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CONDITIONAL RULES IN CRIMINAL PROCEDURE: ALICE IN WONDERLAND MEETS THE CONSTITUTION

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INTRODUCTION

Without recognizing that it has done so, the Supreme Court has created a category of constitutional rules of criminal procedure that are all in a peculiar format, conditional rules. A conditional rule depends on some future event to determine whether one has failed to honor it. In a wide variety of contexts, if a police officer, prosecutor, judge or defense attorney does something that the Constitution regulates, one cannot determine if the constitutional rule has been violated or not until some point in the future.

The Court has used three methods to create these rules. One looks to prejudice, and requires an evaluation at the end of the trial process to see if what happened had an adverse effect on the result. Another method creates rules that depend on the reaction of someone else, typically the defendant, to trigger the violation. The last way the Court has created conditional rules is to aggregate the time frame in which to make a judgment about the legitimacy of the actor's behavior, so that it must await further behavior by the same actor or someone exercising governmental power toward the same end.

These rules superficially resemble applications of the harmless error doctrine or examples of waivers of rights, but they differ in fundamental ways. They are far less protective of the rights of defendants and they send a much different message about the limits of government power to those who control the criminal justice system. They create confusion, fail to guide the

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behavior of the government actors whose power the Constitution limits, stand as barriers to institutional efforts at ex ante prevention, mislead the public about the scope of their rights, and often do not take into account any of the symbolic values that lay behind the provisions of the Constitution governing the state's power to use a criminal sanction.

"Sentence first—verdict afterwards." Lewis Carroll, *Alice's Adventures in Wonderland, in* The Illustrated Lewis Carroll 99 (Roy Gasson ed., 1978).

THE QUIZ

If you are reading this article, it is a fair assumption that you are familiar, at least in a general way, with the basic constitutional rules that govern the criminal process in the United States. You know that the privilege against self-incrimination prevents the prosecutor from calling the defendant in a criminal trial as a witness for the State.[1] You're acquainted with the fact that the Supreme Court used the privilege in *Miranda v. Arizona* as the basis for requiring police officers to warn suspects in custody of their right to remain silent before interrogating them.[2] And if you're particularly well versed, you may know that if a defendant remains silent after receiving a *Miranda* warning, that *Doyle v. Ohio* prevents the prosecutor from using that fact as evidence of the defendant's guilt.[3]

You are almost certainly aware that the Constitution prohibits unreasonable searches and seizures and probably know that the Supreme Court's decision in *Terry v. Ohio* required police officers to have reasonable suspicion that a suspect was involved in a crime in order to detain the suspect briefly in a public setting.[4] You know that

1. *See* U.S. CONST. amend. V; Michigan v. Tucker, 417 U.S. 433, 440 (1974) ("[T]he constitutional language in which the privilege is cast might be construed to apply only to situations in which the prosecution seeks to call a defendant to testify against himself at his criminal trial, its application has not been so limited.").

2. Miranda v. Arizona, 384 U.S. 436, 467–68 (1966).

3. Doyle v. Ohio, 426 U.S. 610, 635 (1976).

4. Terry v. Ohio, 392 U.S. 1, 30 (1968).

the Sixth Amendment not only guarantees defendants the right to be represented by an attorney but imposes an obligation on the state to provide lawyers for the indigent.[5] You surely have some sense that the same right to counsel provision has additional implications for the way the system implements it in practice. The prosecution, you might well believe, cannot listen in on privileged conversations between the lawyer and his client.[6] And, you might remember that there is some quality control mechanism, the idea of effective assistance of counsel, directed toward the competence level of a defendant's attorney.[7]

You may have a vague memory from law school about the famous *Brady* case that prohibits the prosecutor from hiding exculpatory evidence.[8] And if *Brady* ever led you to think at all about the Compulsory Process Clause, you may believe that the prosecutor cannot prevent the defendant from having access to a potential witness.[9]

I am quite confident that you are familiar with the concept of the presumption of innocence, though you may not be quite sure where in the Constitution it appears. I have to admit, though, that it is unrealistic to expect you, the casual reader, to be aware at all of the implication it has for the practice of requiring a defendant to appear in front of the jury in prison clothes.[10] I trust, however, that you can see the problem.

The stage having been set, it is now fair to ask you to hazard a guess about whether the examples that follow describe situations in which there is a violation of the constitutional rule that governs in each case. And, yes, for each of these examples, there is a rule that controls.

5. Gideon v. Wainwright, 372 U.S. 335, 348 (1963).
6. Weatherford v. Bursey, 429 U.S. 545, 560 (1977).
7. Strickland v. Washington, 466 U.S. 668, 686 (1984).
8. Brady v. Maryland, 373 U.S. 83, 86 (1963).
9. United States v. Valenzuela-Bernal, 458 U.S. 858, 872 (1982).
10. Estelle v. Williams, 425 U.S. 501, 512–13 (1976).

1. A police officer comes upon someone standing in the street and with no reason at all to think that the person is involved in criminal activity, other than the fact that the person is wearing a hooded sweatshirt, the officer pulls out his gun and announces: "Don't move."
2. The prosecutor in a bank robbery case does not reveal to defense counsel that an eyewitness to the crime told the police that a third person, not the defendant, was the culprit.
3. The judge presiding over the arraignment of a defendant charged with assault and battery, a misdemeanor that has a maximum sentence of two and one-half years, refuses to appoint a lawyer to represent her even though the defendant insists she is going to take her case to trial in front of a jury.
4. After the defendant testifies on direct that he was just an innocent bystander and not an active participant in the crime, the prosecutor asks on cross-examination: "Isn't it true that after the police gave you a *Miranda* warning, you remained silent and never told them you were an innocent bystander?"
5. A police detective gives a *Miranda* warning and hears the suspect say he wants to remain silent. Ignoring the suspect's statements, the detective continues to question him and elicits a confession.
6. Prior to trial, the defendant's court appointed attorney has spoken to him for only one-half hour. In that time, the defendant did manage to tell his lawyer that he had an alibi, and identifies the friends who would corroborate his whereabouts at the time of the crime. The defense attorney does nothing to investigate the alibi.
7. The judge orders a defendant brought into the courtroom for trial, in front of the jury, knowing that the defendant is wearing distinctive prison clothes.
8. An undercover police agent is indicted as a codefendant, though the prosecutor never intends to place him on trial, and, pretending to be on the defendant's side, attends a meeting between defendant and his lawyer where they discuss trial strategy.

9. Law enforcement authorities deport a person in their custody who was arrested at the same time as the defendant and who was a joint venturer in the crime with which the defendant is charged, making the person unavailable to the defense as a witness.

You suspected some sort of trick, didn't you? Of course, none of the examples has obvious answers. In each and every case, the correct answer is: you cannot tell if the relevant constitutional rule has been violated or not. In none of the examples do you have enough information to be able to answer the question. What's missing in each case is something that will only happen in the future.

The reason for this, in a nutshell, is that the rule that governs each situation is a conditional rule. There are three elements that define a conditional rule. First, there must be some actor whose behavior is the target of the rule. Second, the actor must engage in some predicate behavior that triggers the rule. And third, there is some future consequence that defines a violation of the rule.

Each of the examples has an actor whose behavior is evaluated by a constitutional rule: a judge, prosecutor, policeman, or defense attorney. Each actor has engaged in the predicate behavior that triggers the rule. But in none of the examples has the story unfolded to allow you to determine if the consequence that defines the violation has occurred.

The police officer in the first example may end up violating the Fourth Amendment, but if the sweat-shirted suspect shows foolhardy valor and runs away, the officer is guilty of doing nothing more than displaying extraordinary incivility. The prosecutor in the second example may never reveal the troublesome eyewitness, but if the evidence she introduces at trial is sufficiently strong, she may get in trouble with the ethics authorities in her jurisdiction but certainly will not have violated the constitutional right of the defendant. And the judge who refuses to appoint a lawyer for the misdemeanor defendant facing two and one-half years in jail can insulate himself from any possibility of reversal on appeal by sentencing the defendant to pay a fine if he is convicted rather than incarcerating him. As you read

through the rest of this discussion, you'll see that you can tell a similar story about all of the others. Their behavior on its face may not be laudable. But unless some future event unfolds in a certain way, they will have done nothing that violates the Constitution.

Part I of this article first explores the different methods the Court has used to craft conditional rules. It describes them in roughly the order in which they appeared. First came rules that incorporated prejudice, in terms of having an adverse effect on the outcome of the case, as the future consequence that defined the violation. Next are rules that depend on the person whose interests the rule protects reacting in some way to the predicate behavior. And last are cases in which the future consequence is some subsequent behavior by the actor or someone else working in concert with the actor.

Part II of this article attempts to evaluate the phenomenon of conditional rules from the point of view of their desirability as policy, both pragmatic and constitutional. First, it discusses the disadvantages of these types of rules. It considers their efficacy in shaping the behavior of the actors that conditional rules regulate. It discusses the effect conditional rules have on the ability of courts to serve as vehicles for institutional reform of the agencies that are regulated by the rules and the practices they engage in. It notes how conditional rules can be misleading about the limits placed on the exercise of power in the justice system. And, it explores the problems with rules that rely on a showing of prejudice.

The discussion in Part II then examines the reasons that a conditional rule might be preferable. The first two are the utility of the underlying behavior and reluctance to specify the rules that govern the primary actors. Then it explores the pragmatic considerations—like cost and collateral effects—that might influence a court to adopt a conditional rule. And last, Part II explores whether the language of the Constitution itself, specifically the Due Process Clause, compels the adoption of a conditional rule.

The conclusion is followed by two appendices: one that lists all of the cases in which the Court either discussed or actually adopted a conditional rule; and another indicating the votes of the Justices in each of those cases.

I. THE DEVELOPMENT OF CONDITIONAL RULES

A. Conditional Admission in the Law of Evidence

The concept underlying a conditional rule—that future events must unfold before one can make a final judgment about the legitimacy of an action—is a familiar one in the law of evidence. Common law judges often found themselves in the position of having to rule on the admissibility of evidence in circumstances where all of the facts necessary to establish either its relevance or competence had not yet been established. Rather than suffering the inconvenience of requiring the party offering the evidence to prove foundational facts out of the order which logic commended, a judge would allow the evidence to come in *de bene*, or conditionally.[11] If the proponent of the evidence subsequently "brought home" or "connected up"[12] the evidence, then it became part of the proof the jury could consider. If, however, the proponent failed to come forward with the necessary predicate for evidence that had already been admitted, the judge would order it stricken and tell the jury to disregard it.[13]

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11. *See* 6 WIGMORE ON EVIDENCE § 1871 (Chadbourn rev. 1976) ("Thus the fundamental rule, universally accepted, is that with reference to facts whose relevancy depends upon others, the *order of presentation is left to the discretion of the party himself*, subject of course to the general discretion of the trial court in controlling the order of evidence.") (emphasis added); Edmund M. Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 HARV. L. REV. 165, 166–67 (1929) (questions of relevancy and competence often depend on the existence of other facts); John Maguire & Charles Epstein, *Preliminary Questions of Fact in Determining the Admissibility of Evidence*, 40 HARV. L. REV. 392, 394 n.9 (1927) ("Judges sometimes admit evidence conditionally or *de bene* subject to a motion to strike out.").

12. Christopher Mueller, *The Federal Coconspirator Exception: Action, Assertion, and Hearsay*, 12 HOFSTRA L. REV. 323, 326 (1984).

13. *See* O'Brien v. Keefe, 175 Mass. 274, 279 (1900) ("The possibility of testimony admitted *de bene* not being subsequently made competent is one of the considerations to be passed upon by the presiding magistrate in determining whether to admit such evidence at the time it is offered or not; and it is necessary, in the conduct of trials, that such discretion should be exercised; if evidence admitted *de bene* is not subsequently made good, the only remedy that can be given is, on the proper application being subsequently made, to rule out the testimony. Whether, in such a case, the party, who produces the witness whose testimony has been confused, or the party who has undertaken to assert that the witness is not to be believed because he is a criminal, and it turns out that that assertion is unfounded, is the greater sufferer, is open to question; if he has suffered an injury, it is one inherent in the trial of causes and it is well settled, when such evidence is admitted in a jury trial, that the objecting party cannot be heard to complain, if the evidence is ruled out and the jury are instructed to disregard it.") (citing Smith v. Whitman, 6 Allen 562 (1863); Selkirk v. Cobb, 13 Gray 313 (1859); Whitney v. Bayley, 4 Allen 173 (1862)); *see also* Maguire & Epstein, *supra* note 11, at 411 n.65 (1927) (referring to "the time-saving

When a judge conditionally admits evidence in a criminal case, it can have constitutional implications. Where an out-of-court statement by an absent witness is part of the prosecution's case, it can violate the defendant's right to cross-examine under the Confrontation Clause.[14] However, if the statement was made by a co-conspirator while the conspiracy was ongoing and the statement was in furtherance of the conspiracy's objective, there is a long standing practice that allows the statement into evidence.[15] The historical pedigree removes the co-conspirator exception from the realm of practices prohibited by the Confrontation Clause.[16]

Conspiracy cases are often by their nature quite complex. Requiring the prosecutor to establish the existence of the conspiracy, the defendant's involvement, and the connection of the out-of-court statement with the conspiracy's objective before allowing the statement into evidence can be a logistical nightmare.[17] Thus, early on in the American courts' encounters with these types of trials, judges had the leeway to allow the statements in conditionally.[18] If

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device of tentatively admitting the [evidence] subject at the close of the case to a motion to strike out," in reference to Lord Penzance's ruling in *Hitchens v. Eardley*, L.R. 2 P. & D. 248 (1871)).

14. *See* Lyle v. Koehler, 720 F.2d 426, 433 n.12 (6th Cir. 1983) (stating it is a violation of defendant's Confrontation Clause right to admit statement of co-conspirator when statement was not made in furtherance of the conspiracy); Sanders v. Moore, 156 F. Supp. 2d 1301, 1311 (M.D. Fla. 2001) (granting habeas relief because out of court statements offered in evidence were not made by a co-conspirator during and in furtherance of the conspiracy: "[I]f the evidence did not satisfy the requirements of the coconspirator exception to the rule, then there was not only an evidentiary error, there was also a violation of the right of confrontation.").

15. United States v. Gooding, 25 U.S. 460 (1827) (interpreting statements of co-conspirator as *res gestae* and thus admissible against defendant); Mueller, *supra* note 12, at 325 (tracing the co-conspirator exception to English treason trials in the late eighteenth century).

16. Crawford v. Washington, 541 U.S. 36, 56 (2004) (recognizing co-conspirator's statements as a historically recognized exception to the hearsay rule); Bourjaily v. United States, 483 U.S. 171, 183 (1987) ("[T]he co-conspirator exception to the hearsay rule is steeped in our jurisprudence."); Dutton v. Evans, 400 U.S. 74, 89 (1970) (holding that the Confrontation Clause does not prohibit the introduction of a statement by a co-conspirator made during the concealment phase of the conspiracy).

17. State v. Winner, 17 Kan. 298, 305 (1876) ("Ordinarily when the acts and declarations of one co-conspirator are offered in evidence as against another co-conspirator, the conspiracy itself should first be established *prima facie*, and to the satisfaction of the judge of the court trying the cause. But this cannot always be required. It cannot well be required where the proof of the conspiracy depends upon a vast amount of circumstantial evidence—a vast number of isolated and independent facts.").

