 (1982), the Court further extended the *Carroll* doctrine, using it to sustain the warrantless search of a "movable container" found in a locked car trunk.

⁴⁴ See *Coolidge v. New Hampshire*, 403 U.S. 443, 461-62 (1971) (plurality opinion).

⁴⁵ *New York v. Belton*, 453 U.S. 454 (1981). In *Robbins v. California*, 453 U.S. 420, 452 (1981), a companion case to *Belton*, Justice Stevens warned that an arresting officer may find reason to take a minor traffic offender into custody "whenever he sees an interesting looking briefcase or package in a vehicle that has been stopped for a traffic violation."

need neither a search warrant *nor* probable cause to search the vehicle or to arrest anyone.⁴⁶

Less rigorous warrant requirements and other fourth amendment restrictions govern automobile searches largely because the Court believes "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."⁴⁷ Thus, the automobile cases illustrate a broader principle, one that the Court now calls "the key principle of the Fourth Amendment"⁴⁸ but one that had gained little recognition twenty-seven years ago when Barrett first championed it.⁴⁹ This principle is the need, in determining the constitutionality of a search or seizure, not to apply the same inflexible probable cause standard to all police intrusions but to "balance the nature and quality of the intrusion . . . against the importance of the governmental interests alleged to justify the intrusion."⁵⁰

The best known illustration of this approach is, of course, *Terry v. Ohio*,⁵¹ upholding "stops" and "frisks" on less than traditional probable cause. The NAACP Legal Defense and Educational Fund fiercely resisted this development, but recognized that "[t]his 'balancing' approach . . . finds its most articulate expression in Dean Edward L. Barrett's often quoted [1960 article]."⁵² Indeed it does.

Writing at a time when "no legislature ha[d] attempted an adequate formulation of police power in relation to issues like the right to stop and question [and] the right to frisk,"⁵³ and at a time when the problem had been "largely ignored by commentators and dealt with ambiguously by most courts, in part at least because it is assumed that the issue is whether there were adequate grounds for arrest,"⁵⁴ Barrett

⁴⁶ *South Dakota v. Opperman*, 428 U.S. 364 (1976).

⁴⁷ *Id.* at 367. *But cf.* *California v. Carney*, 471 U.S. 386 (1985).

⁴⁸ "[T]he key principle of the Fourth Amendment is reasonableness — the balancing of competing interests." *Michigan v. Summers*, 452 U.S. 692, 700 n.12 (1981) (quoting Justice White in *Dunaway v. New York*, 442 U.S. 200, 219 (1978)); *see also, e.g.*, *Tennessee v. Garner*, 471 U.S. 1, 8 (1985); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967).

⁴⁹ *See infra* text accompanying notes 55-56.

⁵⁰ *Tennessee v. Garner*, 471 U.S. 1, 8 (1985) (quoting *United States v. Place*, 462 U.S. 696, 703 (1983)).

⁵¹ 392 U.S. 1 (1968).

⁵² Brief for the NAACP Legal Defense Fund, Inc., as amicus curiae, at 33, *Terry v. Ohio*, 392 U.S. 1 (1968).

⁵³ Remington, *The Law Relating to "On the Street" Detention, Questioning and Frisking of Suspected Persons and Police Arrest Privileges in General*, 51 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 386 (1960).

⁵⁴ *Id.* at 390.

observed:

[I]f the general public interest in adequate law enforcement is to be served, it is clear that police must be given reasonably wide powers of investigation. Furthermore, if the goal is to protect individuals from the serious invasion of personal rights which results from formal arrests and charges of crime in the absence of [a] clear showing of probable cause . . . , reasonable latitude must be given for [such investigative techniques as stopping and questioning suspicious persons on the street]. On the other hand, it is obvious that some restraint must be placed upon the police because indiscriminate use of these techniques could be unreasonably oppressive.

In applying the Fourth Amendment to the investigative process the Court makes the issue turn upon the traditional tort law concepts. If the officer trespasses upon the property of the suspected person, he can justify his action only by showing that he has complied with the Fourth Amendment requirements governing searches. If he restricts the liberty of movement of the suspect sufficiently to commit the tort of false imprisonment, he can justify his action only by demonstrating that he had probable cause to make a formal arrest. If the investigation can be carried on without trespass or false imprisonment, then it appears that the Fourth Amendment has no application and the official conduct needs no justification.

The result of this all-or-nothing approach is to place too little restraint on some investigative techniques and too great restraint on others. It tends to defeat the fundamental objectives of the Fourth Amendment by attempting to establish the same protection against relatively minor violations of person and privacy as against the most serious ones.⁵⁵

* * *

The question may be asked whether it is wise to resolve problems of the type presented in *Henry* [where FBI agents stopped a moving vehicle, looked in the vehicle and questioned the occupants briefly] and *Rios* [where the police alighted from their car and approached a stationary taxicab (stopped for a red light) in which defendant was driving to make inquiries] in terms of tort law concepts. Should the law say that those police techniques which do not involve trespass or false imprisonment are not subject to the Fourth Amendment policy in favor of reasonableness while those which do cross the line, however slightly, must require the same justification as a formal arrest? Would not the policy of the Fourth Amendment be better served by an approach which determines the reasonableness of each investigative technique by balancing the seriousness of the suspected crime and the degree of reasonable suspicion possessed by the police against the magnitude of the invasion of the personal security and property rights of the individual involved?

If one looks at the problem in these terms, it becomes rational to argue that in *Henry* the police did have sufficient grounds for suspicion to justify the relatively minor interference with the personal liberty and property rights of [the defendants'] which was involved in stopping their car, ques-

⁵⁵ Barrett, *supra* note 20, at 58-59 (footnotes omitted).

tioning them, and looking [into the car].⁶⁶

In the 1970's and 1980's the Court expanded *Terry* well beyond its facts.⁶⁷ One may not share the view that "the Burger Court has taken advantage of the hole which the Warren Court opened up in *Terry v. Ohio* to exempt a widening variety of intrusive police conduct from [probable cause] requirements and to test them instead against the less rigorous standard of general reasonableness"⁶⁸ and that the expansion "threatens to hand the police new search and seizure powers with little protection against discretionary abuse."⁶⁹ But undeniably the police today have much wider powers of investigation than they did thirty-two years ago, when Barrett first launched his attack on the exclusionary rule, or twenty-seven years ago, when he persuasively argued that the then monolithic probable cause standard should be replaced with a general reasonableness approach.

