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Improving Constitutional Criminal Procedure

Welsh S. White
University of Pittsburgh

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*Welsh S. White**

THE FAILURE OF THE CRIMINAL PROCEDURE REVOLUTION. By *Craig M. Bradley.* Philadelphia: University of Pennsylvania Press. 1993. Pp. x, 264. $34.95.

For criminal procedure aficionados, the 1960s were an exciting period. In almost every year of that decade, the Supreme Court handed down a landmark criminal procedure decision establishing new rights for criminal suspects. In 1961, for example, *Mapp v. Ohio*[1] held that the Fourth Amendment's exclusionary rule applies in state as well as federal criminal cases. Two years later, *Gideon v. Wainwright*[2] held that indigent criminal defendants are entitled to representation by counsel at trial. In 1966, *Miranda v. Arizona*[3] reshaped the law of police interrogation,[4] and a trilogy of cases decided in 1967[5] sought to improve the fairness of police identification procedures.[6] As Craig Bradley[7] explains in his engaging and provocative book, *The Failure of the Criminal Procedure Revolution,* by the time Chief Justice Warren left the Court in 1969, criminal procedure had entered a new era. In place of the old regime, under which only the Court's "shock the conscience" or "fundamental fairness" test checked the states' freedom to regulate criminal pro-

* Professor of Law, University of Pittsburgh. B.A. 1962, Harvard; L.L.B. 1965, University of Pennsylvania. — Ed. I would like to thank Albert Alschuler, Randy Lee, Jules Lobel, Anne Schiff, and my wife Linda who commented on earlier drafts of this review and Melanie Bradish who assisted in preparing the footnotes.

1. 367 U.S. 643 (1961).

2. 372 U.S. 335 (1963).

3. 384 U.S. 436 (1966).

4. In *Miranda,* the Court held that "the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." 384 U.S. at 444.

5. Stovall v. Denno, 388 U.S. 293 (1967); Gilbert v. California, 388 U.S. 263 (1967); United States v. Wade, 388 U.S. 218 (1967).

6. *Wade,* 388 U.S. at 237 (establishing that a criminal defendant has the right to have counsel present at a pretrial lineup); *Gilbert,* 388 U.S. at 272 (same); *Stovall,* 388 U.S. at 301-302 (establishing that pretrial identifications that are unnecessarily suggestive and conducive to irreparable mistaken identifications must be excluded as violations of due process).

7. Craig Bradley, who was a law clerk to Chief Justice Rehnquist, is presently a professor of law at the University of Indiana.

cedure,[8] the Supreme Court had established what Judge Henry Friendly critically characterized as a constitutional code of criminal procedure.[9]

Bradley provides an interesting and generally accurate account of the criminal procedure changes effected by the Warren Court. In evaluating the criminal procedure revolution, he observes that the Warren Court decisions resulted in salutary changes that subsequent Supreme Court decisions have not altered. Not only are criminal defendants afforded substantially greater protections at trial,[10] but also "police respect for constitutional rights has increased considerably" (p. 37). In support of the latter statement, Bradley observes with approval that police receive training in criminal procedure, prosecutors place pressure on the police to follow the law, and "[t]he 'third degree' seems to have largely disappeared from the American scene" (p. 37).

Nevertheless, Bradley claims that "the criminal procedure revolution has failed because it does not provide adequate guidance to police as to what to do" (pp. 37-38). Using interesting hypotheticals devised by himself and Professor Albert Alschuler (pp. 52-54), as well as statistical data (pp. 46-47), Bradley maintains that the Court's decisions on search and seizure and on confessions are virtually incomprehensible.[11] As a result, the Court's criminal procedure rules provide inadequate guidance to the police and result in "disturbingly high numbers of cases lost due to evidentiary exclusion" (p. 44).

In the remainder of his book, Bradley offers an explanation for this unfortunate state of affairs and several suggestions for correcting it. In a chapter that is particularly interesting because it draws from the firsthand knowledge he gained as a Supreme Court clerk,[12] Bradley asserts that the lack of clarity in our constitutional

8. *See, e.g.*, Rochin v. California, 342 U.S. 165, 173 (1952) ("Due process of law . . . precludes defining, and thereby confining . . . standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend 'a sense of justice.' ").

9. HENRY J. FRIENDLY, BENCHMARKS 262-63 (1967).

10. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (holding that criminal defendants have a right to trial by an impartial jury); Klopfer v. North Carolina, 386 U.S. 213 (1967) (holding that criminal defendants have a constitutional right to a speedy trial); Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that indigent criminal defendants have a constitutional right to the assistance of appointed counsel).

11. Bradley maintains that the Supreme Court has not established a comprehensive body of confession or search law because of its case-specific system. As a result of this system, "criminal procedure law will only become more and more murky and difficult as police and courts try to wade through an ever-growing body of complex precedent looking in vain for ever-more-elusive answers to everyday questions." P. 55.

12. Pp. 62-94. Bradley explains the evolution of Supreme Court decisions. He suggests, for example, that certain parts of the majority opinion in Michigan v. Mosley, 423 U.S. 96 (1975), may have been included so that Justice Stewart, who wrote that opinion, would be able to persuade as many Justices as possible to join the majority opinion, rather than simply concurring in the result. Pp. 65-66.

criminal procedure rules cannot be attributed to the ideological makeup of either the Warren or the Burger-Rehnquist Courts, but is instead an inevitable byproduct of the way the Court operates as an institution (p. 62).