18. *See id.*; 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 111, at 127 (2d ed. 1844) ("Sometimes, for the sake of convenience, the acts or declarations of one are admitted in evidence, before sufficient proof is given of the conspiracy; the prosecutor undertaking to furnish such proof in a subsequent stage of the cause. But this rests in the discretion of the Judge, and is not

the prosecutor did not follow through on the necessary proof concerning the conspiracy, however, the judge either had to instruct the jury to disregard the statement or declare a mistrial.[19] While the preferred practice was for the prosecutor to establish the foundation before admitting an absent co-conspirator's statement,[20] if it was not reasonably practicable to do so, courts universally allowed the judge to admit the statement conditionally.[21]

The doctrine of conditional admission in the law of evidence differs from the type of conditional rules that are the subject of this article in one important respect. In the evidentiary context there is a shared expectation among all of the participants in the process that the actor whose behavior is governed by the rule, the lawyer seeking to admit the evidence conditionally, will bring about the future consequence necessary to legitimize the original action. Establishing the reasonableness of this expectation, in fact, is a necessary ingredient for the conditional admission of the evidence in the first place.[22] The conditional rules that the Supreme Court has adopted in the area of constitutional criminal procedure, on the other hand, do not proceed on this assumption at all. When the initial action takes place, there is no obligation on the part of the actor to establish that the future consequence legitimizing it will occur. In fact, it is often the case that the future consequence is entirely outside of the control of the actor and as a result it would not be reasonable, or even possible, for the actor to claim that the future event will take place.

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permitted, except under particular and urgent circumstances; lest the Jury should be misled to infer the fact itself of the conspiracy from the declarations of strangers.").

19. WEINSTEIN'S FEDERAL EVIDENCE § 801.34[6][c] (Joseph M. McLaughlin ed., 1997) [hereinafter WEINSTEIN].

20. *Id.*; GREENLEAF, *supra* note 18.

21. WEINSTEIN, *supra* note 19, § 801.34[6][c] [ii] (listing the rule in each federal circuit). In *Bourjaily v. United States*, 483 U.S. 171, 176 (1987), the Court specifically declined to address the question of the proper order of proof in establishing the foundation for the admission of an absent co-conspirator's statement. However, the law in every circuit allows a judge to admit the statement conditionally where it is not reasonably practicable to require the foundation to come beforehand.

22. *See* 6 WIGMORE ON EVIDENCE § 1871 (Chadbourn rev. 1976) ("[I]f the evidential fact thus put forward has on its face *no apparent connection with the case, an accompanying statement of the connecting facts must be made* by counsel, and a *promise to introduce them* at a later time if they have not already been introduced.") (emphasis added).

B. Incorporating Prejudice

One future event that can make a rule conditional is the admission of additional evidence that renders the outcome of the trial a foregone conclusion despite the existence of the predicate action that triggered the rule. In other words, courts simply incorporate a requirement of *ex post* prejudice in defining the rule.

For those who find that sports analogies make articles about legal doctrine more fun to read, it is very much like the offsides rule in soccer. Players in the half of the field closest to their opponent's goal are penalized for being in an offsides position (when they do not have two opposing players between them and the end line at the moment when one of their teammates touches the ball) only if they gain some advantage by failing to stay on sides.[23] When the ball is played, the assistant referee on the sideline raises a flag to indicate that someone is in an offsides position but subsequent events must often unfold before the referee on the field can make a decision about whether the rule was violated and the defending team awarded an indirect free kick.

Incorporating prejudice is the way the Court first adopted a conditional rule and it remains the most common technique in the Court's conditional rules universe. The value to which the Court has directed the prejudice inquiry considers whether there was any effect on the defendant's ability to convince the fact finder to return a not guilty verdict or a more lenient sentence. It is, in order words, entirely result oriented.

1. Harmless Error and Conditional Rules

A conditional rule based on *ex post* prejudice sounds a lot like the doctrine of harmless error. Contemporary appellate courts affirm convictions all the time despite the presence of some constitutional

23. Federation Internationale de Football Association, LAWS OF THE GAME 2005 Law 11, at 24 ("A player in an offside position is only penalised if, at the moment the ball touches or is played by one of his team, he is, in the opinion of the referee, involved in active play by: interfering with play or; interfering with an opponent or; gaining an advantage by being in that position.").

rule violation because they determine that the error did not affect the result of the trial.[24] Both harmless error and this type of conditional rule stem from a concern that defendants escape convictions for "technical" rule violations that do not affect the fundamental integrity of the process.

The concept of harmless error came about as a reaction to the rigid rule-based system of appellate review that prevailed prior to the early decades of the twentieth century.[25] In the words of one early proponent, the doctrine was a necessary antidote to the prevailing process of review that allowed appellate courts to "tower above the trials of criminal cases as impregnable citadels of technicality."[26] To curb the formalistic practice of "record worship,"[27] Congress first

24. *E.g.*, United States v. Williams, 461 F.3d 441, 448 (4th Cir. 2006); United States v. Allen, 406 F.3d 940, 949 (8th Cir. 2005); Parsad v. Greiner, 337 F.3d 175, 185 (2d Cir. 2003).

25. *See* Chapman v. California, 386 U.S. 18, 48 (1967) (Harlan, J., dissenting) ("The harmless-error rules now utilized by all the States and in the federal judicial system are the product of judicial reform early in this century. Previously most American appellate courts, concerned about the harshness of criminal penalties, followed the rule imposed on English courts through the efforts of Baron Parke, and held that any error of substance required a reversal of conviction.").

The anti-formalist movement that led to the adoption of the harmless error rule on appeal also affected the way the Court interpreted constitutional rules that applied in the trial process. Two cases bracketing the turn of the century that dealt with the same issue display the philosophical current that underlay each position. Both cases dealt with whether the Due Process Clause requires that before a trial can commence the accused must first formally enter a not guilty plea.

The Court first encountered this application of due process in 1896, in *Crain v. United States*, 162 U.S. 625 (1896). *Crain* reversed a conviction because the record of the trial did not reflect the fact that the defendant entered a not guilty plea. "It is true that the [C]onstitution does not, in terms, declare that a person accused of crime cannot be tried until it be demanded of him that he plead, or unless he pleads, to the indictment. But it does forbid the deprivation of liberty without due process of law; and due process of law requires that the accused plead, or be ordered to plead, or, in a proper case, that a plea of not guilty be filed for him, before his trial can rightfully proceed . . . ." *Id.* at 645. Refusing to draw the inescapable inference that the defendant did enter the appropriate plea from the fact that the jury "was sworn to and tried 'the issue joined," *id.*, the Court in *Crain* acted on the basis of a formalist principle, handed down through the centuries, that "safety lies in adhering to established modes of procedure devised for the security of life and liberty." *Id.* at 644. The four dissenting Justices in *Crain* derided the Court's decision as resting "upon the merest technicality." *Id.* at 646.

Crain did not last long as binding precedent. By 1914, the dissent's position commanded a unanimous Court in *Garland v. Washington*, 232 U.S. 642 (1914). The *Garland* Court overruled *Crain*, evincing a sense of confidence in the overall integrity of the process that allowed it to dispense with technical compliance with formality as a bulwark against incursions on liberty, the same impulse that motivated the adoption of the harmless error doctrine.

26. Marcus A. Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 A.B.A. J. 217, 222 (1925) (cited in Kotteakos v. United States, 328 U.S. 750, 759 n.13 (1946)).

27. *See* ROSCOE POUND, CRIMINAL JUSTICE IN AMERICA 161 (1930) ("[Record worship is] an excessive regard for the formal record at the expense of the case, a strict scrutiny of that record for

adopted a statute dealing with the necessity for prejudice in overturning criminal judgments in 1872.[28]

The Supreme Court first dipped its toe into the pool of constitutional harmless error in a criminal case in 1900, in *Motes v. United States*.[29] *Motes* involved the conviction of six defendants for a civil rights violation arising out of the murder of a witness in a bootlegging case in rural Alabama. The Court reversed the conviction of five of the six on the ground that their rights under the Confrontation Clause had been violated by the admission into evidence of the written statement of a witness who was not available for cross examination at the trial.[30] The sixth defendant, Columbus Motes, was not so lucky. His case was different because at trial he evidently tried to save his codefendants by taking the stand and testifying that only two people were responsible for the murder, himself and the missing witness.[31] The Court explained why Motes was to be hoist on his own petard:

> In this evidence the jury had conclusive proof of the guilt of Columbus W. Motes of the crime charged in the indictment. The admission of the statement of [the witness] in evidence was, therefore, of no consequence as to him; for in his own testimony enough was stated to require a verdict of guilty as to him, even if

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'errors of law' at the expense of scrutiny of the case to insure the consonance of the result to the demands of substantive law.").

28. *See* Russell v. United States, 369 U.S. 749, 761–62 (1962). The original statute, Act of June 1, 1872, Ch. 255, 17 Stat. 198, provided:

> [N]o indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.

The statute morphed in that form into Rev. Stat. § 1025, which was cited by both the majority and dissent in *Crain*, 162 U.S. 625.

In 1919, Congress mandated the use of a more general harmless error doctrine. Act of February 26, 1919, ch. 48, 40 Stat. 1181. Section 269 of the Judicial Code required that "[o]n the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

29. Motes v. United States, 178 U.S. 458 (1900).

30. *Id.* at 471–72.

31. *Id.* at 474–75.

> the jury had disregarded [the witness's] statements altogether. We can therefore say, upon the record before us, that the evidence furnished by [the witness's] statement was not so materially to the prejudice of Columbus W. Motes as to justify a reversal of the judgment as to him. It would be trifling with the administration of the criminal law to award him a new trial because of a particular error committed by the trial court, when in effect he has stated under oath that he was guilty of the charge preferred against him.[32]

It took some time, however, for the Supreme Court formally to recognize that the Constitution allowed a permanent breach in the wall of automatic reversal. In the first substantial opinion grappling with the application of the harmless error statute, *Kotteakos v. United States*, the Court averred to the possibility that constitutional errors might be outside the scope of the harmless error doctrine.[33] But it was not until 1967, in *Chapman v. California*, that the Court first made explicit the application of harmless error to constitutional defects in a criminal conviction.[38]

Chapman came to the Court from a California Supreme Court decision ruling that a prosecutor's comment on the fact that the defendant did not testify was, despite being a violation of the defendant's privilege against self incrimination, harmless error under the state's formulation "which forbids reversal unless 'the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.'"[34] The Court concluded that the question of what remedy a state must provide in reviewing a conviction based on an error of constitutional magnitude was just as much a federal

32. *Id.* at 475–76.

33. Kotteakos v. United States, 328 U.S. 750, 764–65 (1946) ("If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress."); *id.* at 765 n.19 (citing Malinski v. New York, 324 U.S. 401, 404 (1945); Lyons v. Oklahoma, 322 U.S. 596, 597 n.1 (1944); Bram v. United States, 168 U.S. 532, 540–42 (1897); United States v. Mitchell, 137 F.2d 1006, 1012 (1943)) ("Thus, when forced confessions have been received, reversals have followed although on other evidence guilt might be taken to be clear.").

34. *Id.* at 20.

question as was the standard for defining the constitutional right that the trial process disregarded in the first place.[35] After establishing its role in saying how harmless error applied in constitutional cases, the Court for the first time rejected the claim that no constitutional error could be harmless, stating, "We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction."[36]

Then the Court went on to disapprove of California's formulation of the harmless error test, and adopted one articulated in an earlier case, *Fahy v. Connecticut*, which concluded, without deciding the issue, that even if a harmless error rule applied to the erroneous admission of evidence seized in violation of the Fourth Amendment, the conviction it was reviewing still could not stand: "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[37]

Ever since *Chapman*, it has been commonplace to accept the notion that a deprivation of a defendant's constitutional rights need not invalidate a conviction. There is only a relatively small category of errors for which the Constitution requires automatic reversal. In making the list, the Court identified those "defect[s] affecting the framework within which the trial proceeds,"[38] so that they "necessarily render a trial fundamentally unfair."[39] For constitutional

35. *Id.* at 21.

36. *Id.* at 22.

37. Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963).

38. Arizona v. Fulimante, 499 U.S. 279, 310 (1991).

39. Rose v. Clark, 478 U.S. 570, 577 (1986). The Court's latest version of these "structural errors" from *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 (2006), includes the following:

- the total deprivation of the right to counsel at trial, *see* Gideon v. Wainwright, 372 U.S. 335 (1963);
- lack of impartiality on the part of the judge, *see* Tumey v. Ohio, 273 U.S. 510 (1927);
- the unlawful exclusion of members of the defendant's race from a grand or petit jury, *see* Vasquez v. Hillery, 474 U.S. 254 (1986);
- denying a defendant the right to self-representation at trial, *see* McKaskle v. Wiggins, 465 U.S. 168, 177–78 n.8 (1984);
- failing to respect the right to public trial, *see* Waller v. Georgia, 467 U.S. 39, 49 n.9 (1984);

errors not on this list, the Constitution allows a court to sanction a conviction so long as it meets the appropriate harmless error test.[40]

There is, of course, a difference between the doctrine of harmless error and the idea of a conditional rule. The most significant is in the audience to whom each is relevant.[41] Harmless error is a constitutional mandate that directs only the behavior of judges reviewing the validity of a conviction. It tells them when they must prevent the state from upholding a conviction that results from a constitutionally flawed process and when they can validate a conviction despite the state's failure to abide by all of the constitutional rules that govern the process. Conditional rules, on the other hand, are directed to the primary actors in the trial process and govern the behavior that leads to a conviction in the first place. Saying that a conviction can stand despite a harmless error does not validate the behavior of the state actor who deprived the defendant of a constitutional right. It simply means that the defendant will be unable to void the conviction as a remedy. Saying that a state actor did not violate a conditional rule, however, means that the defendant has not been deprived of anything the Constitution promises. It not only validates the end result, if it happens to be a guilty verdict; it validates each step in the process by which the state obtained the result.

2. *Due Process and the Defendant's Right to Be Present at Trial*

The first time the Supreme Court announced a constitutional rule in a conditional format was in 1933, when it decided *Snyder v.*

- giving the jury a defective instruction concerning reasonable doubt, *see* Sullivan v. Louisiana, 508 U.S. 275 (1993);
- denying the defendant the right to select counsel of his own choice, *see* United States v. Gonzalez-Lopez, 548 U.S. 140 (2006).

40. The *Chapman* test applies when a conviction is reviewed on appeal. If a court is considering the validity of a conviction in a collateral review process such as habeas corpus, the harmless error test can be more forgiving. *See* Brecht v. Abrahamson, 507 U.S. 619, 627 (1993) (stating that on habeas review, the Constitution allows a test that asks whether the error "had substantial and injurious effect or influence in determining the jury's verdict").

41. There are, of course, other differences, such as which party bears the burden of proof and the effect each has on the behavior of the actors who must obey constitutional rules. *See infra* Part II.A.iv.a.

Massachusetts.[42] *Snyder* did so by incorporating an *ex post* prejudice evaluation into the definition of the right. The issue in *Snyder* was whether Due Process required the defendant's presence when the jury goes on a view. A view is essentially a field trip for the jury at the start of the trial, where they get to look at the scene of the crime. Under Massachusetts procedure, what the jury learned on the view was part of the evidence they could consider in arriving at a verdict.[43] The jury in *Snyder* went with the prosecutor, judge, and defense attorney to the location of the murder for which the defendant was on trial. The judge refused to let the defendant accompany the group. However, essentially all that occurred was for the lawyers to call the jury's attention to various aspects of the physical surroundings. The defendant only learned about what happened on the view after the fact.

Snyder's lawyer in the Supreme Court was not exactly clear about where in the Constitution he was basing his client's claim. The Confrontation Clause was an attractive choice, since it directly addressed the issue of a defendant's presence in the trial process. But since a view entails neither having witnesses make statements nor lawyers ask questions, the Court refused to expand the reach of a defendant's confrontation right to the context of a view.[44] What did govern the process, though, was an implication from the right to defend oneself that the Court found in the general guarantee of due process. "In a prosecution for a felony," Justice Cardozo wrote, "the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."[45]

But how does one determine if a defendant's presence is substantially related to the opportunity to defend himself? The Court's description of the general method was somewhat ambiguous. The opinion states only that "the justice or injustice of that exclusion

42. Snyder v. Massachusetts, 291 U.S. 97 (1934).
43. *Id.* at 125.
44. *Id.* at 108.
45. *Id.* at 105–06.

must be determined in the light of the whole record."[46] This is certainly consistent with the way that one would articulate a conditional rule. You would look to the record at the end of the trial to see if the defendant's absence from the view detracted from his opportunity to defend himself. But it could also mean that the judge must evaluate the whole record at the time the defendant makes the request to join the jury on its adventure rather than waiting for the view and the trial that follows.