Even when traditional probable cause is still required, the Court has made it fairly clear, I think, that that standard requires something less than "more-probable-than-not" (although how much less is anything but clear).⁶⁰ Indeed, at one point in its opinion in *Illinois v. Gates*,⁶¹

⁶⁶ *Id.* at 63-64 (footnotes omitted). The cases mentioned in the text are *Henry v. United States*, 361 U.S. 98 (1959) and *Rios v. United States*, 364 U.S. 253 (1960).

⁶⁷ See, e.g., *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Hensley*, 469 U.S. 221 (1985); *Michigan v. Summers*, 452 U.S. 692 (1981); *Adams v. Williams*, 407 U.S. 143 (1972).

⁶⁸ Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257, 264 (1984).

⁶⁹ Mertens, *The Fourth Amendment and the Control of Police Discretion*, 17 U. MICH. J.L. REF. 551, 617 (1984).

⁶⁰ See Kamisar, *Gates, "Probable Cause," "Good Faith," and Beyond*, 69 IOWA L. REV. 551, 558-89 & n.250 (1984).

⁶¹ 462 U.S. 213 (1983). *Gates* substantially dismantled the prevailing so-called two-pronged *Aguilar-Spinelli* test for determining probable cause when the police rely on an informant's tip. See *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964). According to the two-pronged test, which emerged some years after *Draper v. United States*, 358 U.S. 307 (1959), and *Jones v. United States*, 362 U.S. 257 (1960) (both criticized by Barrett, see *infra* note 68 and accompanying text), an informer's tip, standing alone, could not provide probable cause unless the officer set forth the underlying circumstances that (a) led her to conclude that the informant was probably credible or generally trustworthy (the veracity prong) and (b) that led her to conclude that the informer obtained the information in a reliable way (the basis of knowledge prong). The two prongs or elements had an independent status; a strong showing on one prong did not compensate for a deficient showing on the other. Whether, and if so how, independent police investigatory work that corroborated the tip could overcome deficiencies in either or both prongs was highly disputed. See generally 1 W. LAFAVE, *supra* note 31, at 499-570; C. WHITEBREAD & C. SLOBOGIN, *supra*

which emphasized that probable cause is a practical, common-sense concept, "a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules,"⁶² the Court states that "probable cause requires only a probability or *substantial chance* of criminal activity."⁶³

Barrett must have applauded the result in *Terry*, but I doubt that he welcomed the softening of probable cause in *Gates*. For Barrett's balancing approach was not a one-way street.

Barrett maintained that the Court's reliance on traditional tort law concepts produced excessive restraints on some investigative techniques. But he also voiced concern that if the Court applied a fixed standard of probable cause to varying degrees of police interference with privacy, "[p]ressure may be placed on the courts to water down the standards for probable cause to make formal arrests in order to avoid freeing obviously guilty defendants because of relatively minor invasions of their privacy."⁶⁴ He pointed out that:

[T]he basis on which the *Henry* and *Rios* cases were decided would be the same even though invasions of the privacy of the home had been involved instead of search of an automobile. The little more evidence which the Court indicated in *Henry* would constitute probable cause to arrest would,

note 30, at 148-50; Moylan, *Hearsay and Probable Cause: An Aguilar and Spinelli Primer*, 25 MERCER L. REV. 741 (1974).

⁶² *Gates*, 462 U.S. at 232, 238.

⁶³ *Id.* at 244 n.13 (emphasis added). In deciding *Gates* and in adopting a good faith exception to the exclusionary rule a year later in *Leon*, the Court seemed to assume that exclusion of evidence obtained pursuant to a warrant had been a serious problem. But a study of the search warrant process by the National Center for State Courts (NCSC) reveals that in pre-*Gates* days, warrant applications were seldom rejected for any reason and that warrant searches were seldom the subject of successful motions to suppress for any reason. See R. VAN DUIZEND, L. SUTTON & C. CARTER, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS AND PRACTICES (NCSC) (Williamsburg, Va., 1983) (draft report), summarized and discussed in Davies, *A Hard Look at What We Know (and Still Need to Learn) about the "Costs" of the Exclusionary Rule: The NIJ Study and Other Studies of "Lost" Arrests*, 1983 AM. B. FOUND. RES. J. 611, 664-67. Even if the Court's premise that the police had been unduly restricted by rigid and technical warrant procedures were sound, the Court seems to have engaged in overkill. By softening the probable cause standard (*Gates*) and narrowing the thrust of the exclusionary rule in its central application a year later (*Leon*), the Court seems to have "killed one bird with two stones."

What is the relationship between *Gates* and *Leon*? Because the question had not been briefed or argued in *Leon*, the Court declined to consider whether probable cause existed under the relaxed standard announced a year earlier in *Gates* and thus shed little light on the extent to which the good faith exception furnishes the police greater leeway than that already provided by *Gates*. See *Leon*, 468 U.S. at 958-59 (Brennan, J., joined by Marshall, J., dissenting).