In seeking a corrective device to address this problem, Bradley examines the experience of six other countries.[13] While he does not endorse the specific approaches of any of these countries, Bradley suggests that their experiences provide at least two valuable lessons. First, a discretionary exclusionary rule may be preferable to a mandatory one.[14] Second, a legislative body can more effectively provide criminal procedure rules than a court (p. 130). Bradley then presents his primary proposal for improving constitutional rules of criminal procedure: Congress should appoint a special commission to codify rules of criminal procedure. The task of this commission would be largely limited "to codifying and clarifying current Supreme Court law, and to making the rules more comprehensive, rather than substantially changing the law's ideological content" (p. 145).

Anyone who is interested in either criminal procedure or the Supreme Court should read this book. Bradley is a fluent writer who makes the issues he discusses vivid and interesting. Moreover, his analysis is never superficial or ideological. He has formulated a thoughtful proposal and provided a sophisticated analysis of the benefits and detriments of its implementation. Even those who disagree with Bradley's principal positions will be impressed by his insights and will gain a deeper understanding of our criminal justice system from his book.

I am one of those who disagree with Bradley's principal contentions. In this review, I will discuss several of his positions and my objections. Part I addresses Bradley's premise that the lack of clarity in the Court's criminal procedure decisions stems from the Court's limitations as an institution. While agreeing with Bradley that some of the Court's criminal procedure rules are hopelessly muddled, this Part challenges Bradley's claim that the Supreme Court could not have done any better. It asserts that the rules' lack of clarity stems more from the ideological differences between the Warren Court and its successors than from any inherent limitations

13. Bradley examines criminal procedure practices in England, France, Germany, Italy, Canada, and Australia. P. 95.

14. P. 129. Bradley is somewhat ambivalent regarding his preference for a discretionary exclusionary rule. He observes that, unlike a mandatory rule, a nonmandatory exclusionary rule will, in most cases, result in nonexclusion. Additionally, he states that if he were drafting legislation, he might not include a discretionary exclusionary rule because it is such a major departure from current law. Nevertheless, he intimates that a discretionary exclusionary rule would be preferable to our present exclusionary rule (p. 56) and states that "the uniform practice of other countries in this regard cannot be ignored" (p. 132).

of the Court. Part II addresses Bradley's suggestion that a discretionary exclusionary rule may be preferable to a mandatory one. While not disputing his claim that this approach works well in other countries, this Part maintains that it would not be efficacious in this country. Part III addresses Bradley's proposal that Congress empower a federal commission to enact a code of constitutional criminal procedure. For both theoretical and practical political reasons, this Part concludes that the proposed commission would not improve our system of justice. Finally, Part IV briefly addresses the question whether the Warren Court's criminal procedure revolution failed.

I. Clarity in Criminal Procedure

What makes the rules of criminal procedure complicated? In many cases, the police precipitate the uncertainty by pushing for exceptions to a rule that seems clear. If the Court responds by establishing an exception, the police will interpret that exception, "apply [it] themselves and . . . push [it] to the limit."[15] If in response the Court establishes further exceptions or broadens the existing one, the law is likely to become unclear.

Miranda,[16] the Warren Court's landmark decision on confessions, may not be a model of clarity in every respect.[17] But the Court did seem clear in identifying the content of the warnings the police are required to give criminal suspects before subjecting them to custodial interrogation.[18] In response to *Miranda,* many police departments issued cards imprinted with the four specified warnings so that the police could read them to suspects.[19] Consistent with *Miranda,* one of the warnings invariably told suspects that they had the right to have an attorney present during police interrogation even if they could not afford to hire one.

Police in Hammond, Indiana, added a phrase to this standard warning, however. After stating that the suspect had the right to the advice and presence of a lawyer even if he could not afford to pay for one, the warning continued, "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court."[20] This warning is arguably inconsistent with *Miranda*'s requirement that the police inform the suspect that he will

15. Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting).

16. 384 U.S. 436 (1966).

17. *See* 384 U.S. at 505 (Harlan, J., dissenting) ("[F]ine points of [*Miranda*'s] scheme are far less clear than the Court admits.").

18. *Miranda,* 384 U.S. at 467-73.

19. *See* United States v. Clark, 289 F. Supp. 610, 613 n.5 (E.D. Pa. 1968).

20. Duckworth v. Eagan, 492 U.S. 195, 198 (1989) (quoting Eagan v. Duckworth, 843 F.2d 1554, 1555-56 (7th Cir. 1988)).

be provided with an attorney before any interrogation.[21] At best, it is confusing.[22] Nevertheless, in *Duckworth v. Eagan,*[23] the Court, in a 5-4 decision, held that the warning did not violate *Miranda.*

Professor Yale Kamisar has argued that because of the contradictory message contained in the Hammond, Indiana, warnings, *Duckworth* is inconsistent with *Miranda.*[24] I agree. My point, however, is not that *Duckworth* is wrong but that it creates an uncertain exception to a rule that prior to *Duckworth* appeared clear. Moreover, after *Duckworth,* what further exceptions are the police likely to seek? As Kamisar says, "Many new versions of the *Miranda* warnings are likely to emerge (and some once-disapproved formulations are likely to resurface)."[25] *Duckworth* sends the message to the police that the content of the required *Miranda* warnings is not nearly so inflexible as they may have thought. As a result, an area of the law that once seemed clear has become unclear.

Many other post-Warren Court decisions have also obscured the meaning of *Miranda.*[26] To take another example, *Miranda* provided a seemingly clear rule governing a warned suspect's request for counsel: "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present."[27] In *Edwards v. Arizona,*[28] the Burger Court reaffirmed this rule but established an exception to it: once the suspect asserted his right to an attorney, the police would have to cease the interrogation until an attorney was made available to him "unless the accused himself ini-

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21. Yale Kamisar, Duckworth v. Eagan: *A Little-Noticed* Miranda *Case That May Cause Much Mischief,* 25 CRIM. L. BULL. 550, 552-53 (1989).

