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**INTRODUCTION—THE CHANGED
AND CHANGING WORLD OF
CONSTITUTIONAL CRIMINAL
PROCEDURE: THE CONTRIBUTION
OF THE DEPARTMENT OF
JUSTICE'S OFFICE OF LEGAL
POLICY**

Joseph D. Grano*

I. REMEMBERING THE PAST OF CRIMINAL PROCEDURE

It has been disturbing for me, as I am sure it has been for other law teachers similarly situated, to realize that although I am only in my forty-sixth year,¹ the students I teach share in their consciousness few of the historical experiences that helped to define my life. Whether it be the election of the first Roman Catholic president, the political assassinations of the sixties, the civil rights marches, the riots in the streets, the Chicago-7 trial, the passage of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, the Cuban missile crisis, the Goldwater campaign, the first human landing on the moon, the Vietnam War, or increasingly even the Watergate crisis and the impeachment proceedings against President Nixon, the events that are indelibly pressed in my consciousness—and that help put flesh on many of the cases I teach—are little more than cold history to my students.² So it is with criminal procedure. When I graduated from high school in 1961, the “old world” of criminal procedure still existed, albeit in its waning days;³ when I graduated

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1. The word “only” obviously is influenced by perspective.

2. While we know not to ask our students the “where were you when . . .” questions that we casually ask our peers, many of us have caught ourselves indulging the assumption that discussion of these events in class will evoke the same images and feelings in our students that they do in us.

3. On June 19, 1961, the Court in *Mapp v. Ohio*, 367 U.S. 643 (1961), overruled *Wolf v. Colorado*, 338 U.S. 25 (1949), and applied the fourth amendment exclusionary rule to

from law school in 1968, circa the time most of today's first-year law students were arriving on the scene, the "new world" had fully dislodged the old. Indeed, the force of the new world's revolutionary impetus already had crested.⁴

Some of the change that the criminal procedure revolution effected was for the better,⁵ but much of it, at least as some of us

the states. *Mapp* helped to set the stage for the gradual displacement of truth as the primary goal of American criminal procedure, added to the time and resources consumed in criminal cases, helped to precipitate the now dominant public perception (which lawyers, particularly academic ones, readily dismiss) that the criminal justice system releases defendants on "technicalities," sparked the beginning of the "incorporation" revolution, and converted search and seizure law into an arcane subject that consumes half of the standard criminal procedure course in many law schools. Still, on the same day it decided *Mapp*, the Supreme Court, in *Culombe v. Connecticut*, 367 U.S. 568, 606 (1961), applied the traditional totality-of-circumstances voluntariness test to determine the admissibility of a confession in a state criminal case. The case is best known for Justice Frankfurter's exhaustive exegesis, which only Justice Stewart joined, on the meaning of voluntariness. Noting with obvious approval (and on this point a majority of the Court agreed) that the Court had never employed a single litmus test for inadmissible interrogation, Frankfurter admonished that a confession was not rendered impermissible simply because the police engaged in extensive questioning of the suspect, unduly delayed his arraignment, failed to caution him, or refused to permit him to consult with friends or counsel. *Id.* at 601. (The influence of Frankfurter's *Culombe* opinion is readily apparent in Justice Stewart's opinion in *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) (applying voluntariness test to consent searches)).

4. Cf. Israel, *Criminal Procedure, the Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320, 1346-49 (1977) (discussing possibility that Warren Court's inclination for expansive constitutional rulings had largely dissipated by the end of the Chief Justice's tenure).

5. In particular, from both policy and constitutional perspectives, which should not be equated, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (indigent felony defendants have a constitutional right to appointed counsel) is eminently defensible. The constitutional difficulties arise from the need to justify both the application of the sixth amendment right to counsel to the states and the interpretation of the amendment as providing a right to appointed, not just retained, counsel. Were "incorporation" an open issue, I would find the first difficulty insurmountable: academic defenders of incorporation typically permit the desired ends to justify the means, whether plausible or not. Nevertheless, on the assumption that incorporation now is a fixed part of the legal landscape, the real issue is whether it is consistent with the underlying purpose of the sixth amendment to construe it as requiring appointed counsel for indigents, a view first upheld in *Johnson v. Zerbst*, 304 U.S. 458 (1938). For those who cannot so easily hurdle the incorporation obstacle, it should be recalled that Justice Harlan, who opposed incorporation as such, concurred in *Gideon* squarely on procedural due process grounds. *Gideon*, 372 U.S. at 349 (Harlan, J., concurring).

In defending *Johnson* and *Gideon* (but not incorporation), I reject the Office of Legal Policy's criticism of these cases as unwarranted departures from the original understanding. See OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, 'TRUTH IN CRIMINAL JUSTICE' SERIES REPORT NO. 1, *The Law of Pre-trial Interrogation Part I.B.2.b* (1986) [hereinafter Report No. 1] reprinted in 22 U. Mich J. L. Ref. 437 (1989). This should not be taken, however, as casting any doubt on original meaning jurisprudence. It is appropriate in constitutional interpretation to ask what ends or purposes the framers and ratifiers were trying to achieve. The purpose underlying the sixth amendment, in my view, was to assure the accused, through legal assistance, a meaningful opportunity to confront his ac-

see it, was decidedly for the worse. My students, however, cannot make the comparison; to them the old world has no flesh, and the new world is all they know. For those to whom a world without *Miranda* is as antiquarian as a world without satellites or video cassette recorders, the question of whether we made wrong choices, or of whether we should re-embrace some of what we so precipitously and often casually discarded, does not call for serious analysis.

*Crooker v. California*⁶ and *Cicenia v. LaGay*,⁷ decided together a mere thirty years ago, illustrate the old world. The Supreme Court upheld the admissibility of confessions in both of these cases even though the police had denied the suspects' requests to consult with counsel; indeed, in *Cicenia*, the police refused to permit the suspect's lawyer to consult with his client even though the lawyer was present at the station. Acknowledging that successful interrogation was likely to affect adversely the defendant's chances at trial,⁸ the *Crooker* Court nevertheless concluded that recognition of a right to counsel during police interrogation would have a "devastating effect on enforcement of criminal law, for it would effectively preclude police question-

ers and to present a defense, a purpose that cannot be achieved for indigent defendants unless the state provides the opportunity to obtain legal assistance.

To argue that the framers did not understand the amendment as providing a right to appointed counsel is to miss the point, at least partially. Too often the assumption is made that original meaning jurisprudence depends exclusively upon either an examination of the subjective intentions of the framers or an inquiry into how the framers would have resolved the particular dispute at issue. In this regard, the teaching of Judge Bork on the judge's role in constitutional interpretation is instructive:

[I]t is the task of the judge in this generation to discern how the framers' values, defined in the context of the world they knew, apply to the world we know. . . . The fourth amendment was framed by men who did not foresee electronic surveillance. But that does not make it wrong for judges to apply the central value of that amendment to electronic invasions of personal privacy. . . . The evolution of doctrine to accomplish that end [i.e., making the framers' values effective] contravenes no postulate of judicial restraint.

Ollman v. Evans, 750 F.2d 970, 995-96 (D.C. Cir. 1984) (en banc) (Bork, J., concurring) (newspaper column protected by first amendment against libel suit).

Judge Bork's judicial philosophy, which permits the evolution of doctrine to effectuate the framers' values and purposes, should not be confused with the philosophy, reflected in much of what passes as constitutional law today, that permits courts to add to the Constitution values and principles never ratified by the people. "There is not at issue here the question of creating new constitutional rights or principles." *Id.* at 995; see also *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 796-97 n.5 (1986) (White & Rehnquist, JJ., dissenting) (distinguishing the application of values that have roots in the authoritative text from those that are "extra-constitutional").

6. 357 U.S. 433 (1958).

7. 357 U.S. 504 (1958).

8. 357 U.S. at 441.

ing—*fair as well as unfair*.”⁹ Repeating much the same argument in *Cicenia*, the Court added that a right to counsel during police interrogation required an interpretation of the fourteenth amendment that was “foreign both to the spirit in which it was conceived and the way in which it has been implemented by this Court.”¹⁰ A different world.

I always assign my students the portion of the one page in the casebook devoted to the majority opinions in *Crooker* and *Cicenia*.¹¹ I not only assign this page; I pause over it in class because it provides a glimpse, however inadequate, of the world that the students do not know and of its underlying thinking. When my students are incredulous to learn that I support removing counsel, both retained and appointed, from the interrogation room, I again refer to these cases to demonstrate that the criminal justice system not so long ago proceeded from quite different assumptions, that we did have choices along the way, and that today’s way of thinking—the students’ axiomatic way of thinking—was not predestined to prevail.

Although bloated by questions, notes, and select short quotations from the secondary literature, all presumably intended to provoke students to think, modern criminal procedure casebooks rarely focus their readers’ attention on whether the choices made in the past were sound. Typically, the “thinking” that these books encourage is whether and how to extend existing doctrine to new frontiers. Whether or not intended, the message typically taught by this approach is that change is a one-way ratchet. Moreover, it is unlikely that many criminal procedure teachers are supplementing the casebook materials with serious consideration of whether the changes that occurred in the sixties were desirable; critical examination in most classrooms probably involves little more than didactic professorial and student commentary on the “anti-rights” attitude of the Burger and Rehnquist Courts.¹² Revealing in this regard is the following lament:

9. *Id.* (emphasis in original).