⁶⁴ Barrett, *supra* note 20, at 66.

in theory at least, have been adequate to support the police in entering the home of the suspect and engaging in an incidental search of the premises. But is this approach reasonable? Are there not significant differences in the importance of privacy in homes and in automobiles which should be reflected in the showing needed to justify police entry? If the same degree of probable cause is required to justify the police conduct in *Henry* and *Rios* as is required to justify entering the one of a suspect, placing him under arrest, and making a search of the premises, is it not clear either that too high a standard is being set for the *Henry-Rios* situation or too low a standard for entry into a house?⁶⁶

In upholding the search at issue in *Gates*, the Court relied heavily on *Draper v. United States*.⁶⁶ There, a "reliable" informant had told a federal narcotics agent that Draper would be returning from Chicago to Denver by train on one of two designated mornings and that he would be carrying a supply of heroin. The informant also gave a fairly detailed physical description of Draper and his clothing. The *Gates* Court called the decision in *Draper*, upholding the search of defendant and the bag he was carrying, "the classic case on the value of corroborative efforts of police officials."⁶⁷ I would not be surprised if, upon reading that description of *Draper*, Barrett had winced. For in his 1960 article Barrett had cited *Draper* as a graphic example of how an

⁶⁶ *Id.* at 65. In *Gates*, the search of the defendants' home was preceded by a search of their car, which turned up a large quantity of marijuana, but nothing, I think, turns on that circumstance. The *Gates* Court upheld a warrant to search defendants' car *and their residence*, see 462 U.S. at 245-46 n.14, 246, even though the search warrant issued long before the search of the car took place, see *id.* at 226. As dissenting Justice Stevens noted, "[i]t is a truism that 'a search warrant is valid only if probable cause has been shown to the magistrate and that an inadequate showing may not be rescued by post-search testimony or information known to the searching officer at the time of the search.'" *Id.* at 293 n.6.

At the time Barrett wrote the passage quoted above, even though no exigent circumstance existed, so long as they were armed with probable cause, the police could enter a person's home without a warrant, even break into her home, to execute the arrest. This state of affairs sustained Barrett's contention that, although the security of the "person" was far more important than the protection of property interests, the rules governing arrests were far less restrictive than those governing searches. See Barrett, *supra* note 20, at 46-54. Twenty years later, in *Payton v. New York*, 445 U.S. 573 (1980), the Court held that the police must possess an arrest warrant before entering a suspect's home to make a routine felony arrest, *i.e.*, one for which there was ample time to obtain a warrant. See also *Steagald v. United States*, 451 U.S. 204 (1981) (absent exigent circumstances, a valid warrant to arrest *A*, and naming only *A*, does not adequately protect the fourth amendment interests of *B* when *B*'s home is entered in an effort to locate *A*).

⁶⁶ 358 U.S. 307 (1959).

⁶⁷ 462 U.S. at 242.

all-purpose probable cause standard generates pressure to dilute the standard in terms of the formal arrest and charge:

[C]onsider the implications of [the *Draper*] holding. Suppose the agents had not found any narcotics on searching Draper. Would they have been justified (in fact obligated) to file a complaint against him and take him before a commissioner? Perhaps such a tip from an informer having no corroboration beyond identity of the suspect should be sufficient to justify the invasion of freedom involved in stopping Draper in the station and searching him But would it not be the grossest interference with human freedom for the police to add to the indignities of stopping and searching the additional and far more serious consequences of taking Draper into custody and filing charges against him with no further basis than the informer's tip? Is it not clear that the necessity to justify the search in terms of arrest led the Court in this case to water down dangerously the requirement of probable cause viewed in terms of the formal arrest and charge?⁸⁸

For the reasons indicated above, the police have ample room to maneuver under the fourth amendment today (more in some respects, I suspect, than Barrett deems appropriate), a good deal more flexibility than they did when the California Supreme Court handed down *Cahan* or when the United States Supreme Court decided *Mapp*. Thirty years ago, Barrett may have had good cause for concern that, plagued by ill-defined and yet unarticulated rules governing arrest, search, and seizure, the police might not be able to "avoid the forbidden practices and still do an effective job of law enforcement."⁸⁹ I think there is little basis for such concern today. Thirty years ago, Barrett balked at "[t]he spectacle of . . . criminals being freed because of 'legal

⁸⁸ Barrett, *supra* note 20, at 68-69; see also Barrett's criticism of *Jones v. United States*, 362 U.S. 257 (1960), relying heavily on *Draper* to sustain the search of an apartment based on the corroborated tip of an unidentified informant: "And so a standard developed in the context of stopping a suspect and making a routine search of his person becomes sufficient to justify the issuance of a search warrant to enter and search a private dwelling." Barrett, *supra* note 20, at 70.

⁸⁹ Barrett, *supra* note 6, at 592. Barrett noted that the United States Supreme Court had "been moving in the direction of compelling state courts to exclude evidence obtained by illegal police practices in the confessions and police brutality cases." *Id.* He added: "It may be that the general social policy against police brutality is strong enough to justify letting the defendant go free in *these* cases — especially since the police probably can avoid the forbidden practices and still do an effective job of law enforcement." *Id.* (emphasis added). But Barrett implied, at least, that unlike confession situations (in which the courts, of course, were using the pre-*Miranda* "totality of circumstances" - "voluntariness" test), the police might not be able to avoid what many courts would conclude were violations of the fourth amendment and still do an effective law enforcement job.

technicalities'"⁷⁰ But in the three decades that have since elapsed, the Court has gone a long way toward eliminating that possibility. Indeed, in no small part because of the trenchant criticisms of Barrett and others, ample reason exists to revise Cardozo's famous epigram⁷¹ and to say that nowadays if the criminal goes free it is because the constable has flouted the fourth amendment, not because he has made an honest blunder.⁷²

Since he first turned his attention to the exclusionary rule and other search and seizure problems, Barrett has enjoyed considerable success. The police have received wide powers of investigation, perhaps even more latitude than Barrett would prefer. But one important goal has eluded him. The exclusionary rule, although somewhat battered and bloodied, is still around. The story is not over, however. (In law, it never is.) In the not too distant future Barrett may achieve total victory on this front, too. As I have said elsewhere:

Now that the Fourth Amendment exclusionary rule rests on an "empirical proposition" rather than a "principled basis," it is especially vulnerable. The fact that the Burger Court has finally carved out a "good faith" exception to the exclusionary rule in its central application, together with the cost-benefit balancing it has used to reach that result, renders the rule almost defenseless against Congressional efforts to repeal it, most likely by a statute that purports to replace the rule with what we shall be assured is an "effective" alternative remedy.