22. *See* United States *ex rel.* Williams v. Twomey, 467 F.2d 1248, 1250 (7th Cir. 1972) (rejecting a virtually identical warning on the grounds that it was "misleading," "confusing," and "contradictory").

23. 492 U.S. 195 (1989).

24. Kamisar, *supra* note 21, at 552-53. In *Duckworth,* the warnings gave suspects a contradictory message because they told suspects that they had the right to the advice and the presence of a lawyer but that the police had no way of providing them with a lawyer. Thus, the warning is inconsistent with *Miranda* because *Miranda* held that the police must inform suspects that they are entitled to a lawyer *prior* to any interrogation, even if they cannot afford one.

25. *Id.* at 561. For example, a past formulation of the second *Miranda* warning, "anything you say can and will [or may] be used against you," which has been rejected but may resurface, is a warning advising suspects that anything they say can be used "for or against" them. As Kamisar observes, the Pennsylvania Supreme Court invalidated this warning in Commonwealth v. Singleton, 266 A.2d 753 (Pa. 1970). *See* Kamisar, *supra* note 21, at 561.

26. *See* pp. 53-54 (quoting Albert Alschuler, *Failed Pragmatism: Reflections on the Burger Court,* 100 HARV. L. REV. 1436, 1442-43 (1987) (describing a hypothetical "police training manual" — offering advice that will allow officers to avoid the effect of *Miranda* — that provides excellent examples of exceptions to *Miranda* that the post-Warren Court established and of the effect that those exceptions may have on police interrogation practices)).

27. 384 U.S. at 474.

28. 451 U.S. 477 (1981).

tiate[d] further communications, exchanges, or conversations with the police."[29]

On its face, the *Edwards* "initiation" exception to *Miranda* may not have seemed very significant. Taken in context, *Edwards* seemed to suggest that, once the accused invoked his right to an attorney, the police could not attempt further interrogation unless the accused on his own initiative indicated to the police that he had changed his mind and would prefer to discuss the criminal charges with the police without the presence of counsel. In *Oregon v. Bradshaw,*[30] however, the Court interpreted the "initiated further communications" exception much more broadly.

In *Bradshaw,* the police gave the defendant his *Miranda* warnings and the defendant asserted his right to an attorney. The police then terminated the interrogation. A few minutes later, the defendant said, "Well, what is going to happen to me now?" After rewarning the defendant of his *Miranda* rights, the police interrogated the defendant and obtained a confession.[31] The Court split 4-4 as to whether the defendant's question, "Well, what is going to happen to me now?" constituted "initiating" communications within the meaning of *Edwards.* Speaking for four Justices, Justice Rehnquist concluded that it did meet the *Edwards* standard because "[a]lthough ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation."[32] A fifth Justice, Powell, declined to accept *Edwards'*s test but agreed with the Rehnquist plurality that the lower court properly admitted the defendant's confession.[33]

After *Edwards* and *Bradshaw,* it will admittedly be difficult to determine when courts will permit the police to resume the interrogation of a suspect who has invoked his right to an attorney. If, after requesting an attorney, the suspect makes any substantive statement to the police,[34] the police may have legitimate doubts as to whether the suspect's statement constitutes an "initiation" of communications that will permit them to resume their efforts at in-

29. 451 U.S. at 485.

30. 462 U.S. 1039 (1983).

31. 462 U.S. at 1042 (quoting App. at 16).

32. 462 U.S. at 1045-46.

33. Justice Powell agreed with the Rehnquist plurality that the lower court properly admitted the confession because the facts and circumstances established a valid waiver. 462 U.S. at 1050 (Powell, J., concurring).

34. Justice Rehnquist's plurality opinion observed that "some inquiries, such as a request for a drink of water or a request to use a telephone . . . are so routine that they cannot be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation." 462 U.S. at 1045. Beyond that, however, the Court provided no guidelines as to when a suspect's statement to the police would constitute "initiation."

terrogation. But are the police to be pitied because of this uncertainty in the law? If the police had simply complied with *Miranda*'s rule that interrogation must cease once the suspect requests an attorney, no uncertainty would exist. Successful police efforts to create and then exploit an exception to that rule caused the uncertainty.

If the Court had resisted police efforts to create exceptions to *Miranda, Miranda*'s mandate would have been clearer. As Bradley points out (pp. 72-73), however, the post-Warren Court did not agree with *Miranda* and, yet, was reluctant to overrule it. Professor Geoffrey R. Stone somewhat euphemistically explained that this conflict "exert[ed] considerable strain on the [C]ourt in its efforts to deal forthrightly with the issues posed by *[Miranda].*"[35] In fact, as Bradley's examples (pp. 51-54), as well as those discussed above, demonstrate, the post-Warren Court has frequently distorted *Miranda* or distinguished the case on disingenuous grounds. As a result, *Miranda*'s clarity, which could have been one of its strengths,[36] has been seriously compromised.

The clarity of the Warren Court's search and seizure decisions has been similarly eroded. In *Chimel v. California,*[37] one of the Warren Court's last cases, the Court overruled a nineteen-year-old precedent[38] and established a new rule governing an officer's authority to search incident to arrest. That rule, which limited an arresting officer's power to search to the area within the immediate control of the arrestee,[39] seemed to be based on the principle that the scope of an officer's right to search without a warrant should be limited by the exigencies justifying such a search. An arresting officer can search the arrestee's person and the area within his reach without a warrant because such a search is necessary to prevent the arrestee from using a weapon against the officer or from immediately destroying evidence. Because no further warrantless search is justified, no further search is permitted.

Although *Chimel* only decided the scope of an officer's power to make a warrantless search incident to an arrest, the decision's rationale could be applied to govern other warrantless search situations. In general, the police should not be permitted to make a warrantless search unless the search is justified by a special govern-

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

36. *See, e.g.,* Fare v. Michael C., 442 U.S. 707, 718 (1979) ("*Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation and of informing courts under what circumstances statements obtained during such interrogation are not admissible.").