What the Court had in mind, however, becomes clearer by looking at the way that the opinion justified rejecting Snyder's claim. The Court evaluated whether it was unjust to bar Snyder from the view by examining what happened when the jury visited the scene and at the trial proceedings that followed.[47] The jury was taken to the proper place.[48] They were shown features of the scene that the defendant agreed were there at the time of the crime.[49] The defendant learned everything that happened after the fact and had an opportunity to raise an objection to any misimpression or misinformation the jury might have received.[50] Based on the way the events in *Snyder* unfolded after the judge made the decision to bar the defendant's presence, the Court was at a loss to see any conceivable way that he could have gained even "a shred of advantage" by going on the view.[51] Since Snyder could not show a "reasonable probability that injustice had been done" his claim that the Commonwealth of Massachusetts violated a rule established by the federal Constitution failed.[52]

Why did the Court adopt a conditional rule in *Snyder*? Because of the same impulse that led, decades later, to the adoption of the harmless error doctrine. "There is danger," Justice Cardozo wrote, "that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth

46. *Id.* at 115.
47. *Id.* at 103–04.
48. *Snyder*, 291 U.S at 103.
49. *Id.* at 104.
50. *Id.* at 118.
51. *Id.* at 108.
52. *Id.* at 113.

Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."[53] What sense, one imagines the *Snyder* Court asking itself, would it have made to overturn the conviction when the defendant could not possibly have suffered any ill effect from the practice of which he complained.

The concern with not reversing a case because of a mistake that could have had no effect on the outcome, to the modern ear, makes *Snyder* sound a lot like a garden variety harmless error case. So does the textual justification that Justice Cardozo gave for why prejudice was a necessary component of the right at issue in *Snyder?* He explained that only rights that the Constitution expressly conferred "would not be overlooked as immaterial [if] the evidence thus procured was persuasive of the defendant's guilt."[54] A prejudice requirement was also unnecessary for a right a like the opportunity to be heard, which though not expressly mentioned in the Constitution was "obviously fundamental."[55] But for rights merely implied by the Due Process Clause, as was the right to accompany the jury on a view, the Court was left with the task of making a contextual judgment about whether the proceedings were fair, by reference to the entire record.[56] This division of rights into those that are express or fundamental and those that are merely implied is very similar to

53. *Id.* at 122.

54. *Snyder*, 291 U.S at 116. This textual argument is one the Court would repeat over the years, always with as little explanation as in *Snyder* for why the source of the right makes it necessary to incorporate a prejudice requirement. Delaware v. Van Arsdall, 475 U.S. 673, 679–80 (1986); Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Certainly, subsequent cases have not consistently hewed to this line. Cases based on the Due Process Clause that have not incorporated a prejudice requirement include the following: Penson v. Ohio, 488 U.S. 75, 85–89 (1988) (denying the appointment of counsel on appeal); Mullaney v. Wilbur, 421 U.S. 684, 702–04 (1975) (improperly shifting burden of proof); Wardius v. Oregon, 412 U.S. 470, 475–76 (1973) (lacking reciprocity in discovery); Jackson v. Denno, 378 U.S. 368, 389 (1964) (no judicial determination of voluntariness of confession); Tumey v. Ohio, 273 U.S. 510, 523 (1927) (judge having a financial interest in a criminal conviction). It is not intuitively obvious that the underlying rights involved in all of these cases are more fundamental than the one at issue in *Snyder*. Of these cases, only *Tumey* was decided before *Snyder*. *Tumey*, however, was mentioned only by the dissent in *Snyder*. *Snyder*, 291 U.S. at 128 (citing *Tumey*, 273 U.S. at 523); *see infra* Part II-A-iv-a.

55. *Snyder*, 291 U.S at 116.

56. *Id.* at 117.

the way the Court, decades later, bifurcated harmless error analysis into those rights subject to its application and those so fundamental that they constituted "structural error" and were never harmless.[57]

Indeed, in *Rushen v. Spain*,[58] a case raising the question of whether the due process right involved in *Snyder* is the sort of constitutional claim that is subject to harmless error analysis, the Court cited *Snyder* for the proposition that the right to be personally present was subject to harmless error.[59]

The reference to *Snyder* as a harmless error case, however, was not quite accurate. The language *Snyder* used was phrased in terms that made clear excluding the defendant from the view did not violate his right to be present at all critical stages of the trial. You cannot have harmless error without error in the first place.

The fact that *Snyder* failed to use the framework of harmless error but instead incorporated prejudice into the terms of the constitutional rule was hardly surprising. In 1934 when *Snyder* was decided, the Supreme Court, and most everyone else, assumed that *any* constitutional error required reversal.[60] So if the Court felt it

57. *See supra* note 42.

58. Rushen v. Spain, 464 U.S. 114 (1983). *Spain* presented the Court with a question about the consequence of the trial judge's holding an *ex parte* conference with a juror. Spain, on trial for several murders committed during the course of a prison break, was a member of the Black Panther Party. During *voir dire*, the juror in question said she did not particularly associate the Black Panthers with any sort of violence. *Id.* at 115. However, months later, during the course of trial testimony, the juror recalled that she personally knew the victim of a murder committed by a party member. The juror informed the judge, who met with her alone, to discuss her ability to remain impartial. The constitutional basis for the defendant's complaint in *Spain* about the judge's behavior was, as in *Snyder*, his right to be personally present at all critical stages of the trial, as well as his right to the assistance of counsel. *See id.* at 117 n.2. Relying on the state's concession that the judge's behavior entailed an error of constitutional dimension, the Court assumed without deciding that these two constitutional rights were in fact implicated. The Court went on, however, to hold that whatever constitutional harm was involved in the judge's action was harmless error.

59. *Id.* at 117 n.2.

60. *See* Richard Fallon & Daniel Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1733, 1771–72 (1991) ("A finding that an error is harmless does not, even in theory, constitute a certain conclusion that the defendant was not prejudiced. Indeed, until early in this century, errors at trial were generally treated as requiring automatic reversal, and before 1967 it was generally assumed that constitutional errors were always prejudicial."); Tom Stacy & Kim Dayton, *Rethinking Harmless Constitutional Error*, 88 COLUM. L. REV. 79, 82–83 (1988) ("Until 1967 it was unclear whether constitutional errors occurring in a criminal trial could ever be harmless.").

In a case decided five years after *Snyder*, *Bruno v. United States*, 308 U.S. 287 (1939), the Court gave a sense of the type of problem for which it thought harmless error was appropriate: "Suffice it to indicate, what every student of the history behind [the harmless error statute], knows, that that Act was

necessary to take into account the inevitability of a conviction despite the defendant's absence from the view, it had to make the underlying rule conditional, since harmless error was not yet available as a tool.[61]

Snyder's legacy in the Court's somewhat limited jurisprudence on the rule concerning a defendant's presence during the trial process

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intended to prevent matters concerned with the mere etiquette of trials and with the formalities and minutiae of procedure from touching the merits of a verdict." *Id.* at 294. Deprivation of a constitutional right, such as the one with which the *Snyder* Court grappled, would hardly have been seen as dealing merely with a formality and minutiae of procedure. Not until *Chapman* was harmless error a viable alternative in the Supreme Court's decision making arsenal.

That *Chapman* staked the flag of harmless error on virgin territory is clear from its failure to cite any previous Supreme Court decision, most notably not even *Snyder* or *Motes*, that affirmed a conviction despite finding that the defendant was denied a constitutional right. Justice Harlan's dissenting opinion did cite both cases for the proposition that "errors of constitutional dimension can be harmless," *Chapman*, 386 U.S. at 50 n.3, but the majority opinion did not mention them at all.

Justice Stewart's dissent made the point explicitly, lamenting: "In devising a harmless-error rule for violations of federal constitutional rights, both the Court and [Justice Harlan's] dissent proceed as if the question were one of first impression. But in a long line of cases, involving a variety of constitutional claims in both state and federal prosecutions, this Court has steadfastly rejected any notion that constitutional violations might be disregarded on the ground that they were 'harmless.'" *Id.* at 42. The cases on which he relied dealt with a long list of constitutional provisions:

- The due process right against the admission into evidence of an involuntary confession. *See* Lynumn v. Illinois, 372 U.S. 528, 537 (1963) (the argument "that the error in admitting such a confession 'was a harmless one . . . is an impermissible doctrine'"); Malinski v. New York, 324 U.S. 401, 404 (1945); Payne v. Arkansas, 356 U.S. 560, 568 (1958); Spano v. New York, 360 U.S. 315, 324 (1959); Haynes v. Washington, 373 U.S. 503, 518–19 (1963); Jackson v. Denno, 378 U.S. 368, 376–77 (1964).
- The Sixth Amendment right to counsel. *See* Glasser v. United States, 315 U.S. 60, 76 (1942); Gideon v. Wainwright, 372 U.S. 335 (1963); Hamilton v. Alabama, 368 U.S. 52, 55 (1961); White v. Maryland, 373 U.S. 59, 60 (1963).
- The due process right against participation of a judge with a financial interest in the outcome of the case. *See* Tumey v. Ohio, 273 U.S. 510, 535 (1927).
- The due process protection against effect of pervasive negative pretrial publicity on the jury. *See* Sheppard v. Maxwell, 384 U.S. 333, 351–52 (1966). *Cf.* Rideau v. Louisiana, 373 U.S. 723, 727 (1963). *See also* Estes v. Texas, 381 U.S. 532, 542–44, 562–64 (1965) (Warren, C.J., concurring); 593–94 (Harlan, J., concurring).
- The due process protection against jury instructions containing mandatory presumptions. *See* Bollenbach v. United States, 326 U.S. 607, 614–15 (1946).
- The doctrine that convictions resting on both a valid and constitutionally invalid basis are nevertheless illegitimate. *See* Stromberg v. California, 283 U.S. 359, 367–68 (1931); Williams v. North Carolina, 317 U.S. 287, 292 (1942).
- And, the Sixth and Fourteenth Amendments' protection against discrimination in the selection of grand and petit jurors. *See* Whitus v. Georgia, 385 U.S. 545 (1967).

61. Although *Motes* had laid the groundwork for a harmless rule some years earlier, *Snyder* did not rely on *Motes* for the proposition that a constitutional error could be harmless. While the opinion did cite *Motes*, it was not for that case's treatment of poor Columbus as compared to his five luckier co-defendants, but for details about the application of the Confrontation Clause. *See Snyder*, 291 U.S. at 107.

makes clear that the basis for the decision was the conditional nature of the rule rather than an application of the harmless error doctrine. In fact, this was an explicit issue in a 1987 case, *Kentucky v. Stincer*.[62] *Stincer* also dealt with a defendant who was prohibited from attending a pretrial proceeding, in his case a competency hearing for two child witnesses held outside the presence of the jury.

In concluding that the defendant's absence did not violate the *Snyder* rule, the Court found it necessary to respond to Justice Marshall's complaint in dissent that "the propriety of the decision to exclude respondent from this critical stage of his trial should not be evaluated in light of what transpired in his absence. To do so transforms the issue from whether a due process violation has occurred into whether the violation was harmless."[63] Justice Blackmun's majority opinion directly answered this charge:

> We do not address the question whether harmless-error analysis applies in the situation where a defendant is excluded from a critical stage of the proceedings in which his presence would contribute to the fairness of the proceeding. In this case, respondent simply has failed to establish that his presence at the competency hearing would have contributed to the fairness of the proceeding. He thus fails to establish, as an initial matter, the presence of a constitutional deprivation.[64]

3. Due Process and the Prosecutor's Obligation to Reveal Exculpatory Evidence

The next conditional rule to make its appearance also sprung from the Due Process Clause. As in *Snyder*, the complaint was not something addressed by one of the specific provisions of the Bill of Rights. It was, rather, a "free standing" due process dictate—this one directed to the prosecutor.[65] It dealt with the obligation to disclose

62. Kentucky v. Stincer, 482 U.S. 730 (1987).

63. *Id.* at 754 (Marshall, J., dissenting).

64. *Id.* at 747.

65. Jerold Israel, *Free Standing Due Process and Criminal Procedure: The Supreme Court's Search for Interpretive Guidelines*, 45 ST. LOUIS L.J. 303 (2001).

exculpatory information to the defense. In 1985, the Court eventually cast this rule in a form that required prosecutors to reveal exculpatory information prior to trial only if its significance in the context of the evidence that was eventually admitted against the defendant was so great that it would raise a reasonable probability that the defendant would have been acquitted.[66] The rule, however, did not emerge in this format fully formed as a conditional one.

The path it took began in 1935, in *Mooney v. Holohan.*[67] *Mooney* was a habeas corpus case based on a claim that the state's entire case rested on the prosecutor's knowing use of perjured testimony. This was the Court's first occasion to find in the Due Process Clause any constitutional rule limiting the power of a prosecutor. A unanimous Court concluded that due process:

> [C]annot be deemed to be satisfied by mere notice and hearing if a State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured.[68]

Mooney did not present the Court with an occasion to consider whether to incorporate a prejudice requirement into the definition of its new rule, since there was no factual dispute about the habeas corpus petition's claim that the entire prosecution case consisted of suborned perjury. The same was true the next time the issue appeared seven years later, in *Pyle v. Kansas.*[69] But a case that arose in the 1950s, *Napue v. Illinois,* indicated that the Court was concerned to some degree with the effect that a prosecutor's knowing use of perjured testimony had on the jury's evaluation of all the evidence.[70]

Napue dealt with a prosecutor who allowed a witness to lie not about what the defendant had done, as was the case in the earlier

66. United States v. Bagley, 473 U.S. 667 (1985).
67. Mooney v. Holohan, 294 U.S. 103 (1935).
68. *Id.* at 112.
69. Pyle v. Kansas, 317 U.S. 213 (1942).
70. Napue v. Illinois, 360 U.S. 264 (1959).

decisions, but about something in the witness's background that affected his credibility. In extending the *Mooney* decision to this context, the Court addressed the state's contention that it was bound by a factual determination in the state court that "the false testimony could not in any reasonable likelihood have affected the judgment of the jury."[71] Rather than rejecting the contention as irrelevant to the federal claim, the Court made its own examination of the record and concluded that "the false testimony used by the State in securing the conviction of petitioner may have had an effect on the outcome of the trial."[72]

A standard that asks a court reviewing a conviction to determine, as *Napue* requires, whether the evidence "may have had an effect on the trial" places it in exactly the same position it occupies when it considers whether to apply the harmless error rule that was first articulated in *Fahy v. Connecticut* eight years afterward: "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."[73] For this reason, a court considering a case dealing with the prosecutor's knowing use of perjured testimony would never have to choose between a conditional rule and harmless error. The process of applying the relevant legal doctrine to the facts would always be the same.

As a result, neither *Mooney* nor any of its progeny interpreting the rule preventing prosecutors from using perjured testimony ever truly cast it in conditional form. That opportunity came, however, when the Court had to consider extending the *Mooney* line of cases to situations where the prosecutor's actions consisted of withholding evidence that should have been revealed rather than presenting evidence that never should have come to the attention of the jury.

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71. *Id.* at 271.

72. *Id.* at 272. The context in which the Supreme Court was asked to decide this issue is much narrower than the one that it subsequently adopted as part of the test for a prosecutor's obligation to reveal exculpatory evidence. In *Napue*, the Illinois Supreme Court concluded that there "was no constitutional infirmity by virtue of the false statement," because the witness subsequently admitted that he had been promised that efforts would be made to see that he would receive a reduced sentence if he testified against Napue. Napue v. Illinois, 150 N.E.2d 613, 615 (1958). This makes *Napue* close to a case where the question is whether the witness retracted his lie rather than one that looks at whether the lie was sufficiently important to have affected the jury's decision to convict.

73. Fahy v. Connecticut, 375 U.S. 85, 86–87 (1963).

The case that the Court used as a vehicle to reach this issue was *Brady v. Maryland*.[74] Brady was tried for capital murder and sentenced to die. In the face of overwhelming evidence, his defense attorney's strategy was to concede his client's culpability but argue to the jury that they should spare him the death penalty. Brady, in fact, testified that he and a joint venturer, Boblit, both participated in the robbery that led to the death of the victim but that Boblit, who was tried separately, was the actual killer.