As Justice Brennan recently observed, "[a] doctrine that is explained as if it were an empirical proposition but for which there is only limited empirical support is . . . an easy mark for critics." The exclusionary rule has many critics in the Congress and the state legislature, and these critics will be quick to assert that the legislature has far greater institutional competence to evaluate the "costs" and "benefits" of suppressing reliable physical evidence than do the courts.⁷³

⁷⁰ *Id.* at 589. At this point in his article, Barrett is talking about the effects of the exclusionary rule in the "short-run period" before workable rules of search and seizure had developed. But he goes on to say that "under even the most ideal situation, where the rules are as well defined as possible and the police are trying to comply with rather than to evade the rules, there is bound to be a substantial number of cases in which the trial judge, considering the matter after the event, will find that the policeman guessed wrong." *Id.* at 590; see also *supra* text accompanying note 21.

⁷¹ "The criminal is to go free because the constable has blundered." *People v. DeFore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

⁷² Cf. Wright, *Must the Criminal Go Free If the Constable Blunders?*, 50 TEX. L. REV. 736, 745 (1972).

⁷³ Kamisar, *The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court*, in *THE BURGER YEARS* 143, 168 (H. Schwartz ed. 1987) (forthcoming). The quotation is from Justice Brennan's dissenting opinion in *United States v. Leon*, 468 U.S. 897, 943 (1984).

Commenting on the then recently decided *Miranda* case,⁷⁴ and the controversy over in-custody interrogation generally, the late Judge Henry Friendly observed: "What haunts this whole subject is that so many say so much while knowing so little."⁷⁵ Judge Friendly had in mind members of academe as well as members of the U.S. Supreme Court, but his complaint could hardly be lodged against Professor Barrett.

Barrett has a profound belief in the need for facts.⁷⁶ He realized, some years before *Escobedo* and *Miranda*, that the Court was "closing in" on the confession problem and he shared the view that "[k]nowledge is essential to understanding; and understanding should precede judging."⁷⁷

Barrett's survey of two police departments "suggest[ed] that a full scale survey covering a large number of police departments over a substantial period of time might put police practice problems in a substantially different perspective from that given by reading newspaper accounts and appellate opinions."⁷⁸

Perhaps the most interesting aspect of the survey relates to interrogation and confessions. It is useful to know that in the overwhelming percentage of cases interrogation times in these departments were both surprisingly short and surprisingly productive of confessions and admissions. More data of this kind are essential to a realistic determination of the desirability of any proposals to restrict the authority of police to engage in such interrogation.⁷⁹

Barrett's two-city survey evidently did not impress the *Miranda* majority, who presumed that the compulsion inherent in custodial surroundings is so substantial that, absent the now familiar warnings or a fully effective equivalent, no statement obtained from a suspect under these circumstances "can truly be the product of his free choice."⁸⁰ But Barrett's data, indicating that the type of sustained interrogation involved in most famous confession cases is the exception rather than the

⁷⁴ *Miranda v. Arizona*, 384 U.S. 436 (1966).

⁷⁵ H. FRIENDLY, *A Postscript on Miranda*, in BENCHMARKS 266, 278 (1967).

⁷⁶ Barrett, *supra* note 19; see also Barrett, *Criminal Justice: The Problem of Mass Production*, in THE COURTS, THE PUBLIC AND THE LAW EXPLOSION 85 (H. Jones ed. 1965); Barrett & Thomas, *Pretrial Felony Processing in California: A Study of Alternatives to Existing Procedure* (1975) (materials for a National College of the State Judiciary seminar on judicial administration).

⁷⁷ *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504, 520 (1924) (Brandeis, J., dissenting).

⁷⁸ Barrett, *supra* note 19, at 44.

⁷⁹ *Id.* at 45.

⁸⁰ *Miranda*, 384 U.S. at 458.

rule, supported the dissenters' charge that the factual basis for the *Miranda* majority's core premise was patently inadequate:

[E]ven if the relentless application of [the procedures described in various police manuals] could lead to involuntary confessions, it most assuredly does not follow that each and every case will disclose this kind of interrogation or this kind of consequence [referring to Barrett's 1962 article]. Insofar as appears from the Court's opinion, it has not examined a single transcript of any police interrogation, let alone the interrogation that took place in any one of these cases which it decides today. Judged by any of the standards for empirical investigation utilized in the social sciences the factual basis for the Court's premise is patently inadequate.⁸¹

Barrett did more than present data suggesting that "the generally black picture of police conduct painted by the [*Miranda*] Court"⁸² was a fanciful one. He anticipated and challenged one of the principal rationales of *Miranda* — the notion that a system of *police* warnings could effectively safeguard the rights of criminal suspects. A year and a half *before* the *Miranda* case was handed down, Barrett voiced serious doubts about the sensibleness of such a system. And few have ever made a point, any point, more succinctly or more felicitously. Asked Barrett: "[I]s it the duty of the police to persuade the suspect to talk or to persuade him not to talk? They cannot be expected to do both."⁸³

⁸¹ *Id.* at 533 (White, J., joined by Harlan and Stewart, JJ., dissenting) (footnote omitted); see also H. FRIENDLY, *supra* note 75, at 272.

I can hardly deny, as two of Barrett's co-reporters for the Model Code of Pre-Arrestment Procedure project observed, drawing on Barrett's work, that "[w]hat society has to deal with is not a half-dozen great murder cases (with the issue being elaborate grillings designed to elicit a confession for trial) but a large flow of arrested persons streaming through a metropolitan police station." Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 69 (1966) (pre-*Miranda*). But the great bulk of confession cases that the Supreme Court dealt with in the 30 years before *Miranda* were murder cases. Given the general secrecy surrounding police interrogation, it is hard to fault the Court for turning to the published work of the leading interrogation experts and instructors for an understanding of the techniques recommended and employed when obtaining a confession is deemed important. Indeed, one might argue that the manuals evidence the best current standards of professional police work. Moreover, at the time of *Miranda* at least, "[a]pologetics for modern police interrogation practices do not deny the use of deception or other subtle forms of psychological pressure, but admit their use and defend them on the ground that they are not calculated to produce false confessions." Pye, *Interrogation of Criminal Defendants — Some Views on Miranda v. Arizona*, 35 FORDHAM L. REV. 199, 205 (1966).