10. 357 U.S. at 510.

11. Y. KAMISAR, W. LAFAYE, & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 526 (6th ed. 1986). With the exception of P. JOHNSON, *CRIMINAL PROCEDURE* 399-400 (1988), this is as much attention to these cases as one can find in the criminal procedure casebooks.

12. Although I cannot cite data, the observation in the text is supported, I believe, by more than visceral anguish. Even a casual reader of the academic literature would have to conclude that it is not only largely one-sided but often characterized by inflated rhetoric. See, e.g., McClurg, *Logical Fallacies and the Supreme Court: A Critical Examination of Justice Rehnquist's Decisions in Criminal Procedure Cases*, 59 U. COLO. L. REV. 741 (1988), and Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Rule Doctrine*, 58 OR. L. REV. 151 (1979); but see Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquist Begun?*, 62

Criminal procedure is changing fast these days, but teachers of criminal procedure are not. Most of us have probably given considerable thought to the philosophical and doctrinal significance of the Supreme Court's increasingly conservative approach to constitutional issues, but have we thought about the broader pedagogic and professional implications of this major doctrinal shift? For me, the current conservative trend raises fundamental questions about the kinds of *issues* we should be addressing in our teaching, research, and public service activities. In particular, we need to start asking ourselves whether our traditional heavy emphasis on constitutional issues (which has been going on since before most of us went to law school) is still appropriate. The answer is no, I believe, at least in the present conservative age, and perhaps in any age.¹³

While slanted and deficient training may explain the inability and unwillingness of many students and young lawyers to challenge critically the assumptions of the existing orthodoxy, the similarly broad reluctance of the practicing and academic lawyers who well recall the period of change is more baffling. Writing in 1966, Professor Yale Kamisar reported that the Supreme Court's then recent decision in *Miranda v. Arizona*¹⁴ had "evoked much anger and spread much sorrow among judges, lawyers and professors."¹⁵ Today one wonders where these

IND. L.J. 273 (1987) (despite its title, taking a refreshingly objective approach to the current Chief Justice). Similarly, one need only attend academic conferences on criminal procedure to discover how discrete and insular "conservatives" are in academia.

The same phenomenon exists in constitutional law, of which criminal procedure is really a part. For example, 1,925 law professors, nearly 40% of the full-time faculty at accredited law schools, signed letters to the Senate Judiciary Committee opposing the Supreme Court nomination of Judge Robert Bork. See Grano, *Deconstructing the Constitution*, 2 ACADEMIC QUESTIONS 10 (Winter 1988-89). Only 100 law professors placed their names on a list supporting the nomination. This philosophical imbalance in our law schools does not seem to concern the advocates of diversity.

13. Frase, *Criminal Procedure in a Conservative Age: A Time to Rediscover the Critical Nonconstitutional Issues*, 36 J. LEGAL EDUC. 79, 79 (1986) (emphasis in original). It is noteworthy that the author never considered the option of seriously analyzing the thinking underlying the conservative trend.

14. 384 U.S. 436 (1966).

15. Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the "New" Fifth Amendment and the Old "Voluntariness" Test*, 65 MICH. L. REV. 59, 59 (1966). See also H. ABRAHAM, *FREEDOM AND THE COURT* 125 (4th ed. 1982) (*Miranda* "must rank as the most bitterly criticized, most contentious, and most diversely analyzed criminal procedure decision by the Warren Court.").

judges, lawyers, and professors have gone.¹⁶ In an American Bar Association poll of its members, for example, *Miranda* came in fourth place as a milestone of American legal history.¹⁷ More recently, an American Bar Association Special Committee reported that “[a] very strong majority of those surveyed—prosecutors, judges, and police officers—agree that compliance with *Miranda* does not present serious problems for law enforcement”; the same study reported that “[p]rosecutors, too, generally have little quarrel with *Miranda*.”¹⁸ Perhaps not surprisingly, just a little more than twenty years after he expressed despair over the profession’s response to *Miranda*, Professor Kamisar, with a confidence that is remarkable given the “conservative” jurisprudence we supposedly are witnessing, now is proclaiming that “[o]verturning *Miranda* seems to be an idea whose time has come and gone.”¹⁹

I do not pretend to have the sociological or psychoanalytical explanation for this phenomenon. My purpose here is only to observe that what started out as revolutionary and extremely controversial has become in many circles unassailable dogma.²⁰ The voice that continues to urge repentance today is truly “[t]he voice of him that crieth in the wilderness.”²¹ At least this was so until the Justice Department’s Office of Legal Policy began work on the eight Reports in its Truth in Criminal Justice Series, which this Special Issue of the University of Michigan Journal of Law Reform is publishing in full.²² Whether “the eyes of the blind shall be opened, and the ears of the deaf shall be unstopped”²³ remains to be seen. What is important, however, is

16. Professor Fred Inbau has remained one voice in opposition whose persistence has survived the scathing of time. See, e.g., F. INBAU, J. REID, & J. BUCKLEY, *CRIMINAL INTERROGATION AND CONFESSIONS* (3d ed. 1986); Inbau, *Miranda v. Arizona—Is It Worth the Cost?*, 24 CAL. W. L. REV. 185 (1988); Inbau, *Over-Reaction—The Mischief of Miranda v. Arizona*, 73 J. CRIM. L. & CRIMINOLOGY 797 (1982).

17. J. LIEBERMAN, *MILESTONES—200 YEARS OF AMERICAN LAW* vii (1976) (Foreword). For an expression of surprise at this remarkable change in attitude, see Kamisar, *Miranda: The Case, the Man, and the Players*, 82 MICH. L. REV. 1074, 1074 (1984), reviewing L. BAKER, *MIRANDA: CRIME, LAW AND POLITICS* (1983).

18. SPECIAL COMM. ON CRIMINAL JUSTICE IN A FREE SOCIETY, *CRIMINAL JUSTICE SECTION*, ABA, *CRIMINAL JUSTICE IN CRISIS* 28, 29 (1988).

19. Kamisar, Remarks at Constitutional Law Conference Sponsored by United States Law Week, September 12, 1987, Washington, D.C. But see REPORT No. 1, *supra* note 5, at 542-65.

20. Indeed, when Judge Bork challenged constitutional cases that only twenty years ago provoked dissents from the likes of Justices Black, Harlan, and Stewart, his critics excoriated him as “out of the mainstream.”

21. ISAIAH 40:3.

22. See Preface, *supra*.

23. ISAIAH 35:5.

that a new, energetic, and serious voice—one grounded in coherent and careful argument, not in inflated rhetoric—has joined the fray. Whatever else it accomplishes, the publication of this Series should help provoke a more balanced and vigorous competition of ideas, a competition that, as Justice Holmes insisted, is essential for the testing of truth and good in a free society.²⁴

II. THE CONTRIBUTION OF THE OFFICE OF LEGAL POLICY TO THE EFFORT TO ACHIEVE REFORM

Contrary to any suggestion about a conservative trend in Supreme Court cases,²⁵ criminal procedure, though once again changing, is not changing "fast." Indeed, it is noteworthy that most of the Warren Court's criminal procedure revolution has remained in place, given that it has been almost twenty years since Chief Justice Burger assumed office.²⁶ Much of the Supreme Court's change in direction during the past twenty years has involved no more than a refusal to extend Warren Court rulings. In fairness, a considerable amount of chipping away at existing doctrine also has occurred, but most of the primary precedent remains in place, waiting in repose for a Court with an inclination to repair the minor damage and reclaim the Warren Court's torch. Overruled cases are difficult, though by no means impossible, to disinter, but cases that merely distinguish previous cases, especially when done unconvincingly, are themselves easy to distinguish away. The Warren Court achieved revolu-

24. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes & Brandeis, JJ., dissenting).

25. See *supra* note 13 and accompanying text.

26. Compare Kamisar, *The Warren Court (Was It Really So Defense-Minded?)*, *The Burger Court (Is It Really So Prosecution-Oriented?)*, and *Police Investigatory Practices*, in *THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 62* (V. Blasi ed. 1983) (offering an optimistic prognosis about the continued vitality of Warren Court precedent) with Kamisar, *The "Police Practice" Phases of the Criminal Process and the Three Phases of the Burger Court*, in *THE BURGER YEARS: RIGHTS AND WRONGS IN THE SUPREME COURT 1969-1986* 143, 144-45 (H. Schwartz ed. 1987) (offering, from his perspective, a somewhat less optimistic view). Professor Herman Schwartz most accurately summarized the situation in the preface to the last cited volume:

Despite the many decisions criticized by the contributors to this volume, many basic principles and doctrines developed by the Court under Chief Justice Earl Warren to protect individual liberty and promote social justice [how wonderfully objective the rhetoric is!] have survived the Burger era intact, and some were strengthened.

Id. at xi (Introduction). But see Arenella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 *Geo. L.J.* 185, 187 (1983) (Burger Court's vision differs significantly from that of Warren Court).

tionary change in less than one decade; twenty years of supposedly "conservative" jurisprudence, the wails of the academy notwithstanding, have produced nothing even remotely comparable.