37. 395 U.S. 752 (1969).

38. United States v. Rabinowitz, 339 U.S. 56 (1950).

39. 395 U.S. at 763.

mental interest. As Bradley recognizes,[40] this rule would be clear even though it would not dictate a clear result in every case. The police would know that before making a search, they are required to obtain a warrant unless they can show that taking the time to obtain a warrant would lead to some special problem such as danger to themselves or the loss of evidence.

If the post-Warren Court had applied this principle, many of the anomalies in our law of search and seizure would not have arisen. Because there would have been no reason to distinguish between container searches[41] and auto searches,[42] for example, the Court would not have had to resolve puzzling issues relating to whether the search of a container found in an automobile should be treated as a container search requiring a warrant[43] or as a part of an auto search not requiring a warrant.[44] In that situation, as in others, the police would have to obtain a search warrant unless they could point to some exigent circumstances. As with confessions, however, the post-Warren Court was torn between adhering to precedent and interpreting the Fourth Amendment in a way that would serve the interests of law enforcement. As a result, the Court's Fourth Amendment jurisprudence has become the "mass of contradictions and obscurities"[45] that Bradley deplores.

Bradley is correct in pointing out that the Court is institutionally incapable of rendering a coherent and comprehensive set of rules governing police practices.[46] Nevertheless, the incredible confusion caused by the present constitutional rules governing police practices can be attributed more to the ideological tension between the Warren Court and its successors than to any inherent limitations in the Court's institutional structure. This point, which is not recognized by Bradley, bears on the theoretical viability of his principal proposal.[47]

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40. In a chapter entitled "Alternative Models of Criminal Procedure," Bradley characterizes this approach as "Model I" and asserts that one of its benefits is that it would generally lead to clear results. *See* pp. 168-70.

41. *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 11 (1977) (holding that absent exigent circumstances, the Fourth Amendment requires a judicial warrant to search a container).

42. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42 (1970) (establishing that warrantless searches of automobiles are generally permissible).

43. *See, e.g.*, Arkansas v. Sanders, 442 U.S. 753, 762-65 (1979).

44. *See* California v. Acevedo, 500 U.S. 565, 570-73 (1991); United States v. Ross, 456 U.S. 798, 799 (1982).

45. P. 49 (quoting Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1468 (1985)).

46. For a discussion of the reasons for the Court's inability to perform this task, see *infra* text accompanying notes 84-86.

47. *See infra* Part III.

II. Discretionary Exclusion

Bradley asserts that there are two kinds of unreasonable searches: searches that are flagrantly unreasonable because the police conduct "is offensive" or "obviously violates a clear rule," and searches that are unreasonable because they "break rules the Court has deemed important" (p. 56). He observes that in the six other countries he has studied, evidence obtained from the second type of unreasonable search is not subject to mandatory exclusion. Indeed, he concludes that the United States "is unique in having a (theoretically) mandatory rule for searches that are 'unreasonable' only because they break the (often confusing) rules" (p. 48). Drawing from this experience, Bradley proposes that a new American code adopt a discretionary exclusionary rule (p. 56).

At first blush, Bradley's proposal seems attractive. If a discretionary exclusionary rule has worked in other countries, why not try it here? Moreover, as Bradley observes (p. 131), providing a court with this option might lead it to be more forthright in deciding whether the police violated a constitutional norm. Instead of straining the law to avoid the drastic remedy of exclusion, a court would be able to hold that the police violated the constitution — thus providing guidance in future cases — and, yet, admit the evidence obtained.

There is, however, some danger in assuming that remedies effective in other countries will also work in this country. As Professor Phillip Johnson has pointed out, in seeking to improve our system of justice, our unique set of attitudes and traditions dictates that "[w]e can no more import our solutions than we can export our problems."[48] Thus, before we decide whether to follow other countries in adopting a discretionary exclusionary rule, some of the pertinent differences between this country and other nations must be examined.

One obvious difference is that, unlike other countries, the United States has a constitutional provision that prohibits unreasonable searches and seizures. In this country, therefore, the Court has a special obligation. In addition to defining the content of the constitutional provision — that is, determining what is a reasonable search or seizure — the Court must provide some means of enforcing the constitutional prohibition. Otherwise, the constitutional provision will be reduced to a "form of words."[49]

In theory, of course, there are many ways of enforcing the prohibition on unreasonable searches and seizures. For example, courts could allow tort remedies for victims of unreasonable

48. Phillip E. Johnson, *Importing Justice,* 87 Yale L.J. 406, 414 (1977) (book review).

49. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

searches, preside over criminal prosecutions of police who conduct unreasonable searches, or even mandate that police departments issue guidelines to minimize such searches. In practice, however, the only remedy that has ever made the Fourth Amendment meaningful to the police has been the exclusionary rule.[50]

Before *Mapp v. Ohio*,[51] police in jurisdictions that did not have the exclusionary rule "were not aware that constitutional standards for search and seizure had been applied to them."[52] Indeed, after the *Mapp* decision, the New York City Police Commissioner said that the Court's adoption of the exclusionary rule had had a "traumatic effect" on his department, requiring a wholesale reevaluation of procedures.[53] Of course, *Mapp* had imposed no new Fourth Amendment restrictions on the police. From the police perspective, however, there had been no Fourth Amendment prohibition until the Court adopted the exclusionary rule.