⁸² *Miranda*, 384 U.S. at 515 (Harlan, J., joined by Stewart and White, JJ., dissenting).

⁸³ Brief of Edward L. Barrett, Jr., as amicus curiae, at 9, *People v. Dorado*, 62 Cal. 2d 338, 398 P.2d 361, 42 Cal. Rptr. 169 (1965) (on rehearing). Barrett's brief was

Is there any doubt about what most police officers think their superiors expect them to do? Who has ever heard of a police commissioner congratulating the officer in charge of a murder case for giving the *Miranda* warnings so carefully and so emphatically that the suspect said nary a word? If it is true, as we have often been told, that any lawyer "worth his salt" will tell a suspect not to talk to the police⁸⁴ (at least until the lawyer gets a good grip on the case), is it any less true that any officer "worth his salt" will be sorely tempted to get a suspect to talk? Can we really expect the police to explain to a suspect unbegrudgingly and unequivocally the very means the suspect may use to frustrate them?

Professor Gerald Caplan has recently maintained — borrowing Barrett's memorable language — that "the early empirical studies on the influence of *Miranda* clearly document that, where opportunity permitted, post-Miranda interrogators chose to 'persuade the subject to talk' rather than 'persuade him not to talk.'"⁸⁵ But the extent of this inclination is not at all clear. It cannot be denied that for the past twenty years suspects have continued to make incriminating statements with great frequency. But *why*?

It may be that they have done so because they do not fully grasp the significance of the warnings or because the police, aware that their version of how they gave the warnings is likely to prevail, too often mumble or undermine the warnings. But it may also be because the suspects' promptings of conscience or desire to end the matter override the impact of the warnings.⁸⁶ As the commentary to the first draft of the Model Pre-Arrest Code points out, nothing has necessarily gone wrong if the suspect chooses to speak:

[S]elf-incrimination is [not] so "irrational" that it must be presumed to have resulted from compulsion. Conscience, remorse, even calculation can

submitted November, 1964, in response to a request by Chief Justice Roger Traynor. See also Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View*, 52 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 21, 40-41 (1961).

⁸⁴ See, e.g., *Watts v. Indiana*, 338 U.S. 49, 59 (1949) (Jackson, J., concurring and dissenting).

⁸⁵ Caplan, *Questioning Miranda*, 38 VAND. L. REV. 1417, 1462 (1985).

⁸⁶ On the basis of his office's survey of more than 1000 post-*Miranda* cases, in fully half of which the defendant had made an incriminating statement, then Los Angeles District Attorney Evelle Younger concluded that: "[l]arge or small . . . conscience usually, or at least often, drives a guilty person to confess. If an individual wants to confess[,] a [*Miranda* warning] is not likely to discourage him." Office of the District Attorney, County of Los Angeles, Results of Survey conducted in the District Attorney's Office of Los Angeles County Regarding the Effects of the *Dorado* and *Miranda* Decisions upon the Prosecution of Felony Cases 4 (Aug. 4, 1966).

lead without coercion to confession. The very knowledge of the arrested person that independent investigation may in any event lead to his conviction will often lead him to confess, whether in the hope of favorable treatment or simply in order to get the matter over with.

. . . The privilege is designed against compulsion, not against self-incrimination. . . . Its policy is effectuated by insuring that the state does not deprive a prisoner of adequate conditions for the exercise of choice, rather than imposing conditions which will insure that the exercise of choice always goes in one direction — that of silence. One should not, therefore, assume that something has necessarily gone wrong if the choice is made to speak.⁸⁷

We would, of course, know a good deal more about why suspects continue to incriminate themselves — and the *Miranda* system of police-issued warnings would be a much more formidable safeguard — if, whenever feasible, an electronic recording of the entire waiver transaction had to be made.⁸⁸ There is language in *Miranda* hovering on the brink of such a requirement,⁸⁹ but the courts have largely overlooked or disregarded this language.⁹⁰

Furthermore, hints are not holdings and nowhere in the long *Miranda* opinion does the Court explicitly require the police to make a tape, or even a verbatim stenographic, recording of the crucial events. Whether the Court should have done so, thus adding fuel to the criticism that it was exercising undue control over police practices — that it was “legislating” — is surely one of those “damned if it did, damned if it didn’t” issues.

It may be that the *Miranda* majority thought that requiring as much

⁸⁷ A.L.I., MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 5.01, Commentary at 171-72 (Tent. Draft No. 1, 1966) [hereafter A.L.I., MODEL CODE] (pre-*Miranda*). Barrett was an associate reporter for this Model Code draft — and an especially influential advisor for the ten-year life of this important project.

⁸⁸ The Model Code requires tape recordings of the warnings and waiver procedures at the police station, noting that “mandatory recording of all casual encounters cannot be required without providing that the prisoner remain throughout custody in a room where sound equipment is available or providing for mobile recording units to accompany each person in custody.” A.L.I., MODEL CODE, *supra* note 87, § 130.4, Commentary at 345 (Official Draft, 1975). UNIF. R. CRIM. PROC. 243 (Approved Draft, 1974) provides that “the information of rights, any waiver thereof, and any questioning shall be recorded upon a sound recording *whenever feasible* and in any case where questioning occurs at a place of detention (emphasis added).”

⁸⁹ See *Miranda*, 384 U.S. at 475.

⁹⁰ A striking exception is *Stephan v. State*, 711 P.2d 1156, 1158 (Alaska 1985), holding that “an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect’s right to due process, *under the Alaska Constitution*, and that any statement thus obtained is generally inadmissible” (emphasis added) (footnotes omitted).

as it did was enough for "one gulp."⁹¹ It may be that, at the time, it was not possible to persuade a majority of the Court to go an inch further than it did. It may be that in the midst of the "raging controversial process" of redetermining the conformity of American criminal procedure to the nation's ideals,⁹² the Supreme Court thought it prudent to reserve amplification and reinforcement of the *Miranda* plan for another day⁹³ — underestimating the risk that another day might not come.⁹⁴

Whatever the reasons, the Warren Court, somewhat surprisingly, never did strip police interrogation of its "most unique feature . . . its characteristic secrecy."⁹⁵ And there is no chance that the Rehnquist Court will do so. Indeed the only question for the foreseeable future is whether *Miranda* will continue to shrink⁹⁶ or will disappear

⁹¹ Justice Clark, dissenting in *Miranda*, 384 U.S. at 502, protested that the Court was already requiring too many things "at one gulp."