Part of the reason that a more fundamental reexamination has not occurred is, as suggested in the previous section, the lack of serious debate at the level of first principles in the literature. The Warren Court was both sustained and emboldened by a plethora of advocacy scholarship; the Burger and Rehnquist Courts largely have had to find their way without such extrajudicial sustenance, and indeed in the face of a steady barrage of academic, media, and political criticism. Hopefully, this publication of the Office of Legal Policy's Truth in Criminal Justice Series will help to foster the intellectual environment that will inspire the Rehnquist Court to undertake the much needed fundamental critique of the status quo.

The first step in any fundamental reexamination of the existing order should involve an evaluation of the importance of truth discovery relative to other goals the system might have. Proceeding from the premise that "the criminal justice system must be devoted to discovering the truth,"²⁷ the Truth in Criminal Justice Series was prompted by "grave concern" that "[o]ver the past thirty years . . . a variety of new rules have emerged that impede the discovery of reliable evidence at the investigative stages of the criminal justice process and that require the concealment of relevant facts at trial."²⁸ This emphasis on truth as the primary goal of the criminal justice system recalls an earlier day when such a premise was virtually unassailable. Roscoe Pound, for example, did not risk ridicule when he stressed early in the century the primary importance of truth as a goal of procedural rules in general:

Legal procedure is a means, not an end; it must be made subsidiary to the substantive law as a means of making

27. Prefatory statement of Attorney General Edwin Meese III. The same basic statement appears on unnumbered pages at the beginning of each of the originally published Reports in the Series.

The views of his detractors notwithstanding, Attorney General Meese exhibited more substantive interest in intellectual issues than most recent occupants of his office. The academy (and media), however, viewed him as on the "wrong" side of many issues, an unpardonable offense far worse than not being interested in substantive issues at all. Although ethical issues that warranted scrutiny ultimately enabled Meese's detractors to camouflage much of the real basis of their underlying hostility, many of the attacks on Meese's positions revealed the same intolerance, causticity, and *ad hominem* characteristics as those on Rehnquist and Bork. It should go without saying, of course, that Meese's views on substantive issues cannot be impeached by invoking his alleged improprieties.

28. Prefatory statement, *supra* note 27.

that law effective in action. That procedure is best which most completely realizes the substantive law in the actual administration of justice. . . . Nothing is so subversive of the real purposes of legal procedure as individual vested rights in procedural errors²⁹

To say that discovery of truth must be primary is not to say that it must be the only desideratum. As Professor Mirjan Damaska has indicated, even an "extreme inquisitorial" system must establish a balance between efficiency and other goals.³⁰ If discovery of truth is the primary goal, however, the rules of procedure will sacrifice truth only when necessary to accomplish other goals of overriding importance. Too often, though, the American system, with the endorsement of its lawyers, seems willing to sacrifice truth for ends that are not compelling and when the necessity of sacrificing truth to accomplish such ends is little more than speculative.³¹

29. Pound, *The Canons of Procedural Reform*, 12 A.B.A. J. 541, 543 (1926). Complaints about procedural formalism are not unique to our era. Pound complained about the "exaggerated role of procedure" in his day. *Id.* at 542. See also, Vanderbilt, *The New Federal Criminal Rules*, 51 YALE L.J. 719, 720-21 (1942):

The first impression concerns the enormous number of legal barnacles that encrust the subject of criminal procedure. Legal barnacles are not, however, a peculiarity of criminal procedure alone; they seem to thrive in all branches of adjective law. The first task in procedural reform is to distinguish between the essential and the adventitious and to eliminate the latter. [footnotes omitted]

What distinguishes our own era is not its willingness to sacrifice truth but rather both the number and breadth of its truth-negating rules and its acceptance of truth-negation almost as an end in itself.

30. Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506, 576 (1973).

31. I often ask my students, for example, whether they would continue to support the exclusionary rule from a policy standpoint if they were convinced that a fully effective alternative safeguard for fourth amendment rights was available. Most of those who support the exclusionary rule indicate they would want to retain the exclusionary rule nevertheless. Such a response would not be possible were the students committed to the view that discovery of truth should be sacrificed only for compelling reasons.

Given the lack of credible evidence concerning deterrence, the exclusionary rule is problematic even without the above hypothetical consideration. The rule suppresses extremely reliable evidence on the hope that such suppression will accomplish enough deterrence to make suppression worth the cost. Of course, if the Constitution itself actually required the exclusionary rule, a compelling reason for sacrificing truth would exist; the Court's current view, however, is that the exclusionary rule is not constitutionally mandated. See *United States v. Leon*, 468 U.S. 897, 906-07 (1984) (adopting so-called "good faith" exception to the rule in warrant cases). But see Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 597-606, 620-21, 645-51 (1983) (arguing that the rule should be regarded as constitutionally required; acknowledging that the rule is more problematic under a cost-benefit analysis).

Moreover, many American lawyers seem willing to support the view that prosecution should be made difficult as an end in itself. I frequently have heard arguments, for example, that discovery from the defendant is "unfair," even if it is perfectly constitutional, because it facilitates the prosecutor's task of proving the defendant's guilt.³² I would have thought that proving the defendant's guilt was precisely the goal, at least absent a serious concern about convicting the innocent, condoning or encouraging official misconduct, countenancing violations of the defendant's dignity, or encouraging some other evil of comparable gravity. Apparently, however, a view has taken hold that facilitating the discovery of truth is itself an evil, even when these other concerns are not present. Purging the influence of such misguided thinking from our system is a necessary first step to accomplishing serious reform.³³ By focusing our attention where it should be focused first, the Truth in Criminal Justice Series hopefully will increase the likelihood of expurgation.

The first Report in the Series—the one that has received the most attention³⁴—concerns the law of pretrial interrogation.³⁵ This Report elaborates upon the thesis that *Miranda's* rules "impede the search for truth by conditioning inquiry, no matter how brief and restrained, on a suspect's consent to be questioned, and by excluding a suspect's statements at trial, though fully voluntary and reliable."³⁶ Of course, if the Constitution actually required either of these impediments, the sacrifice of truth would have to be accepted as necessary to further the compelling goal of constitutional compliance. The Report properly observes, however, that the Supreme Court consistently has taken the view that *Miranda's* safeguards are only "prophylactic"—that the prosecution may violate *Miranda's* rules without

32. Grano, *Implementing the Objectives of Procedural Reform: The Proposed Michigan Rules of Criminal Procedure—Part I*, 32 WAYNE L. REV. 1007, 1019 (1986).

33. See generally *id.* at 1011-25; 1042-48; Grano, *Implementing the Objectives of Procedural Reform: The Proposed Michigan Rules of Criminal Procedure—Part II*, 32 WAYNE L. REV. 1335, 1342-53 (1986).

34. See, e.g., Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435 (1987); Schulhofer, *The Fifth Amendment at Justice: A Reply*, 54 U. CHI. L. REV. 950 (1987). See also, Markman, *The Fifth Amendment and Custodial Questioning: A Response to 'Reconsidering Miranda'*, 54 U. CHI. L. REV. 938 (1987) (defending the Justice Department Report against Professor Schulhofer's criticisms). Professor Kamisar also criticized the Report at a national conference. See Kamisar, *supra* note 19. The Report received considerable attention in the press.

35. See REPORT No. 1, *supra* note 5.

36. *Id.* at Executive Summary.

actually violating the fifth amendment.³⁷ The Report weighs truth against the values that *Miranda's* prophylactic rules purport to serve and argues, quite persuasively in my view, that *Miranda* represents the wrong road taken.³⁸

At a more fundamental level, however, the Report challenges the constitutional legitimacy of the Supreme Court's imposition of rules upon the states that the Court concedes are not constitutionally mandated.³⁹ Transcending *Miranda*, this is a challenge that requires consideration of first principles concerning the proper role of the Court in constitutional adjudication, particularly in our federal system. It is a challenge that *Miranda's* defenders cannot, I believe, answer persuasively.⁴⁰ The Report also argues that Congress not only has authority to reject prophylactic rules for the federal courts but also did just this with regard to *Miranda* in the Omnibus Crime Control and Safe Streets Act of 1968.⁴¹ This argument is plausible both because prophylactic rules have all the characteristics of rules based on the Court's so-called "supervisory power,"⁴² and because Congress unquestionably has authority to reject rules based on the supervisory power.⁴³ Unfortunately, the Solicitor General's office, to date, has not seen fit to press this argument.⁴⁴

37. *Id.* at 523-27. It is important to note that the Supreme Court, not the Justice Department or some commentator, has taken the view that *Miranda* violations can occur without violating the fifth amendment. See Grano, *Miranda's Constitutional Difficulties: A Reply to Professor Schulhofer*, 55 U. CHI. L. REV. 174, 176 (1988) (Professor Schulhofer wrong in attributing characterization of *Miranda* as prophylactic to "some critics"; Supreme Court views *Miranda* as such).

38. REPORT NO. 1, *supra* note 5, at 510-12, 546-49. In this regard, the Report contains a valuable review of the treatment of police interrogation in several foreign jurisdictions. *Id.* at 90-97.

39. *Id.* at 526-27, 543, 551-53.