In an effort to find information that would have bolstered this strategy, defense counsel had requested prior to the trial the discovery of any of Boblit's statements the prosecution had in its possession. Several were, in fact, produced. But not until after his conviction did Brady find out that the prosecutor withheld the only statement that Brady would have really wanted to see—the one where Boblit admitted the homicide. In a collateral attack in state court, Brady got the death sentence vacated, leaving the underlying murder conviction intact.[75]

The Supreme Court's articulation of the rule governing situations like Brady's left room for an interpretation that it was a conditional one: "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[76] The key word is "material."

The *Brady* opinion gave no definition of the term. It is likely that Justice Douglas meant it simply in its usual courtroom evidentiary sense—to connote nothing more than evidence that is germane to the fact at issue. In this way, it serves to shed light on what the Court meant by "evidence *favorable* to an accused."

The *Brady* Court's application of its rule to the facts of the case before it is also consistent with this understanding. The Court left the underlying murder conviction standing and affirmed the lower court's

74. Brady v. Maryland, 373 U.S. 83 (1963).
75. Brady v. State, 174 A.2d 167 (Md. 1961).
76. *Brady*, 373 U.S. at 87.

ruling vacating the imposition of the death penalty. In explaining this split decision, *Brady* accepted, as it was obliged, the state court's interpretation of its own law of evidence and of the elements of its substantive crimes. Boblit's confession was not admissible on the question of Brady's guilt because even if the jury accepted it as true, it would have done nothing to negate any of the elements of first degree murder under Maryland law. It would, however, have been admissible on the question of punishment.

In this light, *Brady* is not exactly a conditional rule. It could simply mean that a prosecutor has the obligation of disclosing beforehand any evidence whose character met the terms of this evidentiary sense of materiality, without regard for the proof that was eventually admitted at trial. The rule morphed, however, in its subsequent appearances before the Court.

The first part of the transformation came in *United States v. Agurs*.[77] *Agurs* dealt with a slightly different scenario than *Brady* in terms of the interaction between the defense and prosecution prior to the trial. Whereas Brady's attorney had specifically asked for the information that the prosecutor withheld, Agurs's lawyer did not. This difference led the Court to adopt a different test for materiality, one that is expressly conditional.

The *Agurs* Court, like Caesar in his invasion of Gaul,[78] found that the territory it considered was divided into three parts. The first, knowing use of perjury, meant that the *Napue* formulation applied and a conviction "must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."[79] This formulation is essentially a harmless error standard that puts the burden on the prosecutor to show that the conviction should not be overturned.[80] The second, where the

77. United States v. Agurs, 427 U.S. 97 (1976).

78. JULIUS CAESAR, THE BATTLE FOR GAUL, Anne & Peter Wiseman Trans., (D.R. Godine 1980).

79. *Id.* at 103.

80. Strickler v. Greene, 527 U.S. 263, 299 (1999) (Souter, J., concurring and dissenting) ("We have . . . equated materiality in the perjured-testimony cases with a showing that suppression of the evidence was not harmless beyond a reasonable doubt."); United States v. Bagley, 473 U.S. 667, 679 (1985) (*Agurs* first category stated a rule "in terms that treat the knowing use of perjured testimony as error subject to harmless-error review.").

prosecutor ignored a request for information specifically identifying what the defense sought, requires the prosecutor to comply if the information is material in the sense that *Brady* used the term—so that "the suppressed evidence might have affected the result of the trial."[81] The third, where the defense either made no request or simply asked for exculpatory information in broad, nonspecific terms.[82]

In this third category, the Court crafted a rule that required the prosecutor before trial to evaluate how the significance of the evidence would appear in context after the trial. "[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record."[83] Unlike the *Brady* formulation, this clearly is conditional.

Taking this backward looking view, the prosecutor in *Agurs* did nothing wrong by withholding information that the murder victim, Sewell, had several convictions for crimes of violence (using a knife as the weapon) despite knowing that the defendant intended to rely on a claim of self defense in the face of a knife attack by Sewell. Knowing that the victim had a record would not, in the Justices' minds, have created a reasonable doubt in light of the trial evidence revealing that the victim had been stabbed a number of times while the defendant had no injuries at all.[84]

Agurs did not explain in any detail why it made the rule for this category of exculpatory information conditional. Justice Stevens pointed out that the problem of identifying what the Constitution requires prosecutors to do arises at two different time frames: prior to trial when the prosecutor has to decide whether to turn something over or not; and after trial when a judge has to determine if the prosecutor's inaction at the earlier stage violated the defendant's right

81. *Agurs*, 427 U.S. at 104.

82. *Id.* at 108.

83. *Id.* at 112.

84. *Id.* at 114 ("Sewell's prior record did not contradict any evidence offered by the prosecutor and was largely cumulative . . . .").

to exculpatory information.[85] From there, he concluded that logic required the rule to mean the same thing at both times.[86] "[U]nless the omission deprived the defendant of a fair trial," *Agurs* states, "there was no constitutional violation requiring that the verdict be set aside; and absent a constitutional violation, there was no breach of the prosecutor's constitutional duty to disclose."[87] But it is not obvious why this insight into the coherence of a constitutional rule requires that the Court adopt the *post hoc* vantage point rather than the *ex ante*.

Perhaps more significant were the brief allusions in the opinion to the difficulty the Court foresaw a non-conditional rule would create for prosecutors. The opinion noted how "imprecise" the standard was to identify exculpatory information and how "the significance of an item of evidence can seldom be predicted accurately until the entire record is complete."[88] The opinion went on to bemoan the impracticality of a non-conditional rule: "If everything that might influence a jury must be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of his files as a matter of routine practice."[89]

After *Agurs*, which category one placed an exculpatory evidence case in made all the difference. If defense counsel specifically requested the information, courts would apply a less forgiving standard than when counsel made no request or just asked for *Brady* material in general. However, nine years later, in *United States v. Bagley*,[90] the Court abandoned its categorization scheme and made clear that there was only one rule governing a prosecutor's obligation to disclose exculpatory evidence—that it was conditional.

Defense counsel in *Bagley* had requested information whether prosecution witnesses had received any "deals, promises or inducements" to testify.[91] The prosecution failed to disclose that its

85. *Id.* at 107–08.
86. *Id.* at 108.
87. *Id.*
88. *Agurs*, 427 U.S at 108.
89. *Id.* at 109.
90. United States v. Bagley, 473 U.S. 667 (1985).
91. *Id.* at 669–70.

two principal witnesses had entered into written agreements with federal law enforcement authorities, literally titled a "Contract for Purchase of Information and Payment of Lump Sum Therefore," giving them money in return for gathering information and testifying against the defendant.[92]

The Court of Appeals relied on defense counsel's specific request as the trigger to apply the *Brady* test of materiality rather than the more forgiving *Agurs* conditional rule.[93] Since information that these witnesses were paid informants would have been material to the issue of the defendant's guilt, it meant that the prosecutor had violated the due process right of the defendant and left only the question of remedy. This, in turn, required the court to apply the harmless error rule.[94] Casting about for the proper application of this doctrine, the court reasoned that what happened here could never be harmless because it not only implicated the defendant's right under the Due Process Clause to receive exculpatory evidence but impaired his right under the Confrontation Clause to effectively cross examine adverse witnesses.[95] That was a violation Supreme Court precedent had placed outside the realm of harmless error.[96] It was, in other words, subject to automatic reversal.

The *Bagley* decision rejected the notion that harmless error was the lens through which it was appropriate to consider what the prosecutor had done. Rather than maintaining a separate regime for exculpatory evidence cases depending on whether there has been a request or not, the Court collapsed the two categories and adopted a test from *Strickland v. Washington*, an ineffective assistance of counsel case:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable

92. *Id.* at 687.
93. Bagley v. Lumpkin, 719 F.2d 1462, 1463–64 (9th Cir. 1983).
94. *Id.* at 1463–64.
95. *Id.* at 1464.
96. *See id.* (citing Davis v. Alaska, 415 U.S. 308, 318 (1974)).

> probability" is a probability sufficient to undermine confidence in the outcome.[97]

As before, the Court did not spend a lot of effort explaining why the Constitution required a conditional rule even when the prosecutor ignored defense counsel's specific request. It repeated the language from *Agurs* about the basis for the rule being to ensure fundamental fairness. The opinion also claimed that any non-conditional rule would be wildly impractical: "a rule that the prosecutor commits error by any failure to disclose evidence favorable to the accused, no matter how insignificant, would impose an impossible burden on the prosecutor and would undermine the interest in the finality of judgments."[98] Taking this straw-man on its face, the Court went on to comment that placing this type of obligation on prosecutors would fundamentally alter the adversary system, presumably a result that the Due Process Clause could not encompass.[99]

The *Bagley* Court remanded the case for the application of its newly announced standard. A Ninth Circuit panel of three former trial judges found that the impeachment information was so significant that it raised a reasonable probability that the result of the trial would have been different.[100] Bagley, serving a federal sentence on other charges, was never retried.[101]

4. Due Process and the Prosecutor's Obligation to Avoid Improper Pre-Indictment Delay

Prosecutors control the timing of much of the process that brings defendants to justice. They have total control over the decision whether to charge someone with a crime and when to initiate a complaint or indictment. The Due Process Clause provides the limit on how long a prosecutor can wait in the pre-charge stage of a case before initiating the process that brings the defendant into court. And

97. *Bagley*, 473 U.S. at 682.
98. *Id.* at 676 n.7.
99. *Id.*
100. Bagley v. Lumpkin, 798 F.2d 1297, 1300 n.2 (9th Cir. 1985).
101. United States v. Bagley, 837 F.2d 371 (9th Cir. 1988).

the governing rule that controls is conditional. The line of cases dealing with exculpatory evidence influenced the format of the rule the Court crafted for pre-indictment delay.

In *United States v. Marion*, the government brought a case directly to the Court after the trial judge dismissed the indictment on the ground that the three-year delay between the end of the defendant's criminal behavior and the return of the grand jury's true bill violated the Speedy Trial Clause.[102] The Court summarily rejected this claim on the ground that the speedy trial rule only governed the timing of the process after a defendant is first brought into court.[103]

However, that did not leave the timing of an indictment entirely unregulated. In a brief passage in the opinion, the Court accepted the government's concession that due process still served as a source for preventing governmental overreaching. The resulting test had two parts: first, a defendant had to show that the prosecutor delayed bringing charges to gain a tactical advantage; and second, citing both *Brady* and *Napue*, the defendant had to show that the delay "caused substantial prejudice to [his] rights to a fair trial."[104]

Because Marion had not yet been tried and had neither alleged nor proved any actual prejudice, relying only on the generic possibility that because of the delay "memories will dim, witnesses become inaccessible, and evidence be lost,"[105] the Court found it easy to clear the path for his trial. In light of the lack of any facts against which to craft a more precise standard, the Court left the issue without further illumination.

One can glean the conditional nature of this rule, however, by looking to statements the Court has made in the closely related area of speedy trial law. Whereas prejudice is a necessary component of a due process claim based on pre-indictment delay, it is only one of the interests that the Speedy Trial Clause protects. However, in practical

102. United States v. Marion, 404 U.S. 307 (1971).

103. *Id.* at 313.

104. *Id.* at 324 (citing Brady v. Maryland, 373 U.S. 83 (1963); Napue v. Illinois, 360 U.S. 264 (1959)).

105. *Id.* at 326.

terms, it is the most important and almost always the only interest at stake in speedy trial case.

What the Court said about speedy trial claims in *United States v. MacDonald*[106] applies equally to claims based on *Marion*: "a central interest served by the [due process rule dealing with pre-indictment delay] is the protection of the factfinding process at trial. The essence of a [*Marion*] claim in the usual case is that the passage of time has frustrated his ability to establish his innocence of the crime charged. Normally, it is only after trial that that claim may fairly be assessed."[107] The necessity for a post-trial evaluation is the hallmark of a conditional rule.

5. The Obligation of the Prosecutor Not to Impair the Sixth Amendment's Right to Compulsory Process

The Sixth Amendment guarantees that a defendant will have "compulsory process for obtaining witnesses in his favor."[108] There must also be a rule that prevents the prosecutor from obstructing the defendant's efforts to bring witnesses into court. Otherwise, it would be too easy for the government to frustrate the obligation of a judge to give the defendant the benefit of what the Compulsory Process Clause requires. When a prosecutor contemplates action that will make a potential defense witness unavailable, however, she only has to avoid hindering the defendant's access to those witnesses for whom the defendant can establish there was "a reasonable likelihood that the testimony could have affected the judgment of the trier of fact"[109]—a standard that makes the rule conditional.

In constructing this rule, the Court, in *United States v. Valenzuela-Bernal*, borrowed heavily from the exculpatory evidence cases, as well as the undue pre-indictment delay and the speedy trial cases.[110] *Valenzuela* involved a charge of transporting aliens into the country illegally. The defendant was arrested along with three Mexican aliens

106. United States v. MacDonald, 435 U.S. 850 (1978).
107. *Id.* at 860.
108. U.S. CONST. amend. VI.
109. United States v. Valenzuela-Bernal, 458 U.S. 858, 874 (1982).
110. *Id.*

after fleeing from the car he was driving when he first came to the attention of Border Patrol agents. All of the aliens were interviewed by federal law enforcement authorities. One of them was held to serve as a witness against the defendant. The other two were deported before defense counsel had an opportunity to interview them.

The Court's precedents on the right to compulsory process were sparse, but from them *Valenzuela* could extract a principle much like the one that animated the limit that *Brady* contemplated. The defendant must first establish that a witness, whose testimony would be the subject of compulsory process, would have something to say that could help the defendant on an issue material to the case against him.[111] Beyond this rather minimal test, however, the compulsory process cases could not go.

The Court, however, had a body of law from other parts of the Constitution that it thought related because they also dealt with "the area of constitutionally guaranteed access to evidence."[112] Thus, the Court looked to *Agurs*, the exculpatory evidence case, *Marion*, which dealt with pre-indictment delay and *Barker v. Wingo*,[113] a speedy trial case. In each of these areas, *Valenzuela* noted, the defendant had to establish prejudice to his ability to mount a defense in order to make out a case that the constitutional rule had been violated.[114] So it would be with compulsory process. Although the Court did not rule out the possibility that a determination of whether the prosecutor violated the rule of compulsory process could be made prior to trial, in practical terms it is hard to see how a prosecutor can know at the point in the process when a decision has to be made whether deportation of a potential defense witness would violate the defendant's rights. "Because determinations of materiality are often best made in light of all of the evidence adduced at trial," then Justice Rehnquist wrote, "judges may wish to defer ruling on motions until after the presentation of evidence."[115] Though phrased in terms of a

111. *Id.* at 867.
112. *Id.* at 867–68.
113. Barker v. Wingo, 407 U.S. 514 (1972).
114. *Valenzuela*, 458 U.S. at 868.
115. *Id.* at 874.

suggestion, in practical terms there is often no other option than to wait until after trial to decide if a prosecutor has violated the rule. It is, for all intents and purposes, conditional.

6. The Sixth Amendment's Right to Counsel and the Defense Attorney's Obligation to Provide Effective Assistance

One aspect of the Sixth Amendment's guarantee of the right to counsel is a quality control feature. Ever since the Court's first encounter in 1935 with the constitutional dimension of the right to counsel in the landmark decision in *Powell v. Alabama*,[116] the "Scottsboro Boys" case, it has recognized that in order to serve the function contemplated by the Sixth Amendment, defense attorneys in criminal cases must meet a minimum standard of competence.