⁹² See Breitel, *Criminal Law and Equal Justice*, 1966 UTAH L. REV. 1, 1.

⁹³ See, e.g., the suggested expansion and reinforcement of the *Miranda* rationale by Professor (now Governor) James Thompson in *Detention After Arrest and In-Custody Investigations: Some Exclusionary Principles*, 1966 U. ILL. L.F. 390, 421-22.

⁹⁴ There might not have been another day even if the Court's personnel had not changed. Shortly after it decided *Miranda*, the Court seemed to lose impetus, perhaps because of changes in the social and political mood of the country. See Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L.F. 518, 539.

⁹⁵ Weisburg, *supra* note 83, at 44. "Secrecy is not the same as the privacy which interrogation specialists insist is necessary for effective questioning. Inconspicuous recording equipment or concealed observers would not detract from the intimacy between the interrogator and his subject which is said to increase the likelihood of confession." *Id.*

⁹⁶ See, e.g., *New York v. Quarles*, 467 U.S. 649 (1984) (recognizing a public safety exception to *Miranda* of uncertain dimensions); *California v. Prysock*, 453 U.S. 355 (1981) (warning that arguably conveyed erroneous message that suspect only had right to appointed counsel during courtroom proceedings upheld; police may depart from standard *Miranda* warnings to some extent); *North Carolina v. Butler*, 441 U.S. 369 (1979) (implied or qualified waiver of *Miranda* rights may suffice). Recent cases demonstrate that even *police station* questioning designed to produce incriminating statements is not necessarily custodial interrogation. See *California v. Beheler*, 463 U.S. 1121 (1983) (per curiam) (suspect "voluntarily agreed" to accompany police to station house); *Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam) (suspect agreed to meet officer at police station at convenient time, but even after he arrived and was told by police that his fingerprints had been found at the scene (which was not true), suspect was not subjected to custodial interrogation).

The impeachment cases were the first blows the Burger Court struck *Miranda*. See *Oregon v. Hass*, 420 U.S. 714 (1975) (statements obtained after police refused to honor defendant's request for lawyer and continued to question him may be used to impeach defendant if he testifies in his own defense); *Harris v. New York*, 401 U.S. 222 (1971)

entirely.⁹⁷ But whether *Miranda* survives or fades away, the intracta-

(statements produced by questioning preceded by incomplete *Miranda* warnings may be used to impeach defendant if he testifies in his own defense). But the Rehnquist Court may yet strike *Miranda* the heaviest blow of all (short of overruling it). This is suggested by *Oregon v. Elstad*, 470 U.S. 298 (1985), which ruled that the fact that the police had earlier obtained a statement from defendant in violation of his *Miranda* rights (when they questioned him in his own home) did not bar the admissibility of a subsequent confession (at the station house) when, this time, the police complied with *Miranda*. The Court rejected defendant's "fruit of the poisonous tree" argument because the argument assumed the violation of an underlying constitutional right. But, the Court told us, a failure to give *Miranda* warnings, when called for, is not in itself a violation of the fifth amendment. If this is so, then why apply the "fruit of the poisonous tree" doctrine to physical evidence discovered as a result of a *Miranda* violation any more than to *any other* "fruit"?

Permitting the police to make derivative uses of *Miranda* violations would deal that case a grievous blow. The *Miranda* Court was trying to take away the police's incentive to exploit a suspect's anxiety, confusion, and ignorance when their method of questioning implies that they have a right to an answer and that it will be worse for the suspect if she does not answer. How could we expect the police to comply with *Miranda* if we were to prohibit only the confessions obtained in violation of that doctrine, but allow the use of everything these confessions bring to light?

⁹⁷ The case that has greatly troubled supporters of *Miranda*, ever since it was handed down more than a decade ago, is *Michigan v. Tucker*, 417 U.S. 433 (1974). In that case, the Court, per Rehnquist, J., viewed the *Miranda* warnings as "not themselves rights protected by the Constitution" but only "prophylactic standards" designed to "safeguard" or to "provide practical reinforcement" for the privilege against self-incrimination. *Id.* at 444-46. The Court seemed to equate the compulsion barred by the privilege with coercion or involuntariness that rendered a confession inadmissible under the pre-*Miranda* totality of circumstances test. The *Tucker* majority's declaration that a *Miranda* violation is not necessarily a violation of the self-incrimination clause — it only is if the confession were involuntary under traditional standards — "is an outright rejection of the core premises of *Miranda*." Stone, *The Miranda Doctrine in the Burger Court*, 1977 SUP. CT. REV. 99, 118. *But see* Grano, *Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 683-89 (1986).

I had hoped that the language in Justice Rehnquist's *Tucker* opinion would not be taken seriously — even that it had been forgotten. But recently Justice Rehnquist's way of thinking about *Miranda* reappeared, first in *New York v. Quarles*, 467 U.S. 649 (1984), and then, more prominently, in *Oregon v. Elstad*, 470 U.S. 298 (1985).

Since the Supreme Court has no supervisory power over state criminal justice, if an "ordinary" violation of *Miranda* does not, or at least does not usually, violate the Constitution, where did the Court get the authority to impose *Miranda* on the 50 states? If a confession obtained without giving a suspect the *Miranda* warnings does not infringe the self-incrimination clause *unless accompanied by actual coercion*, then why are the state courts not free to admit all confessions not the product of actual coercions? By disparaging the *Miranda* warnings, by viewing them as only "second-class" prophylactic safeguards and *Miranda* violations as only "second-class" wrongs, language in *Tucker* and the more recent *Quarles* and *Elstad* cases may have prepared the way for

ble problems which that much-maligned case addressed will still be with us. *Miranda* has been widely assailed for going too far. But could the trouble with the case be that it does not go far enough? Is its great weakness (although many, of course, would call it its saving grace) that it permits someone subjected to the inherent pressures of arrest and detention to waive his rights without actually receiving the advice of counsel? The next time around (if there ever is one), why settle for

overruling *Miranda* itself.