40. See Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy*, 80 NW. U.L. REV. 100 (1985) [hereinafter Grano, *Prophylactic Rules*] (arguing against the legitimacy of such rules). See also Grano, *Police Interrogation and the Constitution: Doctrinal Tension and an Uncertain Future*, 25 CRIM. L. BULL. 5, 11-14 (1989) [hereinafter Grano, *Police Interrogation*]; Grano, *supra* note 37, at 175-81.

41. See REPORT NO. 1, *supra* note 5, at 549-50 (referring to 18 U.S.C. §3501).

42. For a discussion of the similarity between prophylactic rules and rules based on the supervisory power, see Grano, *Police Interrogation*, *supra* note 40, at 13 & n.51. This is what makes the legitimacy question so apparent, for we know that the Supreme Court has no supervisory power over state courts or state law enforcement agencies. The supervisory power is discussed *infra* notes 106-15 and accompanying text.

43. Of course, the argument only sharpens the issue of the Court's authority to impose such prophylactic rules on the states in the first place.

44. The Office of Legal Policy suggested, but did not have final authority to make, policy decisions for the Department of Justice. Indeed, other divisions within the Department, such as the Criminal Division, have not embraced everything in these Reports.

It is unfortunate, nevertheless, that the Solicitor General's Office has not been persuaded to adopt the Office of Legal Policy's suggested litigation strategy, for such a strat-

Even aside from the legitimacy objection, the Report views *Miranda* as a “decision without a past”⁴⁵ and predicts, more controversially, that it also is a “decision without a future.”⁴⁶ It is true, as the Report maintains, that the “Supreme Court has rejected the doctrinal basis of *Miranda*, and has no personal stake in perpetuating its particular system of rules.”⁴⁷ Nevertheless, a philosophical tension exists in the Supreme Court’s cases, and until this tension is conclusively resolved, it cannot be stated with certainty that *Miranda* does not reflect the wave of the future.

The tension can best be illustrated by juxtaposing passages from two quite dissimilar Supreme Court opinions. The first set of passages, taken from *Escobedo v. Illinois*,⁴⁸ reflects the thinking that underlies *Miranda* and the Warren Court’s approach to police interrogation in general:

What happened at this interrogation could certainly “affect the whole trial”

. . . .
 . . . The rule sought by the State . . . would make the trial no more than an appeal from the interrogation; and the “right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination.” “One can imagine a cynical prosecutor saying: ‘Let them have the most illustrious counsel, now. They can’t escape the noose. There is nothing counsel can do for them at the trial.’”

It is argued that if the right to counsel is afforded prior to indictment, the number of confessions obtained by the police will diminish significantly. . . . This argument, of course, cuts two ways. The fact that many confessions are obtained . . . points up its critical nature as a “stage when legal aid and advice” are surely needed. . . .

egy would force the Court to confront fundamental issues relating to the scope of its authority.

45. “*Miranda v. Arizona* was a decision without a past. Its rules had no basis in history or precedent but reflected, rather, a willful disregard of the authoritative sources of law.” REPORT NO. 1, *supra* note 5, at 564. I similarly argued a decade ago that *Miranda*’s treatment of the concept of compulsion was inconsistent with generally accepted fifth amendment principles. Grano, *Voluntariness, Free Will, and the Law of Confessions*, 65 VA. L. REV. 859, 926-37 (1979). See also Markman, *Miranda v. Arizona: A Historical Perspective*, 24 AM. CRIM. L. REV. 193 (1987).

46. REPORT NO. 1, *supra* note 5, at 564.

47. *Id.*

48. 378 U.S. 478 (1964).

We have learned the lesson of history . . . that a system of criminal law enforcement which comes to depend on the "confession" will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation.⁴⁹

The second set of passages, taken from *Moran v. Burbine*,⁵⁰ reflect the thinking of the recent cases that have been chipping away at *Miranda*:

No doubt the additional information [that a lawyer obtained by the suspect's sister had called the police station] would have been useful to respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.⁵¹

Later in the same opinion, the Court added:

"[T]he need for police questioning as a tool for effective enforcement of criminal laws" cannot be doubted. Admissions of guilt are more than merely "desirable"; they are essential to society's compelling interest in finding, convicting, and punishing those who violate the law. . . . [A] rule requiring the police to inform the suspect of an attorney's efforts to contact him would contribute to the protection of the Fifth Amendment privilege only incidentally, if at all. This minimal benefit, however, would come at a substantial cost to society's legitimate and substantial interest in securing admissions of guilt.⁵²

The contradictory premises in these two cases are apparent. What deserves emphasis, however, is that *Miranda* and its progeny (and even sixth amendment cases like *Brewer v. Williams*⁵³) are essentially dependent upon the thinking reflected in *Esco-*

49. *Id.* at 486-89 (citations omitted).

50. 475 U.S. 412 (1986).

51. *Id.* at 422. The passages quoted from *Escobedo* seem to come close to requiring this.

52. *Id.* at 426-27 (citations omitted).

53. 430 U.S. 387 (1977). For a discussion of the sixth amendment cases, see *infra* notes 57-74 and accompanying text.

bedo, while the Court's recent limitations on both its fifth and sixth amendment holdings in this area are essentially dependent upon the thinking reflected in *Burbine*. "[W]hat we really have is a Court that pays homage to cases that challenge the legitimacy of police interrogation but that protects police interrogation from those very same cases."⁵⁴ In Professor H. Richard Uviller's words, "[h]aving taken us to the very edge of a confessionless abyss . . . the Court swerved, unable in the crunch to renounce altogether the product of the station house 'inquisition.'"⁵⁵

As long as these incompatible philosophical premises co-exist in the case law, albeit in an unstable equilibrium, the Court always will have a choice between the two. For this reason, the possibility cannot be dismissed that a future Court will resolve the conflict by swerving again, this time in the direction of taking *Miranda* seriously. It is precisely because of the possibility that *Miranda* may be a decision with a future—one far more frightening than its past—that the Office of Legal Policy's invitation to consider first principles is so vital.⁵⁶

While *Miranda* rights, including the *Miranda* right to counsel, are premised on fifth amendment considerations, *Escobedo* and *Massiah v. United States*⁵⁷ relied on the sixth amendment right to counsel in invalidating respectively the direct and surreptitious interrogations involved in those cases. Had *Escobedo*'s holding that sixth amendment rights can attach at "focus" or "custody"⁵⁸ remained viable, *Miranda*'s prophylactic fifth amendment right to counsel would have been redundant. *Escobedo*, however, has not survived as a sixth amendment case. Rather, the Court has since held that sixth amendment rights cannot attach until the start of formal, adversary judicial proceedings against the accused.⁵⁹ In retrospect, the Court per-

54. Grano, *Police Interrogation*, *supra* note 40, at 23; see also Grano, *Selling the Idea To Tell the Truth: The Professional Interrogator and Modern Confessions Law*, 84 MICH. L. REV. 662, 665-75, 690 (1986) (contending that the institution of police interrogation is itself inconsistent with the philosophical premises of *Escobedo* and *Miranda*).

55. Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1168 (1987) (footnote omitted).

56. Despite the importance of *stare decisis*, the danger that a future Court will build upon *Miranda*'s premises is just one reason why the Report is correct in suggesting that the Department of Justice should work to have *Miranda* overruled. See Grano, *Miranda v. Arizona and the Legal Mind: Formalism's Triumph Over Substance and Reason*, 24 AM. CRIM. L. REV. 243, 288-89 (1987) (advocating that *Miranda* be overruled).

57. 377 U.S. 201 (1964).

58. 378 U.S. at 490-91 (referring to both focus and custody).

59. *Moran v. Burbine*, 475 U.S. 412, 428-30 (1986).

ceived that *Escobedo*, like *Miranda*, really should have been decided on fifth amendment grounds.⁶⁰

Massiah, however, has survived *Escobedo*'s demise fully intact, for the undercover informant in *Massiah* engaged the defendant in conversation after he had been indicted—that is, after formal judicial proceedings had commenced. Indeed, the Court has reaffirmed that *once* the sixth amendment right attaches, the right is implicated by both direct questioning⁶¹ and by the use of informants to elicit incriminating statements from the accused.⁶²

In its third Report, *The Sixth Amendment Right to Counsel Under the Massiah Line of Cases*, the Office of Legal Policy suggests that *Massiah* and its sixth amendment progeny are as indefensible as *Miranda*.⁶³ This Report, however, is more cautious than the first in making recommendations. Although it contends that overruling the sixth amendment line of cases would be appropriate, the Report concludes that it may be “more immediately promising” strategically for the Department to seek merely to limit these cases.⁶⁴

The Report recognizes that *Massiah* differs from *Miranda* in that the Court based the substantive right—if not the exclusionary remedy—on its conclusion of what the Constitution actually requires.⁶⁵ This is clearly correct. Because the Court always has suggested that a violation of the *Massiah* right, unlike a violation of the *Miranda* right, actually is a violation of the Constitution, it cannot be said that *Massiah* is only a “prophylactic” decision.⁶⁶ Thus the *legitimacy* of the Court's action in imposing the *Massiah* right on the states cannot be challenged.

This does not mean, however, that *Massiah* correctly interpreted the Constitution. Legitimate exercises of judicial authority may reach “incorrect” results, for the Court's “infallibility” is nothing more than a *de facto* consequence of the unreviewability of its decisions.⁶⁷ The Report argues that “the

60. *Id.* at 429 (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972)).