This feature of the Sixth Amendment makes it unique among constitutional rules because the actor whose behavior is subject to evaluation does not exercise state power in any conventional way. While some defense attorneys do work for the state, as full time public defenders, and others may take on the role of quasi-public employees by virtue of accepting a court appointment to represent an indigent defendant, the Sixth Amendment's guarantee of what has come to be known as the effective assistance of counsel applies as well to lawyers hired by defendants out of their own pockets.[117]

Nevertheless, it does make sense to talk about the Sixth Amendment as a rule that is directed toward the behavior of even these private actors. Their behavior in conducting the defense of their clients will determine the legitimacy of the process that the state has initiated in its attempt to impose a criminal sanction. Certainly, if the process ends in a conviction in which a private lawyer failed to provide effective assistance of counsel, the government may not legitimately deprive the defendant of life, liberty, or property consistent with the Sixth Amendment. And, even if the defendant is acquitted despite the bumbling efforts of an incompetent lawyer, one may certainly argue that defendant failed to receive some benefit that

116. Powell v. Alabama, 287 U.S. 45 (1932).

117. Cuyler v. Sullivan, 446 U.S. 335, 343 (1980).

the Sixth Amendment incorporates. When one looks closer, however, at the details of the rule that defines competence one finds that the Court has chosen a conditional format. Unless the lawyer's incompetence in fact deprived the defendant of a reasonable opportunity to achieve a better result, not even the starkest incompetence violates the Sixth Amendment's rule requiring effective assistance of counsel.

Powell and the right to counsel cases that followed over the next fifty years in the Supreme Court never fleshed out the test by which one could determine if a defendant received the effective assistance of counsel that the Sixth Amendment required.[118] *Strickland v. Washington* gave the Court its first opportunity.[119]

David Leroy Washington was represented by a court-appointed lawyer in a capital, multiple-murder case in a Florida state court. Against his lawyer's advice, Washington not only pled guilty to the murders but chose to waive a jury in the sentencing hearing that followed the plea by a week. Defense counsel, admitting later that he was overcome at that point in the case by a sense of hopelessness, ceased his efforts to investigate the defendant's background.[120] In preparation for the proceeding which would decide his client's fate, he only spoke to two people who could provide insight into his background: the defendant's wife and mother. And he spoke to them over the telephone, not in person.[121] Counsel's performance at the sentencing hearing—which was the subject of Washington's claim that he did not receive effective assistance of counsel—was perfunctory. He failed to request a pre-sentence investigation by the probation department, presented no evidence of his own, and did not cross-examine the witnesses the prosecutor presented or the medical experts who testified about the victims' injuries.[122]

The only sign that defense counsel was actively engaged as an advocate was his objection to the prosecutor's effort to introduce the

118. Powell v. Alabama, 287 U.S. 45 (1932).
119. Strickland v. Washington, 466 U.S. 668 (1984).
120. *Id.* at 672.
121. *Id.* at 673.
122. *Id.*

record of the defendant's prior criminal history, which was offered to prove that the defendant was a danger to commit further crimes of violence.[123] This piece of lawyering legerdemain was accomplished by objecting on the ground that the document the prosecutor was trying to get in as evidence had not been properly certified. This accomplishment is less impressive than it might otherwise seem in light of the fact that defense counsel had already asked the judge to spare his client's life on the ground that he had no history of criminal activity.[124]

Had Washington's attorney been more diligent in trying to discover information that might have swayed the judge to find some reason to sentence him to life imprisonment instead of death, he would have discovered, as did the lawyers who represented him in federal court, a lot. At least fourteen acquaintances and neighbors, including a police officer, would have vouched for what an aberration this spree of violence was and the financial pressure Washington was under at the time.[125] In addition, he could have found expert witnesses, like the two psychologists discovered by post conviction counsel, who would have testified that at the time of the murders the defendant was chronically depressed.[126]

Strickland announced a two part test by which to judge the constitutional adequacy of a defense attorney's efforts. One part was to evaluate counsel's efforts, as the situation appeared at the time in which they were undertaken, against a standard of reasonableness under prevailing professional norms.[127] Nothing about this, so far, makes it a conditional rule. But the second half of the test did.

In addition to showing that counsel performed unreasonably, the constitutional rule the Court crafted requires a showing of prejudice. Justice O'Connor began her discussion of why this is so by noting that "[a]n error by counsel, even if professionally unreasonable, does

123. *Id.*

124. *Strickland*, 466 U.S. at 673. While it may not be obvious to the reader of this account, it must have been obvious to the judge that Washington did, in fact, have a criminal record because the judge had excluded the defendant's rap sheet on evidentiary grounds.

125. *Id.* at 675.

126. *Id.* at 675–76.

127. *Id.* at 688.

not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment," a proposition for which she cited *United States v. Morrison.*[128]

Morrison was an interesting choice for this purpose. It involved the Court's review of the dismissal of an indictment because federal law enforcement agents had contacted the defendant after her indictment in order to persuade her to cooperate with their investigation against a bigger fish. It appears that the DEA agents involved saw the key to their success to be getting Ms. Morrison to jettison her attorney, whom they believed would not have been particularly hospitable to their suggestion.[129] In order to accomplish their end, they disparaged her attorney's merit and urged her to replace him with a public defender whom they thought more pliant. The government, once the case reached the Supreme Court, urged the Justices to hold that, absent a showing of actual prejudice, the actions of its agents did not even violate the Sixth Amendment. The Court, however, assumed without deciding that what the stalwarts from the DEA did was in fact a violation of the constitutional rule, but agreed that it need not be remedied by dismissing the indictment since Morrison could not show prejudice of any kind.[130] She had not only resisted the agents' entreaties to ditch her attorney, but promptly told him what they were up to and stood by his subsequent efforts on her behalf.

Morrison's use of prejudice, then, is all about when you get a remedy and not about defining the rule which sets the boundaries of acceptable behavior for government agents in the sphere of interfering with a defendant's relationship to her attorney. Nevertheless, *Strickland* cited it as a basis for incorporating the question of prejudice into the definition of the right.

Strickland offered a number of reasons that prejudice was necessary as a definitional matter. Of primary importance was the Court's view of the underlying value that the right to effective assistance of counsel served: "The purpose of the Sixth Amendment

128. *Id.* at 691 (citing United States v. Morrison, 449 U.S. 361, 365 (1981)).
129. United States v. Morrison, 449 U.S. 361, 362 (1981).
130. *Id.* at 365.

guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution."[131] Pragmatic concerns played a role as well.

> The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.[132]

For the standard by which a court was to judge the defendant's claim of prejudice, *Strickland* borrowed from *Agurs* and *Valenzuela-Bernal*. The defendant must show that there is a reasonable probability that the attorney's inadequate representation adversely affected the result of the proceeding.[133] Using this standard, the Court concluded that none of the evidence that Strickland said his trial lawyer should have developed would have led to a sentencing profile very much different than the one which led to his eventual death.[134]

131. *Strickland*, 466 U.S. at 692.

132. *Id.* at 693.

133. *Id.* at 694.

134. *Id.* at 700. Once a court is convinced that a defense attorney has performed incompetently, of course, it increases the probability that the defendant will be hampered in her effort to show the lawyer's incompetence adversely affected the result of the trial since, as Justice Marshall noted in his dissent, "evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel." *Id.* at 710.

7. The Sixth Amendment's Right to Counsel and the Responsibility of a Judge to Ensure That the Defendant's Attorney Is Not Subject to a Conflict of Interest

Another part of the problem of defining competent defense counsel comes in the context of conflict of interest. Ten years after *Powell*, *Glasser v. United States* established that "the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests."[135]

When a defendant or a lawyer, prior to trial, objects to the appointment of an attorney on the ground that the lawyer cannot provide objective, unconflicted representation, the *Glasser* rule requires the judge to act, either by appointing separate counsel or investigating to ensure that the risk posed by joint representation is too remote. This rule is not conditional. The judge can determine if requiring the defendant to be represented by the attorney alleged to have a conflict of interest would violate the Constitution or not at the time that she makes the decision, ruling on the facts that were brought to her attention.

But where the facts known to the judge prior to trial make it apparent that a lawyer appointed to represent the defendant serves conflicting interests, if neither the lawyer nor her client objects, the Constitution's mandate *is* conditional. The failure of the judge to act in the face of the facts available to her may, or may not, violate the rule that governs in this situation.

This conditional rule appeared in *Mickens v. Taylor*, a 2002 decision.[136] The juvenile court judge who was responsible for appointing a lawyer to represent Mickens on the murder charge he faced had to have been struck by the coincidence of the victim's identity. She had appointed a lawyer for the victim on weapons and assault charges just seventeen days earlier and had dismissed those

135. Glasser v. United States, 315 U.S. 60, 70 (1942).
136. Mickens v. Taylor, 535 U.S. 162 (2002).

charges when the victim's body was discovered.[137] The very next day, however, she called the lawyer she had appointed for the victim and asked him to "do her a favor" and represent the person who was charged with killing his former client.[138] The lawyer did not object to being placed in a situation that might compromise his ability to represent Mickens and Mickens himself did not discover the conflict until after he was convicted and sentenced to death.[139]

In these circumstances, the majority held, Mickens's right to effective assistance of counsel depended on his establishing that some action the lawyer took *after* being appointed was adversely affected by the lawyer's prior representation of the murder victim. The message to judges charged with appointing lawyers in criminal cases is a conditional one: even if you are aware that a lawyer serves conflicting interests, your failure to act will only violate the Sixth Amendment if the lawyer's subsequent behavior shows some effect traceable to the conflict.[140]

Justice Scalia's opinion in *Mickens* offered several reasons that the rule should be a conditional one. One was the underlying purpose he attributed to the right to counsel, as in *Strickland.* The Constitution protects defendants from being represented by lawyers who have divided interests "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial."[141] And the way that the Court can tell if a defendant had a "fair trial" is to determine if there are "defects in assistance that have [a] probable effect upon the trial's outcome."[142]

In conflict of interest cases, though, the Court makes an exception to the rule that requires a defendant to show an effect on the outcome. Unless the judge improperly overrules an objection that has been raised prior to trial, as in *Glasser*, the defendant must show that the lawyer's divided loyalties had an effect on some action the lawyer

137. *Id.* at 164.
138. *Id.* at 190 n.1.
139. *Id.* at 191.
140. *Id.* at 173.
141. *Id.* at 166 (citing United States v. Cronic, 466 U.S. 648, 658 (1984)).
142. *Mickens*, 535 U.S. at 166.

took or neglected to take, but not a probable effect on the outcome.[143] Since the lawyer's dual representation may make it impossible for the defendant to show prejudice in terms of outcome, all that the Court looks for in this situation is a determination that the lawyer's performance was adversely affected by an actual conflict of interest. This future consequence still leaves the rule in conditional form. And in Justice Scalia's view, finding a violation of the rule from the facts in *Mickens* would be cutting the right to counsel too far adrift from its purpose of ensuring reliable results.

Justice Scalia also believed that it was unnecessary to abandon a conditional rule in *Mickens* as a way of ensuring that judges conscientiously carry out their obligation to ensure that a defendant receives conflict free counsel. Judges, he assumed, are not "as careless or as partial as those police officers who need the incentive of the exclusionary rule."[144]

Justice Souter's dissent addressed both these points.[145] He saw a non-conditional rule requiring a judge to act whenever she learns that defense counsel labors under a conflict the only "sensible regime."[146] "The best time to deal with a known threat to the basic guarantee of fair trial," he wrote, "is before the trial has proceeded to become unfair."[147] The majority's position, he maintained, was "skewed against recognizing judicial responsibility."[148]

Justice Souter also took aim at the majority's defense of a conditional rule on the ground of the underlying value of the Sixth Amendment right to counsel:

> Requiring a criminal defendant to prove a conflict's adverse effect in all no-objection cases only makes sense on the Court's presumption that the Sixth Amendment right against ineffective assistance of counsel is at its core nothing more than a utilitarian

143. *Id.*
144. *See id.* at 173.
145. *See id.* at 207 (Souter, J., dissenting).
146. *Id.*
147. *Id.* at 203.
148. *Mickens*, 535 U.S. at 208.

> right against unprofessional errors that have detectable effects on outcome. . . . [T]he right against ineffective assistance of counsel has as much to do with public confidence in the professionalism of lawyers as with the results of legal proceedings. A revelation that a trusted advocate could not place his client's interest above the interests of self and others in the satisfaction of his professional responsibilities will destroy that confidence, regardless of outcome.[149]

C. Liability Rules

Conditional rules do not have to rely on a *post hoc* evaluation of whether there is prejudice. Another way to make a rule conditional is to cast it as a liability rule. This type of rule allows the actor to engage in the conduct that it addresses but gives to the person whose legal entitlement the act adversely affects the right to obtain a remedy. The essence of a liability rule is that its enforcement depends the person most closely affected to ensure that the remedial mechanism accompanying it is put into play.

It is, to pick a sports analogy closer to the American heart than soccer, like the rule in baseball that requires a base runner to wait until a fly ball is caught before leaving the base to advance her position. If a runner leaves early, the individuals charged with enforcing the rule will not act on their own. It is up to the opposing team to lodge an appeal which sets in motion the umpire's ruling that the runner left early and is, therefore, out.[150]

Liability rules play a major role in the law of torts, where they represent the most efficient way to distribute resources when negotiation between the parties is not practical.[151] As a mechanism for constitutional rules, the most familiar example for this type of format is the Takings Clause.[152] The Takings Clause does not regulate when or how or under what conditions the government may

149. *See id.* at 207.

150. *See* N.C.A.A. 2007 BASEBALL RULES AND INTERPRETATIONS Rule 8, § 6(a), at 96–97.

151. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

152. *See* U.S. CONST. amend. V.

take private property for public use. The rule only prescribes what the government must do after it has taken the property.[153]

In three different situations (dressing the defendant in prison clothes at trial, asking a defendant on cross examination about exercising *Miranda* rights, and the police's confronting a person with a show of force demanding that he or she submit), the Supreme Court has crafted constitutional rules that operate much like liability rules. They depend on the reaction of the person who is the rule's intended beneficiary to determine if the governmental actor whom the rule regulates has violated its precept. In each case, if the target does not respond in the way necessary to define a violation of the rule, the actor's behavior becomes unobjectionable. If, on the other hand, the target does react in the appropriate way, what the actor has done will have violated the target's rights. In a fourth context, a prosecutor's introduction into evidence of a confession by a codefendant implicating the defendant, the Court has molded a constitutional rule into an even more unwieldy format that resembles a liability rule but differs in one respect. The rule depends on the future action of someone other than the beneficiary of the rule to determine the legitimacy of what the government actor has done.

1. Due Process and the Defendant's Right Not to Appear at Trial in Prison Clothes

A number of free-standing dictates of the Due Process Clause flow from the concept of the presumption of innocence. This bedrock principle has implications for a variety of facets of the criminal trial system. It bears on the extent to which a defendant may be deprived of his liberty prior to conviction,[154] the instructions the jury receives about the significance of the fact that the defendant has been charged with a crime,[155] and the requirement that prosecution bear the burden of proof on each of its elements.[156] It also comes into play when the

153. *See* discussion *infra* Part II.B.iv.
154. United States. v. Salerno, 481 U.S. 739 (1987).
155. Taylor v. Kentucky, 436 U.S. 478 (1978).
156. *Id.*

jury is exposed to information that presents an unacceptable risk of influencing them to convict the defendant not because of the strength of the evidence but because of his status as someone accused of a crime.

In *Estelle v. Williams*, the Court considered the implication of this dynamic in a case in which the defendant was clothed in prison attire throughout the course of his trial.[157] The court system in which Williams was tried—Houston, Texas—routinely had defendants who were held on bail appear before the juries who sat on their cases in distinctive, prison-issue clothing. The Court was aware of the psychological implications of a defendant's appearance: "The defendant's clothing is so likely to be a continuing influence throughout the trial that, not unlike placing a jury in the custody of deputy sheriffs who were also witnesses for the prosecution, an unacceptable risk is presented of impermissible factors coming into play."[158] But, the rule the Court constructed to meet this danger was a conditional one. It is only when a defendant objects that forcing him to wear prison clothes violates the Constitution.[159]

Sometimes it makes sense that a rule requires an objection be raised by the protected person before an act can constitute a violation. The privilege against self-incrimination protects a person from "be[ing] compelled . . . to be a witness against himself."[160] Compulsion is part of the linguistic formula and the objectionable aspect of the government's effort to obtain information that it needs to prosecute someone.[161] When a witness is on the stand and is asked a question that may lead to an incriminating answer, the law governing the privilege requires the witness to seek its protection and refuse to answer before being able to find shelter in its protection. If the witness answers without having first asserted the privilege, the answer is not compelled and therefore does not give rise to a

157. Estelle v. Williams, 425 U.S. 501 (1976).

158. *Id.* at 505.