The exclusionary rule has now become a part of our culture. Professor Milton A. Loewenthal's comprehensive study of police attitudes[54] concludes that the police "could neither understand nor respect a Court which purported to impose constitutional standards on the police without excluding evidence obtained in violation of those standards."[55] Just as repealing the exclusionary rule would signal the police that the Fourth Amendment standards are not to be taken seriously,[56] making the exclusionary rule discretionary would signal the police that in those situations in which the Court will not exercise its discretion to exclude evidence, the Fourth Amendment no longer applies.

Bradley observes that his experiences in Germany and Australia led him to believe that "a 'discretionary' exclusionary rule was no exclusionary rule — a remedy that was paid lip service by the courts but was not seriously enforced, and hence had no substantial impact on police behavior" (p. 130). His study of other countries, however, especially Great Britain and Canada, convinced him that a discretionary exclusionary rule could be effective in this country (p. 130).

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50. *See* Yale Kamisar, *"Comparative Responsibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 21-23 (1987).

51. 367 U.S. 643 (1961).

52. Milton A. Loewenthal, *Evaluating the Exclusionary Rule in Search and Seizure*, 49 UMKC L. REV. 24, 29 (1980).

53. Yale Kamisar, *The exclusionary rule in historical perspective: the struggle to make the Fourth Amendment more than "an empty blessing,"* 62 JUDICATURE 337, 347 (1979).

54. Loewenthal, *supra* note 52.

55. *Id.* at 29.

56. *Id.* at 30; *see also* Potter Stewart, *The Road to* Mapp v. Ohio *and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search and Seizure Cases*, 83 COLUM. L. REV. 1365, 1386 (1983).

Is there reason to believe that our courts' administration of a discretionary exclusionary rule would be similar to the administration of such a rule in England and Canada? In England, it is part of the political culture for the legislature to protect minority rights. Indeed, it has been observed that "to transgress the rights of the individual or the minority is bad politics."[57] That level of concern for preventing official lawlessness has never been present in this country.

Changing the exclusionary rule from mandatory to discretionary would have a profound effect on judicial behavior. If the exclusionary rule is mandatory, the conscientious judge will be able to say he had no choice: the law required him to exclude the evidence. If the exclusionary rule is discretionary, however, the judge cannot make this statement. He may properly exercise his discretion to admit the evidence. Given the political system within which most judges operate,[58] a judge will be disinclined to exercise his discretion to exclude evidence. The public, which is concerned with effective law enforcement,[59] will not be impressed with the claim that the decision to exclude evidence was appropriate to safeguard a criminal's constitutional rights. Moreover, the judge will not even be able to defend his discretionary decision to exclude evidence by asserting that federal law mandated it. From the public's point of view, the judge who exercises his discretion to exclude evidence is *choosing* to make it more difficult to convict an accused criminal. Because a judge will not want to be perceived as impeding effective law enforcement, he will generally exercise his discretion to admit the evidence. From the police perspective, this means that the Fourth Amendment standards will be lowered.[60]

If the effect of a discretionary exclusionary rule would be to lower the constitutional standards, then we need to consider whether such modification would be wise. By distinguishing between two types of unreasonable police conduct,[61] Bradley implies that some police conduct now subject to the exclusionary rule does not really need to be deterred. It is interesting to observe, however, that the only examples Bradley provides of searches that are "un-

57. ROBERT H. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 82 (1955).

58. In this country, most state court judges are elected and therefore particularly susceptible to political pressure. *See* Julian N. Eule, *Judicial Review of Direct Democracy*, 99 YALE L.J. 1503, App. B (1994).

59. In a national survey, "researchers found that a majority of Americans favor giving police broader powers to stop and search suspects — even without probable cause — and would be willing to loosen restrictions on the use of improperly obtained evidence in trials." Bob Dart, *Safety beats freedom in public survey: Americans ready to give up rights to help cut crime*, ATLANTA CONST., Sept. 11, 1994, at A7.

60. *See supra* text accompanying note 56.

61. *See supra* part II.

reasonable" but not offensive involve search warrant cases that, under current law, would not be subject to the exclusionary rule.[62] In fact, the post-Warren Court has already lowered Fourth Amendment standards to the point where the exclusionary rule is not likely to apply unless the police conduct is either quite egregious or a clear violation of an existing rule.[63] Thus, adopting a discretionary exclusionary rule would be ill-advised because it would further reduce already low constitutional safeguards.

III. The Proposed Federal Commission

Bradley's proposed federal commission would enact a code of constitutional criminal procedure. According to Bradley, one of the benefits of this enterprise is that it would add clarity to the law of criminal procedure (p. 145). From a theoretical perspective, however, it is difficult to see how a commission could add clarity to the law when its task would essentially be to "codify[ ] . . . current Supreme Court law . . . [without] substantially changing the law's ideological content" (p. 145). As Bradley emphasizes, the Court's current criminal procedure law is hopelessly muddled. Moreover, as I indicated in Part I, much of the current law's lack of clarity stems from the ideological tension between the Warren Court and its successors. Clarifying the law without changing its ideological content would be difficult, if not impossible.

An example that Bradley discusses illustrates the nature of the problem. In *New York v. Belton*,[64] the Court established the rule that an officer who makes "a lawful custodial arrest of the occupant of an automobile . . . may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile,"[65] including any containers found in the passenger area.[66] The Court justified this rule as an extension of *Chimel*, and it specifically de-

62. The only examples Bradley cites are "the searches in *Leon* and *Spinelli*." P. 56. Spinelli v. United States, 393 U.S. 410 (1969), holds that the search warrant at issue was invalid because of the insufficiency of the affidavit of probable cause. In Illinois v. Gates, 462 U.S. 213 (1983), the Court overruled *Spinelli* and established a much more lenient standard of probable cause. United States v. Leon, 468 U.S. 897 (1984), also involves the validity of a search warrant. Under the more lenient *Gates* standard, the affidavit of probable cause in *Leon* would have almost certainly been sufficient. The Court did not consider that issue, however, but instead decided that evidence obtained pursuant to the warrant in *Leon* would be admissible because the officers executing the warrant had an objectively reasonable belief that the warrant was valid.