61. *Brewer v. Williams*, 430 U.S. 387 (1977).

62. *See, e.g., Maine v. Moulton*, 474 U.S. 159 (1985).

63. *See* OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, “TRUTH IN CRIMINAL JUSTICE” SERIES, REPORT NO. 3, *The Sixth Amendment Right to Counsel Under the Massiah Line of Cases* (1986) [hereinafter REPORT NO. 3] reprinted in 22 U. MICH. J.L. REF. 661 (1989). I am taking this Report out of order because of its bearing on police interrogation.

64. *Id.* at 696.

65. *Id.*

66. Grano, *Prophylactic Rules*, *supra* note 40, at 122-23.

67. “We are not final because we are infallible, but we are infallible only because we are final.” *Brown v. Allen*, 344 U.S. 443, 540 (1953) (Jackson, J., concurring).

Massiah rule is historically unsound, is unnecessary to serve the fundamental purposes of the Sixth Amendment right, and is unwise as a matter of policy.”⁶⁸ Like *Miranda*, therefore, *Massiah* and its progeny inhibit the discovery of truth for reasons that not only cannot be deemed compelling but that, upon reflection, must be considered ill-founded.⁶⁹ Independently of the Justice Department’s decisions relating to its litigation strategy in this area, this argument warrants serious consideration by academics and by the judiciary. Indeed, Professor Uviller recently lent credence to the argument in this Report by concluding, after an exhaustive analysis of the issue, “that the sixth amendment provision has been misapplied as an artificial device of cloture on government efforts to obtain cognitive evidence.”⁷⁰

The Report’s suggestion that the *Massiah* exclusionary rule, unlike the underlying substantive right, may not be constitutionally based, and therefore may be subject to repeal by statute,⁷¹ is, to say the least, far more provocative. My own reading of the Court’s sixth amendment cases does not support the Report’s conclusion that the Court sees it this way. Nevertheless, the suggestion that the Court could divorce, if it so chose, right and remedy in this context deserves consideration.

Although the Report draws an analogy to the fourth amendment exclusionary rule,⁷² the analogy may be imperfect. Because the fourth amendment protects a civil right of personal security that is not dependent on criminal prosecution, it is plausible (I would say correct) for the Court to view the fourth amendment wrong as fully accomplished when the search occurs.⁷³ The *Massiah* right, however, is a constitutional rule of criminal procedure designed—albeit misguidedly—to protect the accused from his own folly. Accordingly, it would seem more difficult to accept

68. REPORT No. 3, *supra* note 63, at 697.

69. *Id.*

70. Uviller, *supra* note 55, at 1138. Professor Uviller described the Court’s theoretical and operational position as “unwarranted and unwise.” *Id.* at 1154. His defense of these conclusions is set forth *id.* at 1155-83. See also Markman, *supra* note 45, at 203-04, 206-08.

Although I once defended the Court’s application of the sixth amendment to post-charge interrogations, I now have been persuaded that the application of the sixth amendment in this context is constitutionally indefensible. Grano, *Police Interrogation*, *supra* note 40, at 10. I would distinguish this from the use of the sixth amendment to afford the accused assistance at judicial proceedings. See *supra* note 5.

71. REPORT No. 3, *supra* note 63, at 691-93, 702-05.

72. *Id.* at 702-06.

73. *United States v. Leon*, 468 U.S. 897, 906 (1984). But see Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 267-278 (1988).

that a violation of the *Massiah* right is fully accomplished without the use of the evidence obtained in counsel's absence. In short, the Report may be more persuasive in arguing against the substantive right than in arguing against the "remedy."⁷⁴

The second Report in the Truth in Criminal Justice Series examines the fourth amendment exclusionary rule.⁷⁵ Because of the staggering quantity of writing on the exclusionary rule, one may question the decision to add yet another monograph on this topic. Nevertheless, the Report is significant because it recommends that the Department of Justice officially adopt a strategy of seeking to have the Supreme Court overturn the rule altogether.⁷⁶ In addition, the Report provides a succinct but useful review of both the constitutional and policy objections to the exclusionary rule.

Like *Miranda*, the exclusionary rule raises a question of constitutional legitimacy. This is because the Court has acknowledged that the rule is a Court-made deterrent safeguard rather than a personal constitutional right of the defendant.⁷⁷ In deciding whether to invoke the rule, the Court engages in a process of "weighing the costs and benefits of preventing the use in the prosecution's case in chief of inherently trustworthy tangible evidence."⁷⁸ Under our federal system, however, one would have thought that this was a question for the state courts to decide for themselves. That is, as the Report suggests, the only jurisdiction the Supreme Court has over a state conviction is to determine whether the conviction violates the Constitution:

74. The Report's thesis soon may be tested. See *Michigan v. Harvey* (Mich. Ct. App.), cert. granted, 44 CRIM. L. REP. (BNA) 4165 (Feb. 22, 1989) (issue of whether statements obtained in violation of *Massiah*, like statements obtained in violation of *Miranda*, may be used for impeachment purposes).

75. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, 'TRUTH IN CRIMINAL JUSTICE' SERIES, REPORT No. 2, *The Search and Seizure Exclusionary Rule* (1986) [hereinafter REPORT No. 2] reprinted in 22 U. MICH. J.L. REF. 573 (1989).

76. *Id.* at 652-53. One of the difficulties with the entire series of Reports is identifying with clarity the targeted audience. Although the Reports generally present a careful and complete legal analysis of the issues under consideration, they are addressed to the Attorney General ultimately for the purpose of recommending policy options for the Department of Justice. Understandably, the strategy recommendations sometimes are more cautious than the legal analysis might seem to justify. See, e.g., *supra* note 64 and accompanying text. The reader's more legitimate concern, of course, will be that the legal analysis may be in the nature more of a brief than an objective inquiry. To the extent that some of the analysis may seem to some readers to resemble advocacy, two points can be made: (1) this would not distinguish it from much academic scholarship; (2) the merits of the arguments still would deserve to be taken seriously.

77. See *United States v. Leon*, 468 U.S. 897, 906 (1984). Professor Kamisar has recognized that this rationale raises serious questions about the rule's legitimacy. See Kamisar, *supra* note 31.

78. *Leon*, 468 U.S. at 907.

[I]t is not clear what basis exists for the judicial application of the rule to the state courts. The Supreme Court has never overtly asserted or defended the proposition that it possesses the authority to exclude evidence in a case in which the state court itself would not violate the Constitution by admitting it, and it is difficult to see what constitutional authority the Court could point to as the basis for the assumption of such power.⁷⁹

To my knowledge, neither has any commentator provided a satisfactory account of such authority in the Supreme Court.⁸⁰

Putting aside the legitimacy objection, the Report offers a powerful argument that the exclusionary rule represents ill-conceived policy. Indeed, it may not be an exaggeration to say that no other rule of criminal procedure more effectively denigrates the primacy of truth as a goal of the criminal justice system. While confessions may sometimes raise a concern about reliability, the products of searches and seizures invariably are trustworthy. The exclusionary rule functions entirely by deliberately distorting the picture that the factfinder gets of the defendant's alleged involvement in the criminal offense.

The fourth amendment is one of the most essential provisions of the Bill of Rights, for no truly free society would allow its police unfettered discretion to intrude upon the security of its citizens by searches and seizures. Nevertheless, after spending more than twenty hours in my criminal procedure course on the arcane and often hair-splitting intricacies of search and seizure law—intricacies that are the direct result of the exclusionary rule and that more often than not have little to do with the fourth amendment's essential role in a free society⁸¹—I always

79. REPORT No. 2, *supra* note 75, at 616-17. This argument also undermines the judicial integrity rationale sometimes put forth for the exclusionary rule. See *id.* at 19-20 (discussing this rationale). If the exclusionary rule is not constitutionally required, the "integrity" of state courts is something for the state courts, not the Supreme Court, to worry about.

80. *But see* Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). For criticism of Professor Monaghan's thesis that the federal courts have authority to promulgate a constitutional common law, see Grano, *Prophylactic Rules*, *supra* note 40, at 129-37.

81. The defense attorney in a criminal case has every incentive to raise hair-splitting distinctions and rather trivial search and seizure issues, for exclusion of crucial evidence is the reward for success regardless of the scope of the wrong. Many of the issues litigated in criminal cases would not be pursued in civil litigation, and we would be better off for this. Indeed, abolition of the exclusionary rule might remind us that not every police "infraction" is of constitutional magnitude. While the fourth amendment serves as a vital protection of liberty, it should never have been viewed as the source of a detailed manual of police behavior; indeed, to view it as such is to trivialize its significance.

ask the students to reflect upon whether a rational society would not better utilize such an expenditure of brain power devising other means of controlling police misbehavior. Given that no other country has seen fit to emulate the American experience,⁸² I find it difficult to believe that we are so intellectually impoverished or our police so inclined to misconduct that we lack the capability of devising an effective, alternative approach.