159. *Id.* at 508.

160. U.S. CONST. amend. V.

161. *See* Schmerber v. California, 384 U.S. 757, 761 (1966) ("We hold the [self-incrimination] privilege protects an accused only from being compelled to testify against himself.").

violation. As a result, the ordinary rule that governs the application of the privilege does not prohibit a government official like a prosecutor or judge from asking a witness a question that might tend to incriminate. What the rule prohibits, however, is compelling someone to answer over his or her objection. In other words, the rule's protection only comes into play *after* the privilege is claimed.[162]

Obviously, there is no similar linguistic reason for a rule that has as its foundation in the Due Process Clause. *Estelle* found another basis for justifying the incorporation of a requirement that the defendant object. "[I]t is not an uncommon defense tactic," Chief Justice Warren E. Burger wrote, "to produce the defendant in jail clothes in the hope of eliciting sympathy from the jury. . . . Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system."[163]

There is a familiar doctrine that holds defendants to strategic choices by which they, or their attorneys, consciously choose not to assert underlying rights. That is, of course, the concept of waiver.[164] If a defendant knowingly and voluntarily chooses to forego a protection that the Constitution would otherwise provide, the criminal justice system is under no obligation to remedy the rule violation that preceded the waiver. But this is not the basis on which the Court decided *Estelle*.[165] Under a waiver approach, the Court would have recognized that the judge's decision to have the defendant appear in prison clothes was a violation of due process and placed on the State the burden of showing that the defendant waived this right. There was nothing in the record to indicate in the slightest that the defendant wanted to wear prison clothes in front of the jury.[166]

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162. *See* discussion *infra* Part I.D.ii.

163. *Estelle*, 425 U.S. at 512.

164. *See* United States v. Olano, 507 U.S. 725, 733 (1993) ("[W]aiver is the 'intentional relinquishment or abandonment of a known right.'") (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

165. *Estelle*, 425 U.S. at 512.

166. *Id.*

Nor is it accurate to view *Estelle* as an example of the closely related doctrine of procedural default that the Court could have used to justify its conclusion. Unlike waiver, this concept does not presuppose the defendant's active abandonment of the rule's protection. Rather, it strips the defendant of the ability to complain about the rule's violation because of a failure to assert the right at issue pursuant to the terms of a fair procedural mechanism.[167] While *Estelle* appears superficially to be a procedural default case, since it emphasized the defendant's lack of an objection when he clearly knew that he was wearing prison clothes, it differs in a fundamental way.[168] Procedural default is a doctrine about the remedies that one loses by failing to follow the proper procedure. *Estelle* is about the content of the rule that the judge must follow.[169]

The four Justices who joined the majority opinion in *Estelle* could not have been unaware of the possibility of reaching the result they did by relying on the doctrine of procedural default. Justices Lewis F. Powell and Potter Stewart concurred on precisely this ground.[170] In their view, no relief was warranted in this case because the defense attorney was aware of the possibility of objecting to the way his client was dressed and failed to do so simply because he mistakenly thought it futile.[171]

There are different conclusions one might draw from the majority's crafting a conditional rule rather than relying on the doctrine of procedural default. One is the possibility that the majority was concerned that the procedural default doctrine would not be strong enough medicine to ensure the finality of convictions in cases where the defendant did not lodge an objection. At the time *Estelle* was decided, 1976, the law of constitutional remedies was much more forgiving than it became in the last two decades of the twentieth

167. *See Olano*, 507 U.S. at 731 ("'No procedural principle is more familiar to this Court than that a constitutional right . . . may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'") (quoting Yakus v. United States, 321 U.S. 414, 444 (1944)).

168. *Estelle*, 425 U.S. at 509–10.

169. *Id.* at 507–08.

170. *Id.* at 513–14 (Powell, J., concurring).

171. *Id.* at 514 (Powell, J., concurring).

century. Defendants in the mid-1970s whose lawyers had failed to object to the violation of their clients' rights stood a much better chance of getting relief in a habeas corpus action than their successors thirty years later when habeas relief was much stingier.[172]

Another conclusion that one may draw from the majority opinion in *Estelle* is that by making the rule conditional, the Court may simply have been signaling to trial judges that they have completely unfettered discretion in making decisions about whether defendants appear in prison clothes. Certainly, if the rule in *Estelle* were not cast in conditional form, the state would appear to have an affirmative obligation to provide a less emotionally charged wardrobe for the defendants it chooses to prosecute. It may be that *Estelle* was motivated by a desire to spare that expense.

2. *Due Process and Evidence That the Defendant Remained Silent After Receiving a Miranda Warning*

The famous *Miranda v. Arizona* decision has become so embedded in popular culture that almost every English speaking moviegoer or television watcher knows that after you are arrested, you have a right to remain silent.[173] In *Doyle v. Ohio*, the Court held that if a suspect hears this warning and relies on it, it is so fundamentally unfair to allow the prosecutor to use the defendant's silence as evidence of his guilt that it violates due process.[174] For eleven years, the *Doyle* rule appeared to be straightforward. Prosecutors knew they could not attempt to bring to the attention of the jury the fact that the defendant had remained silent after receiving a *Miranda* warning. *Greer v. Miller*, however, made the rule a conditional one.[175]

Charles Miller took the stand in his murder trial and testified that he had nothing to do with the crime.[176] When the prosecutor had an opportunity to cross-examine, he chose to start out strong:

172. Jake Sussman, *Unlimited Innocence: Recognizing an "Actual Innocence" Exception to AEDPA's Statute of Limitations*, 27 N.Y.U. REV. L. & SOC. CHANGE 343, 377–79, (2001–02).

173. Miranda v. Arizona, 396 U.S. 868 (1969).

174. Doyle v. Ohio, 426 U.S. 610, 618–19 (1976).

175. Greer v. Miller, 483 U.S. 756 (1987).

176. *Id.* at 758.

Q: Mr. Miller, how old are you?
A: 23.
Q: Why didn't you tell this story to anybody when you got arrested?[177]

By highlighting the defendant's post-*Miranda* silence at the very beginning of his cross-examination, the prosecutor cannot have been unaware of the impact this point must have had on the jury. It was no accident that it was the second question, immediately after asking the defendant's age. Defense counsel certainly knew what the prosecutor was up to, for an objection immediately followed.[178] The judge instructed the jury to "ignore [the] question, for the time being."[179] The prosecutor never returned to the issue. Miller was convicted.[180]

Both state appellate courts that considered Miller's appeal, the federal district court that granted him habeas corpus relief and the Seventh Circuit panel, as well as the en banc court that affirmed, approached the case on the understanding that the prosecutor's question violated the defendant's right to remain silent. For each of these courts, the only issue they thought relevant was whether the violation was harmless or not.[181]

The question on which the Court granted certiorari was what the standard of harmless error should be in a habeas proceeding for a *Doyle* violation.[182] But somewhere in the course of its consideration of the case, the Court changed the structure of the *Doyle* rule.[183]

Doyle itself dealt with a case in which the prosecutor had been permitted to question the defendant about his failure to tell the police the same story as included in his direct testimony and to argue to the jury that his post-*Miranda* silence was proof that his claim of innocence at trial was contrived.[184] Since the context of the case

177. *Id.* at 759.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Greer*, 483 U.S. at 760–61.
182. *Id.* at 761 n.3.
183. *Id.* at 764–65.
184. Doyle v. Ohio, 426 U.S. 610, 614 n.5 (1976).

presented the Court with a *fait accompli* concerning the unfair use of the defendant's silence, there was no reason for *Doyle* to have paid attention to the difference between the effect of a prosecutor's merely asking the forbidden question and the defendant's answering it. So, the way that the *Doyle* opinion phrased its rule allowed the majority in *Greer* to find room to make it conditional.

The quotes from *Doyle* that *Greer* excerpted to illustrate its rule gave it room to maneuver:

> [T]he holding of *Doyle* is that the Due Process Clause bars "*the use* for impeachment purposes" of a defendant's post-arrest silence. The Court noted that "'it does not comport with due process *to permit* the prosecution during trial to call attention to [the defendant's] silence.'"[185]

The choice to make *Doyle* a conditional rule may have been a result of the majority's reluctance to face head-on the proper application of the harmless error doctrine to *Doyle* violations. More than one circuit had taken the position that "*Doyle* violations are rarely harmless,"[186] and there was an as yet unsettled question of whether the standard for harmless error should be the same in a habeas corpus case, as this one was, as on direct review. Because the defendant in *Greer* never answered the prosecutor's question, the Court held, there was no *Doyle* violation in the first place and thus no need to address the question of what harmless error standard should apply.[187]

Four Justices disagreed with the majority's decision to make *Doyle* a conditional rule.[188] Justice Stevens "agree[d] with the 10 Illinois judges and 12 federal judges who have concluded that the rule of the *Doyle* case was violated when the prosecutor called the jury's

185. *Greer*, 483 U.S. at 763–64 (quoting *Doyle*, 426 U.S. at 619) (emphasis added).

186. *Id.* at 772 (Brennan, J., dissenting) (quoting Williams v. Zahradnick, 632 F.2d 353, 364 (4th Cir. 1980)).

187. *See id.* at 765.

188. *Id.* at 769 (Stevens, J., concurring) (agreeing with majority's outcome but disagreeing on the standard to be applied on direct appeal); *id.* at 760–70 (Brennan, J., dissenting).

attention to respondent's silence."[189] Although he affirmed the conviction on the ground that the error was harmless, Justice Stevens felt the majority's approach robbed the *Doyle* rule of clarity.[190] Justices William J. Brennan, Jr., Thurgood Marshall, and Harold A. Blackmun criticized the majority for eschewing a harmless error approach that would have been more nuanced than the blunt conditional rule that the Court adopted.[191] A harmless error analysis could not only take into account the fact that the prosecutor's question went unanswered (the major factor relevant to the majority's conditional rule),[192] but also the other events at trial that might have led the jury to weigh the defendant's silence after arrest despite the lack of explicit testimony on the point.[193]

3. *The Fourth Amendment and the Definition of a Seizure*

If there is any provision in the Constitution where both the historical understanding and the contemporary application depend on government officials' being subject to clear rules which tell them in advance of their exercise of power whether they can act or not, the

189. *Id.* at 767.

190. *Greer*, 483 U.S. at 763–64 ("But if there is to be a rule that prohibits a prosecutor's use of a defendant's post-*Miranda* silence, it should be a clearly defined rule.").

191. *Id.* at 769–75 (Brennan, J., dissenting).

192. The majority also relied on the fact that the trial judge instructed the jury to disregard any question to which an objection had been sustained. *See id.* at 764.

193. For example, the context in which the prosecutor's question came, the weight of the evidence, and the importance of the defendant's credibility all played a factor in the lower court's conclusion that the error in *Greer* was not harmless. Miller v. Greer, 789 F.2d 438, 445–47 (7th Cir. 1986) (*en banc*).

The majority was not completely blind to the inherent unfairness of allowing the prosecutor to suggest by his question that the defendant should not be believed, because he did not tell his story to the police. In a separate part of the opinion, they considered whether prosecutorial misconduct "'so infec[ted] the trial with unfairness as to make the resulting conviction a denial of due process.'" *Greer*, 483 U.S. at 765 n.7. But what was it that the prosecutor did that would even require the Court to evaluate its impact in the context of the entire trial? It must be, though the Court never specifically says, the possibility that the jury would infer as true the suggestion contained in the question posed by the prosecutor about the defendant's silence. And what, one might ask, was that implicit suggestion? It must have been the inference that the defendant remained silent after receiving a *Miranda* warning. But that is precisely the factual assertion that *Doyle* itself prevents the prosecutor from making a part of the evidence. True, it does more damage when the defendant admits the assertion than when the prosecutor suggests it in a question. But it is hard to see why this difference justifies applying two different rules to what is essentially the same problem. Nevertheless, by subsuming this analysis under the rubric of the test applicable to prosecutorial misconduct, the majority was able to subject it to a less demanding standard than the one that was in place at the time for harmless error. *Greer*, 483 U.S. at 765 n.7.

Fourth Amendment would be at the top of almost every list. Much of the Court's recent Fourth Amendment analysis is driven by its desire to make things simple for the police officers who have to translate their legal doctrine into action out on the street.[194] Yet in one important area, the Court has constructed a Fourth Amendment conditional rule that makes the legitimacy of what a police officer does dependent on how the target of his actions responds.

Boiled down to its essence, all Fourth Amendment issues relevant to the cop on the beat depend on a preliminary question that defines the relevant scope of action that the Amendment controls. Is she doing something that the Amendment addresses? The Fourth Amendment regulates only searches and seizures.[195] If a police officer contemplates doing something that fits neither category, like shining a flashlight into a car parked on a public street or following someone walking through a public park, then that is the end of the matter.[196] It is only if the conduct fits into one of these two categories that the officer has to apply the myriad rules the Court has crafted to fit the Amendment's standard of reasonableness to the vast array of modern day contexts in which we expect our police to act.

The most common area where police action implicates the Fourth Amendment is in one of the two varieties of seizures that infringe on an individual's liberty interest. Ever since the Court broke the mold of a unitary Fourth Amendment in *Terry v. Ohio*, police and courts classify seizures, depending on how intrusive they are, into either *Terry* stops or full-scale arrests.[197] In order to make the sort of brief stop of a suspect that *Terry* allows to conduct a threshold inquiry, an

194. New York v. Belton, 453 U.S. 454, 458 (1981) ("[T]he protection of the Fourth and Fourteenth Amendments 'can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'"); Dunaway v. New York, 442 U.S. 200, 213–14 (1979) ("A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.").

195. U.S. CONST. amend. IV.

196. *See* Texas v. Brown, 460 U.S. 730, 740 (1983); United States v. Lee, 274 U.S. 559, 563 (1927); United States v. Feliz, No. 08-CR-133 (DLI), 2009 WL 3069742, at *8 (E.D.N.Y. Sept. 28, 2009).

197. Terry v. Ohio, 392 U.S. 1 (1968).

officer needs some reasonable suspicion that the person is, has been, or will be engaged in a crime.[198]

Reasonable suspicion, the Court has held many times, is determined *ex ante*.[199] It depends not on what the true state of affairs turns out to be after the fact, but on how things appear to the officer at the time she exercises her power. Otherwise, the Fourth Amendment cannot serve as a guide to the officer's behavior.

One would think that the same logic must apply to the question of defining a seizure. If an officer cannot tell in advance if she proposes to engage in activity regulated by the Fourth Amendment, how can she know if what she plans to do crosses the line? This was essentially the question the Court confronted in *California v. Hodari D.*[200]

The officers whose actions precipitated the Court's encounter came across Hodari Dulin in an alley where he and a number of other young men were huddled around a car.[201] The boys scattered when they saw the officers and, predictably, the police gave chase. In the course of the pursuit, one of the officers saw Dulin throw down a small rock of what he later learned was crack cocaine.[202] In the juvenile court proceeding, Dulin sought to suppress the use of the drugs as evidence on the ground that he had been seized without justification at the initiation of the chase and the discovery of the cocaine was a "fruit of the poisonous tree."[203] Since the State conceded that up until the time Dulin dropped the drugs the officer did not have reasonable suspicion that Dulin was engaged in any criminal activity,[204] the legality of the officer's discovery of the drugs depended on whether Dulin had been seized for Fourth Amendment purposes when he saw the officer begin the chase.[205]

198. *Id.* at 22.
199. *Id.*
200. California v. Hodari D., 499 U.S. 621 (1991).
201. *Id.* at 622.
202. *Id.* at 622–23.
203. *Id.* at 623.
204. *Id.* at 623 n.1.
205. *Id.* at 623.