63. For a discussion of some of the ways in which the Court has lowered Fourth Amendment standards, see Kamisar, *supra* note 50, at 39-42.

64. 453 U.S. 454 (1981).

65. 453 U.S. at 460.

66. 453 U.S. at 460-61 (holding that the police may examine the contents of any containers, both opened and closed, found within the passenger compartment of a car, including glove compartments).

nied that its holding disturbed that precedent in any way.[67] Under *Chimel,* the officer's power to search incident to arrest extends to the area within the physical control of the arrestee.[68] The Court in *Belton* concluded that when the police arrest the occupant of an automobile, the passenger compartment of the automobile is "generally, even if not inevitably, within" the area of the search authorized by *Chimel.*[69] In order to provide clear guidance to the police, the Court created a bright-line rule that permits searches of the passenger compartment.[70]

As Justice Brennan observed in dissent,[71] however, *Belton* cannot be viewed as consistent with *Chimel.* When, as in *Belton* itself,[72] the occupant of an automobile is arrested outside of the car, it would be implausible to claim that the interior of the vehicle is within the arrestee's physical control. Moreover, there is even less reason to believe that containers within the interior of the automobile — including locked luggage — will be within the arrestee's control. Thus, *Belton* is an example of the post-Warren Court straining precedent to reach a result favorable to law enforcement.

Belton seems to provide a clear rule. But, as Justice Brennan pointed out,[73] *Belton* does not resolve some issues related to an officer's authority to search an automobile incident to an arrest. For example, once the occupant has been arrested, how long may the police wait before conducting a warrantless search of his auto? Will *Belton* apply even if the police established probable cause to arrest the occupant only after he left the vehicle? If the officer has authority to search the passenger compartment of the automobile, may the search include the interior of door panels or the area under the floorboards?[74]

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67. 453 U.S. at 460 n.3 ("Our holding today does no more than determine the meaning of *Chimel*'s principles in this particular . . . context. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.").

68. *See supra* text accompanying note 39.

69. 453 U.S. at 460.

70. 453 U.S. at 460.

71. 453 U.S. at 463 (Brennan, J., dissenting).

72. The police officer in *Belton* directed the arrestee to get out of the car, placed him on an area of the New York Thruway, arrested and searched him, and then proceeded to search the automobile. 453 U.S. at 456.

73. 453 U.S. at 470 (Brennan, J., dissenting).

74. 453 U.S. at 469-70 (Brennan, J., dissenting). Moreover, as Alschuler has said, *Belton* may have implications for other search-incident-to-arrest situations. The government might argue, for example:

> Just as the Court permitted an officer to search a jacket in an automobile that had been near an arrestee at the time of his arrest despite the fact that the arrestee had been removed from the area, an officer should be allowed to search a jacket in a room that an arrestee no longer occupies so long as the jacket had been within the arrestee's "grabbing area" at the time of arrest.

Brennan observes that a police officer will have difficulty answering these questions because the Court "abandons the justifications underlying *Chimel*"[75] without providing any new rationale. Will a commission be in any better position to answer these questions than the police? What rationale should guide their decisionmaking? If the commission focuses on the majority's statement in *Belton* — that they are adhering to *Chimel* and simply establishing a bright-line rule that will be easy to administer — then the questions posed above will be answered adversely to the police[76] because in these situations the police cannot plausibly claim that the area they searched was within the arrestee's control. On the other hand, if the commission rejects the *Chimel* rationale on the ground that it does not justify the *Belton* rule,[77] what new rationale should the commission apply?

In explaining how the commission might operate, Bradley answers some of the questions that *Belton* fails to resolve (p. 157). He states, for example, that the search incident to the arrest need not be contemporaneous with the arrest[78] and that the police will not be permitted to search areas inaccessible to passengers, such as the "the area under the floorboards, and the area behind door panels" (p. 157). While these answers may be helpful to the police, they seem arbitrary because they do not stem from any consistent view of the Fourth Amendment. Based on *Belton,* the opposite answers to these questions would be just as reasonable. Thus, if Bradley's proposed commission follows his mandate, it will be unable to produce guidelines that are meaningful in the sense that they reflect a consistent view of the relevant constitutional provisions.

Bradley might respond that, because the police's need for guidance is so great, answers that do not reflect a consistent view of the relevant constitutional provisions are better than no answers at all. I do not dispute that the police need guidance. My point is that the commission could not be ideologically neutral. In many instances, the members would have to draw their answers from their own values, rather than from those reflected in the Court's criminal procedure decisions. Indeed, it appears Bradley drew his answers to the issues posed by the *Belton* case from values that were not

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Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment,* 45 U. PITT. L. REV. 227, 283-84 (1984).

75. 453 U.S. at 470 (Brennan, J., dissenting).

76. In these situations it cannot be said that the area to be searched is "generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].' " 453 U.S. at 460 (quoting Chimel v. California, 395 U.S. 752, 763 (1969) (alteration in original)).

77. *See supra* text accompanying notes 71-73.

78. P. 157. Bradley does not, however, specify how long an officer who arrests the occupant of an automobile may wait before conducting a warrantless search of the vehicle.

articulated by *Chimel, Belton,* or any other applicable Fourth Amendment decision.[79]

Of course, Bradley contemplates that the commission he proposes would have wide powers and would also engage in some law reform. He suggests, for example, that the commission should seek to remedy one of the criminal justice system's most pernicious problems, mistaken identifications stemming from suggestive identification procedures,[80] by providing that lineups and other identifications "be photographed and tape recorded (or videotaped) and that these records be produced in court" (p. 84). A commission that would address the most important problems in our system of justice and that would be inclined toward adopting solutions that provide greater fairness to criminal suspects would indeed make a substantial contribution. Would the commission proposed by Bradley be so inclined?