To its credit, the Office of Legal Policy Report not only advocates abolition of the exclusionary rule but also offers suggestions for effectively deterring deliberate police illegality.⁸³ I am not sanguine, however, that commentators will rush to focus their energies on evaluating and trying to improve upon these suggestions, because many who have grown accustomed to the existing world, irrational as it may be, simply are incapable of conceiving the reality of an American criminal justice system without an exclusionary rule. Even so, by adopting the litigative and administrative strategy recommended in this Report, the Justice Department could do much to help change the public's level of awareness and ultimately to bring about the needed reforms.⁸⁴

In its fourth Report, the Office of Legal Policy examines the historical and policy underpinnings of the law governing the admissibility of other crimes evidence.⁸⁵ In what surely is a provocative proposal, the Report recommends amending the Federal Rules of Evidence to permit the use of prior convictions not only to impeach credibility but also to show that the person convicted acted on the occasion in question in accordance with his general character.⁸⁶ Under the existing federal rule, which has roots in at least the late common law and is consistent with prevailing American practice, other crimes evidence, though admissible to prove such specific matters as motive, opportunity, in-

82. REPORT No. 2, *supra* note 75, at 617-20.

83. *Id.* at 623-31, 639-50.

84. In *United States v. Leon*, 468 U.S. 897 (1984), the Supreme Court adopted a so-called good faith exception to the exclusionary rule in warrant cases. While opponents of the rule generally applaud this development, the costs of moving in this direction should not be overlooked. First, without discussion of the issue, *Leon* has reinforced the view that the Supreme Court has constitutional authority to impose rules on the states that are not constitutionally mandated. Second, *Leon* may actually entrench the rule, as modified, in our jurisprudence. Despite these concerns, the Report seems to accept, although somewhat ambiguously, expansion of the good faith exception as an alternative to complete abolition. REPORT No. 2, *supra* note 75, at 632-33, 651-52.

85. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, 'TRUTH IN CRIMINAL JUSTICE' SERIES, REPORT No. 4, *The Admission of Criminal Histories at Trial* (1986) [hereinafter REPORT No. 4] reprinted in 22 U. MICH. J.L. REF. 707 (1989).

86. *Id.* at 764-65.

tent, knowledge, and the absence of mistake or accident, is inadmissible to prove that a person acted in conformity with a bad character.⁸⁷

Examined solely from the standpoint of relevancy, other crimes evidence has some tendency to prove character, which in turn has some tendency to prove conduct.⁸⁸ The existing law's concern with other crimes evidence, therefore, is not the lack of probative value in such evidence but rather, among other things, the danger that the factfinder will give such evidence more consideration than it warrants.⁸⁹ The Report recognizes this reason for exclusion but argues that the risk of prejudice has been overstated;⁹⁰ indeed, it suggests that the notion that a significant risk of prejudice exists from such evidence "has acquired the status of dogma through sheer force of repetition."⁹¹

The Report insists that the existing rules "disserve the search for truth."⁹² Unlike *Miranda* and the exclusionary rule, however, the evidentiary rules under consideration are themselves motivated by a concern for truth: the concern that an innocent person will be wrongfully convicted. Were the law indifferent about which side should bear the risk of mistake, the rules of evidence and procedure simply would seek to maximize overall accuracy. Because the law is less tolerant of wrongful convictions than wrongful acquittals, however, maximum accuracy sometimes is sacrificed to reduce the risk of the less tolerable kind of mistake.⁹³

In support of its proposed reform, the Report argues that the current rule excluding the substantive use of prior convictions at criminal trials is inconsistent with rules that admit such evi-

87. FED. R. EVID. 404(b). The proposed rule also would expand FED. R. EVID. 609(a), which contains the current impeachment rule.

88. Relevant evidence is evidence having "any tendency" to make the existence of a fact more or less probable than it would be without the evidence. FED. R. EVID. 401.

89. See C. McCORMICK, EVIDENCE 554 (3d ed. 1984) (character evidence generally not admissible to prove conduct because such evidence, "while typically being of relatively slight value, usually is laden with the dangerous baggage of prejudice, distraction, time consumption and surprise").

90. REPORT NO. 4, *supra* note 85, at 730-34. The Report correctly notes that prejudice does not exist merely because the evidence increases the likelihood of conviction, for that is the precise function of the prosecution's case in chief. The concept of prejudice in exclusionary evidentiary rules pertains to the risk that the factfinder will misuse the evidence, such as by giving it too much weight. *Id.* at 730-31. See also *supra* note 32 and accompanying text.

91. REPORT NO. 4, *supra* note 85, at 732.

92. *Id.* at 771.

93. Cf. C. McCORMICK, *supra* note 89, at 962 (although proof beyond reasonable doubt standard increases the number of incorrect verdicts, it is justified by the desire to avoid mistaken convictions).

dence at pretrial release determinations, sentencing hearings, and civil commitment proceedings.⁹⁴ The Report overlooks, however, that evidentiary rules in general are more relaxed at such proceedings.⁹⁵ A significant reason is that the law is less concerned at these proceedings than at a criminal trial about mistakes against the individual. It is only at the criminal trial, after all, that we employ the rigorous standard of proof beyond a reasonable doubt.

The Report also maintains that the rule under discussion is inconsistent with the rule's exceptions, such as that permitting the use of prior crimes to show a common scheme or *modus operandi*.⁹⁶ "[t]here is no more than a difference of degree between such cases and the ordinary situation in which a defendant has a record of offenses which show less specific or generic similarities to the currently charged offense."⁹⁷ Nevertheless, whenever arguments are made that relevant evidence should be excluded because of danger of unfair prejudice, the question is one of degree. Under the Federal Rules, relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury."⁹⁸ The difference between admissible and excludable evidence under such a balancing approach necessarily is one of degree.

The Report also insists that the rule barring substantive use of prior convictions is inconsistent with the rule allowing such evidence to be used for impeachment purposes.⁹⁹ In support of this argument, the Report contends that the impeachment rule, albeit through a less direct route, leads to the same inference of ultimate guilt:

If a defendant takes the stand, his testimony will amount in one way or another to a denial of his guilt. If prior convictions are taken as evidence that he may be lying in making his denial, then they must also be taken as evidence that he may in fact be guilty.¹⁰⁰

94. REPORT NO. 4, *supra* note 85, at 735-37.

95. *See, e.g.*, 18 U.S.C. § 3142(f)(2) (rules of evidence not applicable at pretrial detention hearings); FED. R. EVID. 1101(d) (rules not applicable at "miscellaneous" proceedings, including preliminary examinations, sentencing, pretrial release, and probation revocation).

96. REPORT NO. 4, *supra* note 85, at 737-39.

97. *Id.* at 738.

98. FED. R. EVID. 403.

99. REPORT NO. 4, *supra* note 85, at 739-42.

100. *Id.* at 739-40.

Whatever goes on in the minds of triers of fact, the impeachment rule does *not* permit disbelief of the defendant to be translated into substantive evidence of guilt. If the impeachment evidence does its job, the trier of fact may put aside the defendant's self-serving testimony, but it still must look elsewhere for substantive evidence of the defendant's guilt. This rule becomes especially important on appeal, for an appellate court will not use impeachment evidence of the defendant's dishonesty to support his conviction.¹⁰¹

The difference between impeachment use of prior crimes and substantive use of prior crimes is one of degree. To prevent the risk of wrongful conviction, the law generally may be willing to tolerate the loss of relevant prior crimes evidence. When the defendant adds to that risk by presenting an exculpatory story, however, the prosecutor's increased need to use such evidence may tip the scales in favor of admissibility, even if the judge's limiting instruction only slightly decreases the danger of unfair prejudice. Always the issue is whether probative value is substantially outweighed by the danger of unfair prejudice, and the answer necessarily depends upon context.

Ultimately, then, the Report's argument is dependent upon its claim that the danger of unfair prejudice has been overstated. In support of this claim, the Report draws upon empirical data taken from the well-known Kalven and Zeisel study of the jury.¹⁰² Whether the data is powerful enough to carry the Report's burden of persuasion may be doubted.¹⁰³ Nevertheless, the Report's claims at least warrant further study, for the law has no legitimate interest in suppressing probative evidence that does not create a real and significant risk of wrongful conviction. As the Report properly observes, "[a] special rule of exclusion would be justified only if it could be shown that the risk of overestimation or antagonism is substantially greater in connection with prior crimes evidence than with other types of evidence of comparable importance that are not subject to special exclusionary rules."¹⁰⁴

101. Cf. 3 Wigmore, Evidence § 925 (use of character evidence for impeachment), § 731-32 (use of prior inconstant statements) (Chadborne rev. ed. 1970).

102. REPORT No. 4, *supra* note 85, at 732-33 (reviewing H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966)).

103. The Report acknowledges that the Kalven and Zeisel study gave support in its conclusions to the traditional evidentiary law. REPORT No. 4, *supra* note 85, at 733 n.49. Because the Report recommends changing a well-established rule that has truth as its concern, the burden of persuasion properly lies with the Report.