But supporters of *Miranda* may take some comfort from *Moran v. Burbine*, 106 S. Ct. 1135 (1986), even though they may not be happy with the particular result of that case. The Court held that a confession preceded by an otherwise valid waiver of *Miranda* rights should not be excluded "either because the police misinformed an inquiring attorney about their plans concerning the suspect or because they failed to inform the suspect of the attorney's efforts to reach him." *Id.* at 1140. The Court, per O'Connor, J., observed:

[B]ecause we think that [*Miranda*] as written strikes the proper balance between society's legitimate law-enforcement interests and the protection of the defendant's Fifth Amendment rights, we decline [to] further extend *Miranda*'s reach. *Id.* at 1143.

* * *

Declining to adopt the more extreme position that the actual presence of a lawyer was necessary to dispel the coercion inherent in custodial interrogation, the [*Miranda*] Court found that the suspect's Fifth Amendment rights could be adequately protected by less intrusive means *Id.* at 1144.

* * *

. . . [R]ather than proceeding from the premise that the rights and needs of the defendant are paramount to all others, [*Miranda*] embodies a carefully crafted balance designed to fully protect *both* the defendant's and society's interests. *Id.* at 1147-48 n.4.

This is the way *Miranda*'s defenders — not its critics — have talked about the case since it was first handed down. Although it is too early to tell, the *Burbine* Court's view of *Miranda* as a serious effort to strike a proper balance between, or to reconcile, competing interests may turn out to be a good deal more important than its specific ruling.

[Several weeks after I completed my commentary on Barrett's career and sent the manuscript to the *U.C. Davis Law Review*, Attorney General Edwin Meese III endorsed and publicized a Justice Department report calling for the overruling of *Miranda*. See N.Y. Times, Jan. 22, 1987, at 1; N.Y. Times, Jan. 23, 1987, at 4. I share the view of former Deputy Solicitor General Andrew Frey (the leading criminal procedure specialist in the Department of Justice for a dozen years before he entered private practice last year) that such a "frontal assault" on *Miranda* only makes the task of toppling it "much harder. [It] only makes 'middle-road' Justices bristle." Kamisar, *The Case of Meese v. Miranda*, L.A. Times, Feb. 11, 1987, at 5. Thus, as I have said elsewhere, I believe the Attorney General's recent assault on *Miranda* is only likely to reduce "to the vanishing point whatever small chance remains of overturning *Miranda* in the near future." *Id.*]

hesitant, half-way measures? Why not take equal protection and the right to counsel all the way?

Few, if any, have cut through all the rhetoric surrounding the confession problem (e.g., "right to counsel," "equal protection," "ours is an accusatorial system, not an inquisitorial one") more trenchantly and few, if any, have addressed the underlying issues more provocatively than did Ed Barrett six months *before* the *Miranda* case was handed down.⁹⁸ What he said then is still a good place to begin. What he said then, I venture to say, will *always* be a good place to begin:

There are two fundamental questions here. One of them is just what . . . do we want to use the lawyer for? He is a scarce and . . . valuable commodity. The other and more fundamental question, of course, is the one which underlies all of this discussion — to what extent do we want, in the administration of the criminal law, to rely upon incriminatory statements made by people suspected of crime?

Now, just for a moment, let us look at the first question. . . . [W]hat can the lawyer do [even if he manages to get down to the police station as soon as the police bring in the suspect]? I suggest that really there is only one thing he can do and that is to say to his client whom he's just acquired, "Don't tell anybody anything until I find out what this is all about. And then after I have had a chance to find out what this is all about we will decide what we're going to do from this point on." If this is [so] . . . , is this what we want to use lawyers for and can we use them for it? I suggest that in the generality of cases, . . . we can't have the lawyer at the police station. And this is at least as true for the rich man as the poor man His life as a lawyer means that he must be [in court or] in other places and can't be in the police station at any particular point in time.⁹⁹

* * * *

What we want to use the lawyer for depends on our goal. If our goal is to see that all persons are adequately advised [of their rights] . . . there are certainly much more efficient and economical means of accomplishing this objective than providing the relative[ly] scarce commodity of lawyer time to communicate this message [W]e could even have a very persuasive lawyer record the message and play it for every defendant who comes [into the police station].

. . . [I]f all we are talking about is adequately advising [an arrestee] of his rights, . . . the net result is apt to be that the innocent, confused, average citizen who happens to come in contact with the law will hear the message and then proceed to talk to the policeman. Perhaps not the *rich* defendant but the *experienced* defendant will perceive the message much more clearly and perhaps will not talk to the police unless he is convinced that it's to his own advantage. Hence, if all we are talking about is advice,

⁹⁸ Barrett, *supra* note 5, at 509-14. For another, and very recent, strong effort to cut through the rhetoric surrounding the confession problem, see Grano, *supra* note 97.

⁹⁹ Barrett, *supra* note 5, at 509-10.

. . . that mere advice is apt to leave the situation much as at present — the poor, more often than others, will, having been advised, persist in talking to the police.

All this suggests that [the real question is not the lawyer question, but rather] do we want confessions? Do we want police to interrogate? Do we want to have this kind of evidence? . . .

There are two general factual areas in which we are remarkably uninformed. The first is . . . [t]o what extent can we cope with the problems of administration of criminal justice without the use of confessions? We do not even know how many cases depend upon interrogation. We do not know what would happen in terms of the case load without confessions One of the consequences of eliminating confessions would probably be a reduction in the cases disposed of on guilty pleas. I once did a little computing in California which suggested that if you reduced the guilty [pleas] in felony cases by ten per cent, it would require an increase on the order of thirty per cent in all of the courts, prosecutors, public defenders and associated personnel dealing with the trials of felony criminal cases in California. In addition to economic cost there is another kind of cost, which is: probably the only effective way to deal with the situation would be to greatly increase police manpower to create a much more pervasive police establishment, in order to get the evidence which will solve crimes. Such an increase then disturbs other values of a civil libertarian concern. I must say my own reaction is that if there were a policeman on every corner, I would feel much more inhibited and much more as though I were living in some kind of a police state than the present system gives me¹⁰⁰

[I]f we decide our real objective is to eliminate the use of interrogation in custody and resultant confessions, it would be much more economical and, on the whole, much more satisfactory to do it directly. We could just say that confessions obtained from people in police custody cannot be used in the prosecution of criminal cases, and then see what happens. Such a direct approach would also be more conducive to realizing the equal protection values that are being talked about than the indirect one of providing lawyers at the station.¹⁰¹

¹⁰⁰ *Id.* at 510-12 (emphasis in original).