Who would be appointed to the commission? Although Bradley would like to minimize Congress's role in the work of the commission,[81] Congress would appoint the members of the commission. Given the current political climate, the commission's membership would certainly reflect the conservative constitutional view of the present congressional majority. A commission so composed would be more conservative than the current Supreme Court. Would such a commission be likely to provide new protections for criminal suspects?

Identification procedures provide an apt example. If the commission addressed the question of the admissibility of identification evidence, would it be inclined to reform police practices at lineups and other identifications as suggested by Bradley? In 1968, when Congress was much less conservative than it is now, it passed a statute dealing with identification evidence. But, instead of providing

79. Bradley states, for example, that he would extend the search permitted by *Belton* because "[g]iven the privacy intrusion already occasioned by the arrest and search incident thereto, the clarity achieved by extending *Belton* . . . outweighs any further intrusion on privacy." P. 157. Although individual Justices have endorsed the view that a greater infringement of privacy, such as an arrest, justifies a lesser infringement, such as an extended search incident to arrest, *Chimel* flatly rejects this rationale, *see* 395 U.S. at 766 n.12, and the Court has never adopted it.

80. *See* EDWIN M. BORCHARD, CONVICTING THE INNOCENT (1932) (presenting numerous cases in which completely innocent people were convicted by reason of misidentification); JEROME FRANK & BARBARA FRANK, NOT GUILTY (De Capo Press 1971) (1957) (demonstrating, through examples relating to the fallibility of witnesses, the capacity of the legal system to produce injustices); ELIZABETH F. LOFTUS, & KATHERINE KETCHAM, WITNESS FOR THE DEFENSE: THE ACCUSED, THE EYEWITNESS, AND THE EXPERT WHO PUTS MEMORY ON TRIAL (1991) (recounting cases in which defendants convicted on the basis of eyewitness testimony were later shown to be not guilty).

81. P. 145. Bradley proposes that Congress appoint a special bipartisan commission or expand the power of the committee that drafts the Federal Rules of Criminal Procedure and that the legislature should retain only the authority to approve or disapprove the final product.

procedures for the police to follow, the 1968 Crime Control and Safe Street Act[82] simply provided that the Court's identification decisions should be restricted so that eyewitness testimony would never be excluded from federal criminal trials.[83] Given today's political realities, Bradley's proposed commission would be much more likely to adopt this kind of approach than it would be to adopt procedures that provide protections for those accused of serious crimes.

Delegating constitutional rulemaking power to a federal commission raises serious constitutional issues that Bradley addresses (pp. 150-54). Assuming that Congress could give the commission power to act as Bradley proposes, in my judgment it would not be sound policy for Congress to establish this commission. If Supreme Court doctrine in fact constrained the commission, then the commission would encounter difficulty in constructing a coherent body of criminal procedure rules. Moreover, to the extent that the commission would be free to address problems in the administration of justice, political realities dictate that the commission would be unlikely to address these problems in a manner that would enhance the fairness of our system of justice.

IV. The Failed Revolution?

In assessing the Warren Court's criminal procedure decisions, Bradley focuses almost entirely on its decisions regulating police practices.[84] He concludes that the criminal procedure revolution failed because it did not "provide adequate guidance to police as to what to do" (p. 38). I have argued that the lack of clarity in the current constitutional rules governing search and seizure and confessions stems at least in part from the ideological tension between the Warren Court and its successors.[85] Nevertheless, if the criterion for a successful criminal procedure revolution is whether the

82. Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 211 (codified at 18 U.S.C. § 3502 (1988)).

83. Title II of the Omnibus Crime Control and Safe Streets Act of 1968 reads:

> The testimony of a witness that he saw the accused commit or participate in the commission of the crime for which the accused is being tried shall be admissible in evidence in a criminal prosecution in any trial court ordained and established under article III of the Constitution of the United States.

18 U.S.C. § 3502. Inferior federal courts have ignored the legislation, feeling bound by the Supreme Court's reading of the Constitution. *See* Carl McGowan, *Constitutional Interpretation and Criminal Identification*, 12 Wm. & Mary L. Rev. 235, 249-50 (1970).

84. Although Bradley explains that the Warren Court applied nearly all of the provisions of the Bill of Rights to the states (p. 18), he does not discuss the impact of decisions such as Gideon v. Wainwright, 372 U.S. 335 (1963), Washington v. Texas, 388 U.S. 14 (1967), and Duncan v. Louisiana, 391 U.S. 145 (1968), which provided new constitutional protections to criminal defendants at trial.

85. *See supra* Part I.

Court's decisions provide "adequate guidance" to the police, then no Court could succeed.

As Professor Anthony Amsterdam has explained, when the Court reviews police conduct in criminal procedure cases,

> [i]ts view of the questioned conduct is limited to the appearance of the conduct on a particular trial record or records — records which may not even isolate or focus precisely upon that conduct. The Court cannot know whether the conduct before it is typical or atypical, unconnected or connected with a set of other practices or — if there is some connection — what is the comprehensive shape of the set of practices involved, what are their relations, their justifications, their consequences.[86]

Operating within this vacuum, the Court is deprived of the ability "to develop any organized regulation of . . . police conduct."[87]

Does this mean that the Warren Court's attempt to regulate police conduct was misguided? Echoing the views of more conservative commentators,[88] Bradley suggests that the Warren Court's criminal procedure decisions caused "Congress and state legislatures [to] largely abandon[ ] the field" (p. 144). But this is nonsense. Prior to the Warren Court criminal procedure decisions, Congress and the state legislatures had already completely abandoned the field. Indeed, "a vast abnegation of responsibility . . . forced the Court to construct *all* the law regulating the everyday functioning of the police."[89] If the legislatures were interested in regulating police conduct, why did they fail to do so?