104. REPORT No. 4, *supra* note 85, at 732.

Some might respond that the Report's proposed modification in the law should be rejected once it is recognized that it may increase the risk, however slightly, of wrongful conviction. This, of course, would be nonsense. The risk of wrongful conviction can be eliminated altogether only by abolishing criminal prosecutions. While we obviously would prefer that five or ten guilty persons escape than that one innocent person be convicted, the ratio cannot become too large without undermining the entire system:

I dare say some sentimentalists would assent to the proposition that it is better that a thousand, or even a million, guilty persons should escape than that one innocent person should suffer; but no sensible and practical person would accept such a view. For it is obvious that if our ratio is extended indefinitely, there comes a point when the whole system of justice has broken down and society is in a state of chaos. In short, it is only when there is a reasonable and uniform probability of guilty persons being detected and convicted that we can allow humane doubt to prevail over security. But we must never forget that ideally the acquittal of ten guilty persons is exactly ten times as great a failure of *justice* as the conviction of one innocent person.¹⁰⁵

The question for scholars and those who draft rules, therefore, is whether the Report is correct in assessing the relative risks.

The fifth Report in this Special Issue analyzes the so-called "supervisory power" of the federal courts. In 1984, Professor Sara Beale published a powerful article challenging the constitutional legitimacy of many exercises of this power.¹⁰⁶ Professor Beale distinguished, however, the use of the supervisory power to devise rules of conduct for the executive branch from the use of this power to regulate judicial procedure. While challenging the former, she argued that "the authority to regulate judicial procedure is an incidental or ancillary power implied in the article III grant of judicial power."¹⁰⁷ The Office of Legal Policy contends that even this proposition is dubious.¹⁰⁸

105. C. ALLEN, *LEGAL DUTIES* 286-87 (1931) (emphasis in original). See also Grano, *supra* note 32, at 1012-14.

106. Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433 (1984).

107. *Id.* at 1468.

108. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, "TRUTH IN CRIMINAL JUSTICE" SERIES, REPORT NO. 5, *The Judiciary's Use of Supervisory Power to Control Federal*

Agreeing with Professor William W. Van Alstyne,¹⁰⁹ the Report argues that the judiciary, unlike the legislature, has only those implied powers that are "indispensable" to the exercise of its express powers.¹¹⁰ Professor Beale, on the other hand, contends that the "express grant of authority in article III . . . implicitly carries with it ancillary power similar to the broad authority conferred on Congress by the necessary and proper clause of article I."¹¹¹ The significance of this issue obviously transcends criminal procedure.

The differences in the positions taken by Professor Beale and by the Report, though important to consider, should not obscure their common ground. The most significant and controversial invocations of supervisory power have occurred when judges have sought to impose restrictions on the conduct of executive officials,¹¹² and both Professor Beale and the Report maintain that reliance on the supervisory power for this purpose not only is indefensible but, more importantly, contravenes the doctrine of separation of powers.¹¹³ Moreover, Professor Beale and the Report both contend that the courts cannot invoke the supervisory power to justify rulings, such as the one in *Mallory v. United*

Law Enforcement Activity (1986) [hereinafter REPORT No. 5] reprinted in 22 U. MICH. J.L. REF. 773 (1989).

109. Van Alstyne, *The Role of Congress in Determining Incidental Powers of the President and of the Federal Courts: A Comment on the Horizontal Effect of the Sweeping Clause*, 40 LAW & CONTEMP. PROBS. 102 (Spring 1976).

110. REPORT No. 5, *supra* note 108, at 785-90.

111. Beale, *supra* note 106, at 1470. When I challenged, a few years ago, the Supreme Court's authority to impose "prophylactic rules" on the states, I nevertheless expressed agreement with Professor Beale's position on implied or ancillary judicial power. Grano, *Prophylactic Rules*, *supra* note 40, at 137-47 (maintaining, however, that prophylactic rules cannot be justified by this theory). In conversations with me, Professor Van Alstyne indicated that he remained unconvinced by both of our analyses. I have not yet been persuaded to change my view, but I believe the issue deserves more scholarly analysis.

Although *Miranda* and the exclusionary rule have the characteristics of supervisory power rules, *see supra* note 42 and accompanying text, the Report errs, I believe, in including these issues in the discussion. REPORT No. 5, *supra* note 108, at 777, 800, 819-20. The issue of the federal courts' authority to promulgate rules binding only on the federal system differs from the issue of their authority to impose rules that are not constitutionally mandated on the states. The former raises separation of powers questions, while the latter raises federalism questions. Moreover, as previously discussed, earlier Reports adequately challenged the legitimacy of *Miranda* and the exclusionary rule.

112. The minority position on entrapment provides an excellent example. *See United States v. Russell*, 411 U.S. 423, 439-45 (1973) (Stewart, Brennan, & Marshall, JJ., dissenting).

113. Beale, *supra* note 106, at 1473-77, 1504, 1508-10; REPORT No. 5, *supra* note 108, at 777-78, 810-17.

States,¹¹⁴ that have created remedies for situations in which executive officers violate federal statutory proscriptions.¹¹⁵ To the extent they are persuasive, and both present powerful arguments, Professor Beale and the Office of Legal Policy Report have provided yet another avenue of attack, a constitutional one, against some of the judicially fashioned rules that have impeded the search for truth in the criminal justice system.

In its sixth Report, the Office of Legal Policy analyzes whether the double jeopardy clause would permit governmental appeals of acquittals. Many who work in the criminal justice system believe both that wrongful acquittals occur more frequently than wrongful convictions and that judicial errors often are responsible for such acquittals. From the perspective of truth discovery, an attractive possible solution would be to permit the prosecutor to appeal acquittals that can be fairly traced to such legal errors. While noting the benefits of the solution, the Office of Legal Policy Report rejects it on constitutional grounds.¹¹⁶

From a policy perspective, the Report concludes that granting the government a right to appeal from acquittals would promote truth and fairness.¹¹⁷ Nevertheless, after an exhaustive examination of the historical background of the fifth amendment's double jeopardy clause,¹¹⁸ the Report concludes "that a general rule authorizing the government to appeal all acquittals—at least to the extent such appeals would result in new trials¹¹⁹—must be rejected on constitutional grounds."¹²⁰ In the Report's view, sound policy must yield to the force of original

114. 354 U.S. 449 (1957) (imposing an exclusionary remedy to enforce prompt arraignment requirement in Federal Rules of Criminal Procedure).

115. Beale, *supra* note 106, at 1501-06, 1520-22; REPORT No. 5, *supra* note 108, at 813-15. Professor Beale's conclusions on this issue are worth stating:

A remedial ruling that is grounded on supervisory power raises the same concerns about institutional competence and separation of powers that have been addressed in the cases involving the implication of civil remedies. Reliance on the concept of supervisory power adds nothing to the analysis.

Beale, *supra* note 106, at 1506.

116. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, "TRUTH IN CRIMINAL JUSTICE" SERIES, REPORT No. 6, *Double Jeopardy and Government Appeals of Acquittals* (1987) [hereinafter REPORT No. 6] reprinted in 22 U. MICH. J.L. REF. 831 (1989).

117. *Id.* at 889-93.

118. *Id.* at 843-61.

119. The caveat, if limited to judgments of acquittal by the trial judge following a jury verdict, is supported by case law. See *United States v. Scott*, 437 U.S. 82, 91 n.7 (1978); *United States v. Wilson*, 420 U.S. 332 (1975). The Report argues for a somewhat less rigid limitation. REPORT No. 6, *supra* note 116, at Part IV.B.

120. REPORT No. 6, *supra* note 116, at 893. Justice Holmes, speaking for four justices, once argued to the contrary. *Kepner v. United States*, 195 U.S. 100, 134-37 (1904) (Holmes, J., dissenting).

meaning jurisprudence.¹²¹ Those who view original meaning jurisprudence as little more than a euphemistic cover for a "conservative" result-oriented approach might take note.¹²²

In its seventh Report, the Office of Legal Policy reviews the historical and policy underpinnings of federal habeas corpus review of state court judgments and recommends, among other things, the abolition of this review.¹²³ This Report should rank as one of the most important in the Series, for perhaps nothing contributes more to the lack of finality in the American criminal justice system than the existence of federal habeas corpus review of state convictions. The Report presents both powerful policy arguments against this review¹²⁴ and concrete illustrations of cases that dragged on almost interminably because of it.¹²⁵

Although argument by example often has limits, in this context it can be used effectively to demonstrate the low regard our existing system has for truth, finality, and rationality. *Brewer v. Williams*,¹²⁶ the famous (or infamous) sixth amendment "Christian burial speech" case, is a good example. Charged with the murder of ten-year-old Pamela Powers on December 24, 1968, the defendant, Williams, unsuccessfully moved on various constitutional grounds to exclude evidence that he had taken the police to the place where he had disposed of the deceased girl's body. After the jury convicted Williams of first degree murder, the Iowa Supreme Court, in a 5-4 decision, upheld the trial judge in rejecting Williams' constitutional claims.¹²⁷ Williams did not seek certiorari in the United States Supreme Court. Early in 1974, however, a federal district judge, disagreeing with the Iowa Supreme Court, granted Williams' petition for habeas corpus relief,¹²⁸ a decision that the Eighth Circuit Court of Ap-

121. Cf. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, GUIDELINES ON CONSTITUTIONAL LITIGATION 3-13 (1988) (discussing the principles that should control constitutional interpretation).

122. The Office of Legal Policy acknowledges, as it must, that disagreement about meaning may exist among persons applying the same approach to interpretation. *Id.* at 5. For an example of such disagreement, see *supra* note 5.

123. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, 'TRUTH IN CRIMINAL JUSTICE' SERIES, REPORT NO. 7, *Federal Habeas Corpus Review of State Judgments* (1988) [hereinafter REPORT NO. 7] reprinted in 22 U. MICH. J.L. REF. 901 (1989).