In doctrinal terms, the resolution of *Hodari D.* depended on whether the Court would continue to adhere to its most widely accepted modern day formulation of what constituted a seizure or would revert to the historical common law understanding. The prevailing contemporary test for defining a seizure under circumstances like Dulin's was an objective one: "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."[206] No one on the Court disputed that the officer's action, chasing Dulin, implicitly communicated that the State intended to interfere with his freedom to run down that alley.[207]

The common law definition of a seizure came exclusively from the tort law of trespass. It required that either the police must touch their suspect physically or the suspect must submit in some way to a show of force.[208] Since Dulin was not touched and certainly did not submit, he would have been unable to successfully establish the elements of trespass, as the doctrine was known in the Eighteenth century.

Underlying the choice between these two approaches were the different views the Justices had on the practical consequence of the rule that would emerge. The historical account leads to a conditional rule that gives police officers much more freedom in using a display of authority to get people's cooperation, even if those people are viewed by the police as targets for whom they lack objective indicia of criminality. Justice Antonin Scalia, who wrote the majority opinion in *Hodari D.*, clearly belongs in this camp:

> We do not think it desirable, even as a policy matter, to stretch the Fourth Amendment beyond its words and beyond the meaning of arrest . . . . Street pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged. Only a few of those orders, we must

206. *Hodari D.*, 499 U.S. at 627–28 (quoting United States v. Mendenhall, 446 U.S. 544, 554 (1980)).
207. *Id.* at 625.
208. *See Mendenhall*, 446 U.S. at 553 ("[A] person is 'seized' only when, by means of physical force or show of authority, his freedom of movement is restrained.").

> presume, will be without adequate basis, and since the addressee has no ready means of identifying the deficient ones it almost invariably is the responsible course to comply. Unlawful orders will not be deterred, moreover, by sanctioning through the exclusionary rule those of them that are *not* obeyed. Since policemen do not command "Stop!" expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures.[209]

The two dissenters, Justices Stevens and Marshall, thought that the construction of a conditional rule to govern when police officers could attempt to interfere with a person's liberty "profoundly unwise."[210] Without a rule that allowed a police officer to know in advance whether his course of action was consistent with the restrictions of the Fourth Amendment, they argued, not only creates uncertainty but also provides police with a perverse incentive. Since merely directing a menacing show of force at an individual is, under the majority's view, not governed by the Fourth Amendment, police officers would be free to threaten to interfere with someone whom they could not lawfully stop and hope that the suspect's reaction gave them the reasonable suspicion that they otherwise lacked.[211] "In an airport setting," Justice Stevens posed, "may a drug enforcement agent now approach a group of passengers with his gun drawn, announce a 'baggage search,' and rely on the passengers' reactions to justify his investigative stops?"[212]

4. The Confrontation Clause and the Admissibility of a Codefendant's Confession

In *Bruton v. United States*, the Court held that the Confrontation Clause prohibits a prosecutor from introducing as evidence at a joint trial the confession of one of the group charged with the crime if it

209. *Hodari*, 499 U.S. at 627.

210. *Id.* at 630 (Stevens, J., dissenting).

211. *Id.* at 643–44.

212. *Id.* at 645. *E.g.*, United States v. Waterman, 569 F.3d 144 (3d Cir. 2009) (holding that merely pointing a gun at a suspect does not constitute a seizure).

incriminates a codefendant, even if the jury receives an instruction directing them to consider it only against the person who made it.[213] The problem such a situation creates for the values the Confrontation Clause protects stems from the Court's assumption about the utility of a limiting instruction in this circumstance. The chance that the jury would use the confession against both the person who made it and the person whom it mentions is overwhelming.[214] Once that barrier is breached, the confession becomes part of the evidence against the nonconfessing codefendant, and its admission without the ability to cross-examine its maker violates the Confrontation Clause's core guarantee.[215]

On its face then, *Bruton* presents a straightforward nonconditional rule. But two years later, in *Nelson v. O'Neil*, the Court found a way to make it less clear. The trial in *Nelson* involved two codefendants, O'Neil and Runnels. Runnels confessed and implicated O'Neil.[216] The prosecutor put three witnesses on the stand: a police officer who testified to the circumstances of the arrest; the victim of the crime, who identified both men; and the police office to whom Runnels made his confession. The judge instructed the jury that they were to use the confession as evidence only against Runnels, not O'Neil.[217] The trial took place before *Bruton* was decided, so neither the prosecutor nor the judge would have had a reason to believe that this limiting instruction did not eliminate the Confrontation Clause problem inherent in the prosecutor's use of the confession. *Bruton*, however, had been given retroactive effect in *Roberts v. Russell*, so

213. Bruton v. United States, 391 U.S. 123 (1968).

214. *See id.* at 135–36 ("[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect . . . .").

215. *See* Lilly v. Virginia, 527 U.S. 116, 116–17 (1999) (stating that admission of nontestifying co-defendant's confession violates the Confrontation Clause despite state's hearsay exception for declarations against penal interest).

216. Nelson v. O'Neil, 402 U.S. 622 (1971).

217. *Id.* at 624.

O'Neil was able to raise his Confrontation Clause claim in a habeas corpus petition.[218]

Nelson, however, presented the Court with a development at trial that *Bruton* did not. As part of the defense case, each defendant took the stand. O'Neil testified to an alibi. Runnels not only corroborated the alibi, contradicting the account in the police officer's testimony about the confession, but he denied making the confession at all. O'Neil's defense counsel had an opportunity to cross-examine Runnels, but chose to forego the chance.[219] Since the principal vice the Court saw in the *Bruton* situation was the admission of an inculpatory statement by an out-of-court declarant who was "unavailable at the trial for 'full and effective' cross-examination,"[220] the mere prospect of putting questions to Runnels that O'Neil had when his codefendant took the stand was enough to take this case out of the ambit of *Bruton*.[221]

What makes *Nelson* significant for the purpose of bringing it into the lineup of conditional rule cases is the way the Court described the consequence of Runnels's availability for cross-examination. The Court announced as the reason for ruling against O'Neil: "there was no violation of the Constitution in this case."[222] The simplest meaning of this way of describing O'Neil's claim is to see *Bruton* as a conditional rule. With the benefit of hindsight, knowing that O'Neil had a chance to cross-examine the person who made the confession, the Court treated this situation like a prosecutor's asking a question about a defendant's assertion of *Miranda* rights, or a judge's ordering a defendant to appear before the jury in prison clothes, or a police officer's drawing a gun and ordering someone to halt. In all of these

218. Roberts v. Russell, 392 U.S. 293 (1968).

219. *Nelson*, 402 U.S. at 624.

220. *Id.* at 627.

221. *Id.* at 627–29. The majority assumed that had Runnels taken the stand and affirmed his confession, there would have been no Confrontation Clause problem. Had Runnels done so, the Court reasoned, O'Neil would have been in a worse position than if Runnels had denied making the confession. Given that the former situation would not have violated the Confrontation Clause, it was easy for the Court to conclude that neither did the latter.

222. *Id.* at 626.

situations, something that happened in the future determined if the Constitution had been violated or not.

If the Court had meant to convey that *Bruton* was not a conditional rule, it could easily have adopted either of the two lines of reasoning that the government put forward on the merits in the Ninth Circuit to argue against O'Neil's Confrontation Clause claim. The first of these arguments was that the opportunity to cross-examine Runnels "cured" the *Bruton* error.[223] Going to a doctor who cures a disease is quite different than going to one who tells you that you are perfectly healthy. If the Court had used "cure" language, the rule would not have been conditional. But it did not.

The Supreme Court was certainly familiar with the concept of curing an error. The Court had used the metaphor in considering whether a prosecutor's correction of her own improper remarks cured the error of her presentation before the jury,[224] a judge's instruction cured the error of a prosecutor mentioning testimony in the Government's opening statement that was not forthcoming in the case in chief,[225] and whether a defense attorney's use of a peremptory challenge cured a judge's error in allowing a juror to sit who was not qualified.[226] But there isn't any hint in *Nelson* that this is what the Court was doing. The majority's opinion eschewed any suggestion that what Runnels did cured a preexisting violation of the Confrontation Clause. It simply made the *post hoc* announcement that there was no violation at all.[227]

The other argument the Court could have adopted in *Nelson* was that the *Bruton* error was harmless.[228] But as with the possibility of

223. O'Neil v. Nelson, 422 F.2d 319, 321 (9th Cir. 1970).

224. *See* Dunlop v. United States, 165 U.S. 486, 498 (1897).

225. *See* Frazier v. Cupp, 394 U.S. 731, 734–35 (1969) (considering and rejecting argument that instruction could not cure the error, by holding that there was no error at all given the context of the remark in the overall evaluation of the fairness of the trial); *Dunlop*, 165 U.S. at 498 (trial judge's ruling holding prosecutor's remarks improper in connection with prosecutor's withdrawing them will generally cure the error).

226. *See* United States v. Martinez-Salazar, 528 U.S. 304, 304 (2000); Ross v. Oklahoma, 487 U.S. 81, 88 (1988) ("Petitioner was undoubtedly required to exercise a peremptory challenge to cure the trial court's error.").

227. *Nelson*, 402 U.S. at 626.

228. *See O'Neil*, 422 F.2d at 322.

framing what had happened as a cure, the Court rejected this way of describing O'Neil's claim.[229] Rather than conceding there was an error, the Court concluded that an assessment of what the Confrontation Clause requires extends beyond the close of the prosecutor's case, making it a conditional rule:

> We conclude that where a codefendant takes the stand in his own defense, denies making an alleged out-of-court statement implicating the defendant, and proceeds to testify favorably to the defendant concerning the underlying facts, the defendant has been denied no rights protected by the Sixth and Fourteenth Amendments.[230]

Courts and commentators have, by and large, overlooked the conditional nature of the rule in *Nelson*. This absence is hardly surprising in reported decisions, given that the vast majority of them come from judges reviewing convictions after the fact, when a court already knows if the person who made the confession testified or not. From that vantage point, nothing turns on whether one describes the rule as conditional, though some courts still persist in labeling what happened a "cure" of a prior Confrontation Clause violation,[231] rather than saying, as did the Supreme Court, that the defendant's rights were not violated at all. On occasion, though, one can find a trial court opinion that takes advantage of the conditional nature of *Nelson*. Where a defendant moves on *Bruton* grounds to sever a pending trial from that of a codefendant who has confessed,[232] and where the trial judge is reasonably certain that the codefendant will take the stand, *Nelson* has been used as authority for denying

229. *Nelson*, 402 U.S. at 626.

230. *Id.* at 629–30.

231. *See, e.g.*, Moore v. Casperson, 345 F.3d 474, 489 (7th Cir. 2003).

232. In many jurisdictions, if the prosecution plans to introduce a confession by one of several co-defendants, and the prosecution cannot redact it to eliminate any reference to the others who will be subject to the joint trial, a motion to sever must be granted. *See, e.g.*, United States v. Cleveland, 590 F.2d 24, 28 (1st Cir. 1978); United States v. Truslow, 530 F.2d 257, 262 n.3 (4th Cir. 1975); United States v. Johnson, 478 F.2d 1129, 1133 (5th Cir. 1973); Schaffer v. United States, 221 F.2d 17, 19 (5th Cir. 1955); Smith v. United States, 312 A.2d 781, 788 (D.C. 1973); People v. Aranda, 407 P.2d 265, 272–73 (Cal. 1965); State v. Rosen, 86 N.E.2d 24, 26 (Ohio 1949).

severance on the ground that in the end there will be no Confrontation Clause violation.[233] If *Nelson* were not in a conditional format, one can hardly imagine a trial judge's allowing the prosecutor to use the codefendant's confession as part of the state's case in chief. It would be akin to denying a meritorious motion to suppress a confession on the ground that the defendant indicated he would plead guilty if he lost, raising the prospect that the issue of the confession would be moot.[234]

The scarcity of cases where a trial judge allows a prosecutor to use a codefendant's unredacted confession is a reflection of the unusual nature of *Nelson*'s conditional rule. Unlike the others that resemble liability rules, the future action that determines the constitutionality of admitting an unredacted codefendant's confession is dependent on the decision of a third party, not the person whose rights are at issue. Moreover, the third party's behavior comes, if at all, at some point in time far removed from the action of the government that placed the defendant's rights in jeopardy. Even more significantly, the remedy for a violation of the rule is relatively severe. In the prison clothes context, if the defendant objects to the way he or she is dressed, it simply means that someone has to bring in something else to wear. If a prosecutor asks a question implicating *Doyle*, an objection to the question simply leads to the judge instructing the witness not to answer and telling the jury to draw no inference from the question. And when a suspect submits to an official show of force for which there is no justification, the police are put in no worse a situation in terms of discovering evidence of a crime than they would have been

233. *See, e.g.*, United States v. Chapman, 501 F. Supp. 704, 705 (S.D. Ohio 1980) ("As to prejudice to the defendant from statements by and a document admitted against his co-defendant, the circumstances at this time do not indicate that defendant will suffer any prejudice thereby. Co-defendant's counsel has indicated that his client will take the stand in his own defense. Consequently, defendant will be able to cross-examine him thoroughly as to any incriminating statements he may make regarding defendant."); United States v. Mandel, 415 F. Supp. 1033, 1048 (D. Md. 1976) ("The main difficulty with defendants' contentions based on *Bruton* is that there is no present reason to believe that any defendant in this case will not testify. Under such circumstances, it is clear that the *Bruton* rule is not applicable.").

234. *See* Parker v. North Carolina, 397 U.S. 790, 796 (1970) (holding that defendant may not attack voluntary nature of guilty plea on ground that confession was coerced).

in had they done nothing.[235] In a situation raising a *Bruton* issue, however, if the codefendant who made the confession does not eventually take the stand, then the judge must almost always declare a mistrial.

The awkward nature of prospectively applying a conditional rule where the consequence of being wrong is so great has the practical effect of influencing those who must abide by the rule to treat it as if it were unconditional.[236] Indeed, the Supreme Court is not unmindful of the awkwardness of a conditional rule in protecting a defendant's Confrontation Clause rights. In a case applying *Bruton* to the problem of redacted confessions, *Richardson v. Marsh*, the Court explicitly rejected a conditional rule because it was unworkable.[237]

Richardson addressed the question of whether *Bruton* would bar a codefendant's confession that had been redacted to eliminate any reference to the defendant, in circumstances where other evidence made clear that the confession inculpated the defendant.[238] The case involved a joint trial of two codefendants, Marsh and Williams. As

235. It is true that if a police officer makes a stop without proper justification, he or she is liable for damages in a civil rights action under 28 U.S.C. § 1983 (2006). But in practical terms, if the suspect was released immediately there is very little likelihood of a successful lawsuit, in large part because the damages would be nominal. *See* David Rudovsky, *Law Enforcement by Stereotypes and Serendipity: Racial Profiling and Stops and Searches Without Cause*, 3 U. PA. J. CONST. L. 296, 354–55 (2001) ("In cases in which no contraband is found, and a strong legal claim for damages can be stated, the damages may be too modest to justify full-scale litigation. Absent particularly harsh or malicious conduct, the damages that flow from a relatively short stop and incidental frisk or search, may appear to be nominal to some juries. As a result, such cases are not likely to attract competent counsel. Moreover, many civil rights plaintiffs are burdened by racial and class characteristics that may prejudice juries against them. Jurors tend to dismiss their allegations, often awarding them less than a full measure of compensation.").

236. A jurisdiction's rules on severance typically direct judges to avoid *Bruton* problems in advance. *See, e.g.*, STANDARDS FOR JOINDER AND SEVERANCE § 2.3 (Proposed Rev. 1968) which provides: "(a) When a defendant moves for a severance because an out-of-court statement of a co-defendant makes reference to him but is not admissible against him, the court should determine whether the prosecution intends to offer the statement in evidence at the trial. If so, the court should require the prosecuting attorney to elect one of the following courses: (i) a joint trial at which the statement is not admitted into evidence; (ii) a joint trial at which the statement is admitted into evidence only after all references to the moving defendant have been deleted, provided that, as deleted, the confession will not prejudice the moving defendant; or (iii) severance of the moving defendant."

Rule 14(b) of the Federal Rules of Criminal Procedure also provides a mechanism for a judge to alleviate *Bruton* problems in advance, by providing that "[b]efore ruling on a defendant's motion to sever, the court may order an attorney for the government to deliver to the court for in camera inspection any defendant's statement that the government intends to use as evidence." FED. R. CRIM. P. 14(b).