Moreover, the Warren Court did not preempt the legislatures. On the contrary, in some of its landmark decisions, the Court expressly invited Congress and other agencies to participate in providing rules for the police. In *Miranda,* for example, the Court stated that the specified procedures would be required "unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it."[90] Similarly, in *United States v. Wade,*[91] the Court emphasized that "[l]egislative or other regulations . . . eliminat[ing] the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial"[92] could displace the constitutional requirement imposed by the Court. In both cases,

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86. Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases,* 45 N.Y.U. L. REV. 785, 791 (1970).

87. *Id.*

88. *See, e.g.,* Stephen J. Markman, *The Fifth Amendment and Custodial Questioning: A Response to "Reconsidering* Miranda," 54 U. CHI. L. REV. 938, 949 (1987).

89. Amsterdam, *supra* note 86, at 790.

90. 384 U.S. at 444.

91. 388 U.S. 218 (1967).

92. 388 U.S. at 239.

the Court invited Congress to provide regulations that would address a significant issue relating to the fairness of our system of justice. In both cases, Congress failed to provide a meaningful response.[93] Thus, the criminal procedure revolution should not be faulted on the ground that it prevented Congress or other agencies from regulating police conduct.

In deciding whether the criminal procedure revolution was a failure, the real question should not be whether the Court has provided adequate guidance for the police but, rather, whether the Court's decisions improved our system of justice. In my judgment, the Warren Court's criminal procedure decisions led to several salutary developments that probably would not have occurred otherwise.

First, as Bradley notes (p. 37), the Court decisions changed police practices by making the police more sensitive to constitutional rights. As a result of the exclusionary rule, the police have received extensive training in criminal procedure. Even if some of the specific rules promulgated by the Court are unclear or ineffective, the training provided to the police makes it less likely that they will flagrantly violate a suspect's constitutional rights. Thus, even if the *Miranda* decision has too many loopholes to be effective,[94] that decision may have played a part in causing the virtual disappearance of the "third degree."[95]

Second, the Warren Court decisions identified problems in the administration of justice that the courts can ameliorate. Perhaps the most notable example is the problem of suggestive police identification procedures identified in the *Wade-Gilbert-Stovall* trilogy.[96] Prior to the lineup decisions, defendants' claims that identification evidence should be excluded because of suggestive identification procedures were dismissed as fanciful.[97] *Wade* and its progeny exposed the problem of miscarriages of justices occurring as a result of suggestive procedures and demonstrated that courts can provide remedies that will address this problem. Even though the post-Warren Court has sharply limited the Warren Court's lineup decisions,[98] those decisions continue to have an impact because state

93. In the 1968 Omnibus Crime Bill, Congress sought to repeal *Miranda* and *Wade*. *See supra* note 82. *See generally* Amsterdam, *supra* note 86, at 802.

94. *See supra* note 26.

95. *See supra* text accompanying notes 10-11.

96. *See supra* text accompanying notes 5-6.

97. *See, e.g.*, Kennedy v. United States, 353 F.2d 462 (D.C. Cir. 1965).

98. *See* Manson v. Brathwaite, 432 U.S. 98 (1977) (replacing *Stovall's* per se rule by which identifications stemming from unnecessarily suggestive procedures are excluded under a totality-of-circumstances test in which identifications stemming from unnecessarily suggestive procedures are not excluded unless there is "a very substantial likelihood of irreparable misidentification"); Kirby v. Illinois, 406 U.S. 682 (1972) (limiting *Wade* to identifications conducted after formal prosecutorial proceedings have been initiated).

courts, recognizing the legitimacy of the Warren Court's concern, have applied the principles emanating from the lineup decisions as a matter of state law.[99]

Finally, the Warren Court criminal procedure decisions benefitted our system of justice by articulating goals. In general terms, the Warren Court envisioned a system of justice under which the most important provisions of the Bill of Rights would provide meaningful protection for criminal suspects,[100] the inequality between the treatment afforded rich and poor would be reduced,[101] and government officials would treat criminal suspects with greater fairness.[102] Whether these goals are ever realized, they are valuable because they "state our aspirations."[103] In a climate in which the public's rising fear of crime causes increased emphasis on the needs of law enforcement, these aspirations are especially important. They remind us that, under our Constitution, our system of justice should be concerned not only with convicting the guilty but also with providing meaningful protections against governmental abuse for both ordinary citizens and those accused of crimes.

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99. *See, e.g.,* Livingston v. State, 519 So. 2d 1218 (Miss. 1988) (holding that a defendant arrested pursuant to a warrant has a Sixth Amendment right to counsel at a preindictment lineup); Commonwealth v. Richman, 320 A.2d 351 (Pa. 1974) (holding that a defendant has a Sixth Amendment right to counsel at a preindictment lineup because, under Pennsylvania state law, the initiation of adversary proceedings begins when the defendant is arrested).

100. As Bradley observes, nearly all of the provisions of the Bill of Rights were applied to the states through the Fourteenth Amendment. *See supra* note 84. The Court sought to ensure that state criminal defendants were provided with at least the same protection that had previously been afforded federal defendants.

101. *See* Amsterdam, *supra* note 86, at 797.

102. Critics sometimes charge that the Warren Court was too concerned with reaching a just result as opposed to adhering to constitutional principles. *See, e.g.,* ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 120-21 (1975) (noting that for Chief Justice Warren the essential question was whether the result was "right and good").

103. Amsterdam, *supra* note 86, at 793.