¹⁰¹ *Id.* at 513. But we now know that whether a person is in “police custody” is not an easy question. Indeed, recent cases demonstrate that even *police station* interrogation is not necessarily custodial. See *supra* note 96. Moreover, if, as appears to be the case, a ban on “confessions *obtained from* people in police custody,” Barrett, *supra* note 5, at 513 (emphasis added), would not cover spontaneous confessions or, more generally, confessions that were *not* the product of interrogation, we now know that this, too, would raise difficult questions. See, e.g., *Rhode Island v. Innis*, 446 U.S. 291 (1980); *United States v. Thierman*, 678 F.2d 1331 (9th Cir. 1982); *Harryman v. Estelle*, 616 F.2d 870 (5th Cir. 1980) (en banc).

Even if we were to go a good deal further than Barrett suggested in his pre-*Miranda* remarks and were to ban the use of *all* confessions or incriminating statements made to a police officer (whether or not the suspect was in custody and whether or not he was interrogated), there would *still* be lingering problems. The defense would argue that

[The equal protection problem] is a little more complicated than we tend to view it Under the best of circumstances by the time [a suspect who can afford a lawyer] has called [one] and gotten one from some downtown office [to] the police station to talk to him, a good deal of police interrogation may have taken place. If we say then that in order to satisfy equal protection a lawyer must be provided for the man who [cannot afford one], the only practicable way really of doing this in large cities is going to be to station somebody like a public defender in the police station so [a lawyer will be there to talk to him]. [But then the] man who didn't have the money would have a lawyer present immediately and the rich man ordinarily would not. If we went that route, the next step would likely be to forget all about equal protection and provide a lawyer at the station for everybody¹⁰²

CONCLUSION

I am aware that one who participates in occasions such as this may be suspected of engaging in "laudator's talk." That is why it may be useful to recall what I said about Ed Barrett more than twenty years ago — when he was a leading participant in "a massive re-examination of criminal law enforcement procedures on a scale never before witnessed."¹⁰³

the drugs or stolen property or murder weapon was the "fruit" of an inadmissible confession. The government would deny it. The government would maintain that the defendant *never said a word* and that the police gathered all the proffered evidence independently of any incriminating statement. But the defendant would insist that she *did* confess and that the police uncovered all the proffered evidence *as a result*.

We could, of course, bar all statements, yet allow the use of all physical evidence obtained as a result. But would there be much point in banning the direct use of *all* statements if the police could still use all the leads and clues stemming from these inadmissible statements? Wouldn't the derivative use of illegally obtained statements furnish the police with a strong incentive to act illegally? *But cf.* *Oregon v. Elstad*, 470 U.S. 298 (1985) (earlier obtained confession in violation of *Miranda* does not bar use of subsequent confession in compliance with *Miranda*).

¹⁰² Barrett, *supra* note 5, at 513.

If I may add a personal note, I was a participant in the symposium at which Barrett spoke. In a sense, Barrett was speaking to the world at large, but it was plain that I was the person present who was supposed to rebut him. Indeed, formally Barrett was responding to my opening remarks. When, a few moments later, the moderator whispered to me, that, sadly, the program had "run over" and thus there would be no time for me to respond to Barrett, I, too, expressed regret but I felt a sense of relief that the moderator never imagined.

¹⁰³ *Miranda v. Arizona*, 384 U.S. 436, 523 (1966) (Harlan, J., joined by Stewart and White, JJ., dissenting).

In this tribute I have spoken only of Barrett the commentator. But from 1965-74 he served first as Associate Reporter, then as an adviser to the Model Code of Pre-Arrestment Procedure project and from 1960-71 he served as Reporter for, and member

I had a strong affection for the Warren Court and a fondness, too, for the California Supreme Court of that era. Thus, I was usually irritated, sometimes even outraged, when the decisions of these courts aroused resentment and attack, as they often did. Therefore, I launched what I like to think of as a counterattack against what I called the "police-prosecution oriented critics of the courts."¹⁰⁴ But I was careful to exclude Ed Barrett (and Frank Remington) from this group. I said then:

[One] who is critical of the Court's performance in the constitutional-criminal procedure area is not necessarily police-prosecution oriented. This article focuses on criticism characterized by hyperbole, not criticism possessing "that quality of judiciousness . . . demanded of the Court itself." Critics such as Professor Edward Barrett . . . have amply demonstrated that in this field as in others the only alternatives open to observers of the Court need not — and should not — be "unbridled abuse or indiscriminate praise."¹⁰⁵

Barrett writes well and he writes (and reads) easily. His analyses of fundamental issues are penetrating and illuminating. But it is largely because his criticism possesses "that quality of judiciousness demanded of the Court itself" that he has accomplished what we all strive to do — write a number of articles that will be "hard to get rid of."¹⁰⁶ Indeed, Barrett's writings on criminal procedure deserve to be read and reread as long as people differ about the rights of the accused and the needs of law enforcement. And that will be a long, long time.

of, the Advisory Committee on Federal Criminal Rules.

¹⁰⁴ Kamisar, *supra* note 1.

¹⁰⁵ *Id.* at 436 n.* (quoting from P. FREUND, *The Court and Its Critics*, in *THE SUPREME COURT OF THE UNITED STATES* 177 (1961)).

¹⁰⁶ *Cf.* *THE COMPLETE POEMS OF CARL SANDBURG* xx (rev. & expanded ed. 1970) (introduction by Archibald MacLeish).