124. *Id.* at 945-51, 953-66.

125. *Id.* at 990-1003.

126. 430 U.S. 387 (1977).

127. *State v. Williams*, 182 N.W.2d 396 (Iowa 1971).

128. *Williams v. Brewer*, 375 F. Supp. 170 (S.D. Iowa 1974). That one federal judge has authority, in effect, to overturn the decision of a state supreme court is just one of the remarkable features of habeas corpus. In terms of the federal judge's authority, it would not have mattered if the Iowa Supreme Court had affirmed the conviction by a vote of 9-0.

peals, in a 2-1 decision, affirmed later the same year.¹²⁹ In 1977, the United States Supreme Court, in a 5-4 opinion, affirmed the Eighth Circuit, finding that the detective's "Christian burial speech" had prompted Williams, in violation of the sixth amendment right to counsel, to disclose the whereabouts of the body.¹³⁰

Before his second trial in 1977, Williams moved to suppress not only that he had taken the police to the body but also evidence concerning the body itself. Applying an "inevitable discovery" exception to the exclusionary rule and concluding that the police would have found the body even without Williams' help, the trial judge refused to exclude testimony concerning the body. After a jury again convicted Williams of first degree murder, the Iowa Supreme Court, in a 5-0 decision, upheld the trial judge's use of the "inevitable discovery" exception.¹³¹ The United States Supreme Court denied certiorari in 1980.¹³² In 1981 Williams lost a bid for federal habeas corpus relief,¹³³ but, in a 3-0 opinion on appeal, the Eighth Circuit reversed the district court,¹³⁴ concluding that the "inevitable discovery" exception could not apply because the police had acted in bad faith. An equally divided court denied rehearing en banc.¹³⁵ In 1984, however, the Supreme Court, applying the "inevitable discovery" exception, reversed the Eighth Circuit.¹³⁶ The following year, the Eighth Circuit decided that the district judge properly had rejected Williams' other claims for habeas corpus relief,¹³⁷ and shortly thereafter, the Supreme Court declined to review the case any further.¹³⁸

Altogether, twenty-three judges in five separate proceedings reviewed the right to counsel issue in the first trial; they divided 12-11, the state judges dividing 6-4 in the state's favor, the federal judges dividing 8-5 in Williams' favor. Not including the denial of certiorari and the denial of rehearing by the Eighth Circuit—which, of course, consumed time and resources—nineteen judges in five separate proceedings addressed the inevitable discovery issue in the second trial; they divided 14-5, the state

129. *Williams v. Brewer*, 509 F.2d 227 (8th Cir. 1974).

130. *Brewer v. Williams*, 430 U.S. 387 (1977).

131. *State v. Williams*, 285 N.W.2d 248 (Iowa 1979).

132. *Williams v. Iowa*, 446 U.S. 921 (1980).

133. *Williams v. Nix*, 528 F. Supp. 664 (S.D. Iowa 1981).

134. *Williams v. Nix*, 700 F.2d 1164 (8th Cir. 1983).

135. *Id.* at 1175.

136. *Nix v. Williams*, 467 U.S. 431 (1984).

137. *Williams v. Nix*, 751 F.2d 956 (8th Cir. 1985).

138. *Williams v. Nix*, 471 U.S. 1138 (1985).

judges dividing 6-0, the federal judges dividing 8-5, both in the state's favor. Even after the Supreme Court's decision on the inevitable discovery exception, the case required one more proceeding in the Eighth Circuit and yet another consideration by the Supreme Court. Murdered at the age of ten, Pamela Powers, had she lived, would have been twenty-seven when the Supreme Court declined further review of Williams' conviction. The psychological trauma to her parents during this seemingly interminable nightmare cannot fairly be surmised.

A few observations about the *Williams* cases deserve emphasis. First, the constitutional issues that were litigated on habeas corpus had nothing to do with the truth of the charges against Williams; indeed, Williams' goal all along was to eliminate from the jury's consideration evidence that was relevant to whether he had committed the crime.¹³⁹ Second, given the divided votes in the two cases, one must acknowledge that the governing case law would have permitted the Supreme Court to decide both of the cases differently. Indeed, were the Supreme Court itself subject to further review, we can only guess what the ultimate outcome would have been. This, of course, makes only the obvious point that the Supreme Court's "infallibility" rests entirely on it being the last and final court in the chain of review.¹⁴⁰ Third, although the state judges were somewhat more inclined than the federal judges to support the state's arguments in these particular cases, both the state and federal judges disagreed among themselves, and the numerical difference between the two groups was not that great. This is what one should have expected, given empirical findings that petitioners only rarely succeed in obtaining federal habeas corpus relief from their state court convictions.¹⁴¹

Along with the Office of Legal Policy, we appropriately should be perplexed by a system that devotes so much of its human and material resources to the repeated relitigation of contestable issues that have no bearing on actual guilt or innocence. We also should be perplexed by the willingness of the system to invest such substantial resources for so little tangible return. The ex-

139. Even if it could be claimed that Williams somehow might have been innocent, the body's location and condition and Williams' knowledge concerning such matters certainly were relevant facts. To keep a jury ignorant of such facts distorts the factfinding process. For a critical evaluation of the claim that Williams might have been innocent, see Johnson, *The Return of the "Christian Burial Speech" Case*, 32 EMORY L.J. 349 (1983).

140. See *supra* note 67 and accompanying text.

141. REPORT No. 7, *supra* note 123, at 947-49 (reporting that in 1975-1977 only 3.2% of the habeas cases resulted in some form of relief).

isting system of multi-tiered layers of review seems to reflect a society that does not believe in its institutions and that doubts its moral right to punish criminal offenders. At the very least, the existing system reflects an underlying premise that state courts cannot be trusted. Indeed, when it greatly expanded federal habeas corpus review in the 1960s, the Supreme Court undoubtedly held the view that some of our state courts—presumably unlike our federal courts—could not be trusted to assure constitutional justice, especially in cases involving minority defendants. Even assuming the validity of such a pathology then, today the pathology lies in the counter-factual persistence of such distrust. We should be grateful to the Office of Legal Policy for confronting this pathology head-on.

The final Report in the Series addresses the issue of adverse inferences from silence.¹⁴² The Report presents an exhaustive historical and policy critique of the existing law in this area and concludes that *Griffin v. California*,¹⁴³ which bars comment on the defendant's silence at trial, should be overruled. The Report also supports the constitutionality of using the defendant's pre-trial silence as substantive evidence of guilt.

III. CONTEMPLATING THE FUTURE OF CRIMINAL PROCEDURE

The world of constitutional criminal procedure would be quite different were the reforms proposed by the Office of Legal Policy to be adopted. The new world would be one without *Miranda*, *Massiah*, the fourth amendment exclusionary rule, and federal habeas corpus review of state convictions. It would be a world in which federal courts could not employ a "supervisory authority" to adopt rules, authorized by neither statutory law nor constitutional mandate, that intrude upon the executive's authority to enforce the law. It would be a world in which comment upon the defendant's failure to testify would be permissible and in which the rules of evidence would aim primarily at the discovery of truth.

Those who can see only the existing world are bound to decry the Office of Legal Policy proposals as frightening, extreme, and out of the mainstream. Others, however, may see in much of the

142. OFFICE OF LEGAL POLICY, U.S. DEP'T OF JUSTICE, "TRUTH IN CRIMINAL JUSTICE" SERIES, REPORT No. 8, *Adverse Inferences from Silence* (1989) reprinted in 22 U. MICH. J.L. REF. 1005 (1989).

143. 380 U.S. 609 (1965).

proposed new world the good features, but not the bad, of the pre-1960s world, features that too hastily were discarded in the headlong pursuit of a vision that the Constitution did not impose and that the people did not, and still do not, share.¹⁴⁴ For those who agree with the public that the American criminal justice system has gone seriously and fundamentally awry, the proposed reforms will seem not frightening or extreme but an overdue step along the road toward restoration.

The world of constitutional criminal procedure is changing slowly. Repudiating much of the thinking that led to the existing world, the changes are being driven by arguments that share common ground with those expressed in the Office of Legal Policy Reports. The unanswered question is whether tomorrow's changes will mirror the logical ramifications of this new way of thinking. What we cannot know today, as we ponder these Reports, is whether twenty years hence, as a new generation of law students begins to study our endeavors, the mistakes of the 1960s will be little more than "cold history."¹⁴⁵ Whatever our society does in the years ahead, the Office of Legal Policy and the University of Michigan Journal of Law Reform have rendered a significant contribution by entering the debate and by showing us that we do have a rather clear choice.

144. The risk of serious mistake always is great when the Supreme Court bases its decisions not on what the law actually requires but on its idea of progress. Cf. A. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 181 (1970) (emphasis added):

The true secret of the Court's survival is not, certainly, that in the universe of change it has been possessed of more permanent truth than other institutions, but rather that its authority, although asserted in absolute terms, is in practice limited and ambivalent, and with respect to any given enterprise or field of policy, temporary. In this accommodation, the Court endures. But only in this accommodation. *For, by right, the idea of progress is common property.*

145. See *supra* note 2 and accompanying text.