237. Richardson v. Marsh, 481 U.S. 200 (1987).

238. *Id.* at 202.

part of the State's case charging them in a robbery murder scheme, the prosecution introduced Williams's confession into evidence. The confession described how Williams and someone named Martin drove to the robbery scene, discussing what would happen along the way.[239] According to the confession, Martin said that he would have to kill the victims after the robbery.[240] The confession neither mentioned Marsh nor suggested the participation of a third person in the crime.[241] The judge instructed the jury to consider the confession as evidence only against Williams not Marsh.[242] Williams did not testify.[243]

What created the problem for Marsh was the other evidence in the case. The only surviving victim testified that Marsh arrived at the scene together with Williams and Martin and helped them commit the robbery, leading to an inference that she must have been in the car and overheard her two cohorts plan the crime while they were all driving to the scene.[244] Marsh's own testimony provided another link. While she testified that her presence at the scene was as an unwitting dupe, she also admitted that she had traveled to the scene of the robbery in the car with Martin and Williams, albeit for an innocent purpose.[245] She told the jury she knew they were discussing something, but that she sat in the back seat and could not hear the conversation.[246] But of course, the jury was not bound to accept all of what she said. They could, and evidently did, believe she was in the car and disbelieve her denying knowing about the plan.

The question that split the majority and the dissent in *Richardson* was whether to apply *Bruton* by considering only the confession on its face, or to evaluate it in the context of all of the evidence to determine if it incriminated the defendant.[247] One of the factors that

239. *Id.* at 203–04.
240. *Id.* at 203 n.1.
241. *Id.*
242. *Id.* at 204.
243. *Richardson*, 481 U.S. at 204.
244. *Id.* at 215 n.3.
245. *Id.* at 204.
246. *Id.*
247. *Id.* at 213.

played into this decision was the practical effect of each position. How would the trial judge apply a rule making the admissibility of the codefendant's confession turn on how the rest of the evidence came out?

Justice Stevens, in dissent, proposed a conditional rule:

> In most [of these kinds of] cases the trial judge can comply with the dictates of *Bruton* by postponing his or her decision on the admissibility of the confession until the prosecution rests, at which time its potentially inculpatory effect can be evaluated in the light of the government's entire case.[248]

Justice Scalia, writing for the majority, pounced on the problems that this proposal, as all conditional rules, would entail:

> Even more significantly, evidence requiring linkage differs from evidence incriminating on its face in the practical effects which application of the *Bruton* exception would produce. If limited to facially incriminating confessions, *Bruton* can be complied with by redaction—a possibility suggested in that opinion itself. If extended to confessions incriminating by connection, not only is that not possible, but it is not even possible to predict the admissibility of a confession in advance of trial. The "contextual implication" doctrine . . . would presumably require the trial judge to assess at the end of each trial whether, in light of all of the evidence, a nontestifying codefendant's confession has been so "powerfully incriminating" that a new, separate trial is required for the defendant. This obviously lends itself to manipulation by the defense—and even without manipulation will result in numerous mistrials and appeals. It might be

248. *Id.* at 220 (Stevens, J., dissenting). The dissent never mentioned what would happen if the judge determined that the rest of the evidence, as in *Richardson* itself, linked the defendant to the confession. Presumably, though, the judge would have to declare a mistrial. Justice Stevens did make suggestions about how to avoid the problem in the first place, by "granting immunity, making plea bargains, or simply waiting until after a confessing defendant has been tried separately." *Id.* at 219 (Stevens, J., dissenting).

> suggested that those consequences could be reduced by conducting a pretrial hearing at which prosecution and defense would reveal the evidence they plan to introduce, enabling the court to assess compliance with *Bruton ex ante* rather than *ex post*. If this approach is even feasible under the Federal Rules (which is doubtful—see, *e.g.*, FED. R. CRIM. P. 14), it would be time consuming and obviously far from foolproof.[249]

Neither opinion in *Richardson* mentions *Nelson*, much less implies that the *Bruton* doctrine was already a conditional rule.

D. Aggregation

The third way that the Supreme Court has made constitutional rules conditional is to aggregate the time frame in which to make a judgment about the legitimacy of an actor's behavior. As with the other forms of conditional rules, in order to determine if the action at issue is constitutional, one must take into account a future event. But with aggregation, the future event is one taken by the same actor who was responsible for the original action, or by someone exercising government power toward the same end.[250] In generic form, such a rule has the following form:

(i) If a government official does X at time 1, then it violates the Constitution for the government to do Y at time 2.
(ii) X and Y both must occur to violate the rule.

For the appropriate sports analogy, one must turn to football. In order to make a judgment about whether an ineligible receiver has gone downfield on a pass play, the referee cannot simply determine how far an interior lineman has moved past the line of scrimmage as the quarterback goes back to pass. One must wait until the

249. *Richardson*, 481 U.S. at 208–09 (Scalia, J., majority opinion).

250. Thus, a rule made conditional by aggregation differs from a liability rule in that in the latter, the future action is taken by the person who is the beneficiary of the rule and in the former by the person whose power the rule restricts.

quarterback actually throws the ball while an ineligible receiver is in a prohibited position before one can determine that a foul has occurred.[251]

At a trivial level, something like this analysis operates whenever a judge makes an order for something to happen which will violate the constitutional rights of the defendant. If the order is never executed, the mere announcement will not violate the Constitution, absent some extraordinary circumstance by which the words alone have an effect on the process. It is on this basis, for example, that the result the Court reached in *Gaines v. Washington* makes sense.[252] The defendant in *Gaines* claimed that he was denied his right to a public trial by virtue of the trial judge's order closing the courtroom.[253] The record, however, disclosed that either the judge changed his mind or the bailiffs simply ignored him. Because nothing ever happened as a result of the judge's original order, the Court refused to find any rule violation.[254]

It is easy to see why aggregation is necessary in a *Gaines* situation. Since the judge's order was never implemented, his words were no more damaging to the defendant than the private thought that immediately preceded them. Even where this is not the case, however, aggregation is sometimes necessary because the words that the defendant objects to are but a small part of a continuous course of action whose impact depends on the overall effect. This is what occurs when one must decide if a judge or prosecutor has deprived the defendant of a constitutional right by a single comment that comes in the course of a relatively lengthy presentation. An isolated slip of the tongue that is immediately corrected, for example, would not violate any constitutional rule.[255]

251. N.C.A.A. Football Rules and Interpretations Rule 7.3, Art. 10 (2007).

252. Gaines v. Washington, 277 U.S. 81 (1928).

253. *Id.* at 84.

254. *Id.* at 86.

255. *See, e.g.*, Commonwealth v. Cotto, 870 N.E.2d 109, 115 (Mass. App. Ct. 2007) (finding that trial court's erroneous statement to jury that defendant had burden of proof with respect to element of the crime was not a violation of defendant's rights as it was a "single, isolated slip of the tongue, which the judge quickly corrected").

When judges instruct juries on the law they must apply in deciding a defendant's guilt, they often allude to a particular legal doctrine a number of times, using different vantage points to illuminate related aspects of interlocking concepts. For example, a judge may tell the jury about the doctrine of the presumption of innocence, the prosecution's burden of proof beyond a reasonable doubt, and how to evaluate the truthfulness of witnesses' testimony. An isolated statement to the effect that "every witness is presumed to speak the truth," appears problematic in a case where all of the witnesses appeared for the prosecution, as occurred in *Cupp v. Naughten*.[256] In considering, however, whether this statement so undermined the presumption of innocence that it deprived the defendant of due process, the Court applied an aggregation technique that made evaluating the constitutional rule conditional:

> In determining the effect of this instruction . . . we accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. While this does not mean that an instruction by itself may never rise to the level of constitutional error, it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction.[257]

256. Cupp v. Naughten, 414 U.S. 141, 142 (1973).

257. *Id.* at 146–47 (citations omitted). *See also* Middleton v. McNeil, 541 U.S. 433, 437 (2004) (no due process violation where judge gave one erroneous instruction on the elements of the crime and at least three correct instructions on the same issue, "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation"); Boyde v. California, 494 U.S. 370, 380 (1990) (stating that where the defendant claims that a judge's instruction is ambiguous and therefore subject to an erroneous interpretation, "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in [an improper] way.").

The same holds true when considering whether a single part of a prosecutor's closing statement to a jury violates due process.[258]

In the situations discussed below, however, the appeal of aggregation is less obvious. The time frame within which events are aggregated is much lengthier, and the effect of freeing the earlier action from the direct application of the Constitution is more drastic.

1. The Sixth Amendment Right to the Appointment of Counsel for Indigent Defendants Accused of Misdemeanors

In 1963, the Supreme Court decided one of the iconic cases in constitutional criminal procedure, *Gideon v. Wainwright*.[259] *Gideon* held that the state of Florida violated the Due Process Clause of the Fourteenth Amendment by refusing to appoint a lawyer for an indigent defendant charged with a felony.[260] The case arose in the heyday of due process incorporation, when the Warren Court picked its way one by one through the specific provisions of the Bill of Rights and decided whether or not they applied to the states in more or less the same format as they did to the federal government. As did almost every other incorporation case, *Gideon* held that the Sixth Amendment right to counsel provision was the constitutional rule that governed the appointment of counsel in state courts, rather than a more general and less generous due process balancing test. Justice Black wrote for the Court: "[R]eason and reflection require us to recognize that in our adversary system of criminal justice, any person hauled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[261] Finding the right to counsel "fundamental and essential to a fair trial,"[262] the Court held that this part of the Sixth Amendment was applicable to the states.

258. *See* Donnelly v. DeChristoforo, 416 U.S. 637, 645 (1974) ("[T]he prosecutor's remark here, admittedly an ambiguous one, was but one moment in an extended trial and was followed by specific disapproving instructions. Although the process of constitutional line drawing in this regard is necessarily imprecise, we simply do not believe that this incident made respondent's trial so fundamentally unfair as to deny him due process.").

259. Gideon v. Wainwright, 372 U.S. 335 (1963).

260. *Id.* at 339.

261. *Id.* at 344.

262. *Id.* at 342.

On its face, however, the right to counsel clause does not explicitly address the question that *Gideon* raised. "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."[263] There is no reference to the right to have the state appoint you a lawyer if you are too poor to hire one on your own. And, the historical context against which the provision was included in the Bill of Rights presented a quite different issue—the practice of English courts denying all felony defendants the right to be represented by any attorney whatsoever. Nevertheless, *Gideon* did not have to craft its own answer to what the right to counsel provision of the Sixth Amendment meant for criminal courts confronted by an indigent defendant.

In 1938, the Court had decided one of the few right to counsel cases that came to its docket from the federal process, *Johnson v. Zerbst*.[264] *Johnson* was a habeas corpus petition challenging a federal conviction on the ground that having been denied an appointed lawyer and being unable to afford one on his own, the defendant was being held in custody in violation of his right under the Sixth Amendment. The Court viewed the right to counsel as a cornerstone of the integrity of the entire criminal process—one of the "essential barriers against arbitrary or unjust deprivation of human rights."[265] Relying on *Powell v. Alabama* for the proposition that without a lawyer, the right to a hearing is essentially meaningless for even an intelligent and sophisticated lay defendant, the Court held that "[t]he Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has or waives the assistance of counsel."[266] Counsel was so fundamentally important a feature that without it, the Court, "kiss[ed] the jurisdictional book" and made the claim cognizable in habeas corpus.[267]

263. U.S. CONST. amend. VI.

264. Johnson v. Zerbst, 304 U.S. 458 (1938).

265. *Id.* at 462.

266. *Id.* at 463.

267. The reference is to the phrase coined by Judge Friendly. *See* Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 151 (1970–1971).

By incorporating the right to counsel clause in the Fourteenth Amendment, *Gideon* established a relatively straightforward non-conditional rule. But the state criminal court systems dwarfed their federal counterparts, and the practical problem of providing attorneys for the millions of state defendants led to efforts to restrict the scope of *Gideon*'s mandate. The obvious path to take for states that could not, or did not want to, appoint attorneys in every case was to confine *Gideon* only to felony cases. One could defend this line on more than pragmatic grounds. *Gideon* itself was a felony case, and the Court's language about the need for a lawyer to make the process fair arguably was less relevant to the often simple and relatively brief proceedings that resolved most misdemeanors. Moreover, there was a constitutional provision, the right to a jury, which incorporated a distinction that very closely tracked the felony-misdemeanor line. Defendants in petty cases, generally those subject to a maximum sentence of less than six months, were not entitled to a jury.[268] If defendants in less serious cases could be tried without a jury, why not without a lawyer?

This led to the two cases in which the Court defined the limit of the *Gideon* principle, *Argersinger v. Hamlin*,[269] which came first, and *Scott v. Illinois*.[270] *Argersinger* and *Scott* both involved misdemeanor convictions of indigent defendants who had been denied an appointed lawyer. They differed, however, in one fundamental respect. Argersinger was sentenced to a short jail term,[271] and Scott received only a fine.[272] The rule that emerged from the two was classically conditional. An indigent misdemeanor defendant's Sixth Amendment right to appointed counsel is violated if, and only if, at the end of the process he receives a sentence of imprisonment.[273] Thus, in

268. *See* Duncan v. Louisiana, 391 U.S. 145, 158 (1968).

269. Argersinger v. Hamlin, 407 U.S. 25 (1972).

270. Scott v. Illinois, 440 U.S. 367 (1979).

271. *Argersinger*, 407 U.S. at 26.

272. *Scott*, 440 U.S. at 368.

273. *See Argersinger*, 407 U.S. at 40 (holding that in misdemeanor cases "that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of 'the guiding hand of counsel' so necessary when one's liberty is in jeopardy"); *Scott*, 440 U.S. at 374 (holding "that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal

Argersinger, where the defendant went to jail, the Court held that his sentence, not his conviction, violated the Constitution.[274] And in *Scott*, where jail was not an issue, the conviction was unexceptional.[275]

One might think that these two cases are not really right to counsel cases at all, but simply regulate a judge's sentencing authority. One could reformulate the rule that emerged from *Scott* as a non-conditional one, telling judges they may not sentence an indigent defendant to incarceration in a misdemeanor case if the defendant was not afforded the right to appointed counsel. But that kind of a rule would logically require a quite different remedy than the one that the Court imposed in *Argersinger*. A sentencing rule would call for a new sentencing procedure, not invalidating the underlying conviction. Thus, the misdemeanor version of the right to counsel rule is truly a conditional one: you cannot tell if the judge violated the rule until after the sentence is imposed.

The problem this creates, of course, is that a judge has to make a decision about whether to appoint counsel at the start of the process. In order to implement the rule in its conditional format, a judge would have to make a decision at arraignment whether to preserve the option of incarceration for a misdemeanor defendant. The information available at such an early stage of the process is almost always far less meaningful to an intelligent sentencing decision than after a full exposition of the facts. The end result may be that a judge will be forced by circumstance to "abandon his responsibility to consider the full range of punishments established by the legislature."[276]

It is clear from both opinions that resource concerns played a major rule in the Court's decision not to extend *Gideon* to the misdemeanor context. *Argersinger* noted that misdemeanor cases outnumbered felonies by more than ten to one, and that did not even

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defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel").

274. *Argersinger*, 407 U.S. at 40.

275. *Scott*, 440 U.S. at 369.

276. *Argersinger*, 407 U.S. at 53 (Powell, J., concurring).

count the 40 to 50 million traffic cases each year.[277] But there were a number of ways to create a different rule for misdemeanors without making it conditional. Various alternatives were proposed by one Justice or another writing in the two cases when not in the majority. Among them were proposals to draw the line at cases where there was no statutorily authorized term of imprisonment possible,[278] or where the defendant was charged with a petty crime so that there would be no constitutional right to a jury.[279]

Scott's conclusion to keep the conditional rule by construing *Argersinger's* line as the limit of the right to counsel was, at bottom, a pragmatic one. Perhaps the most telling part of Chief Justice Rehnquist's opinion was the one that asserted: "*Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States."[280] Keeping a conditional rule was, quite simply, the cheapest alternative.

2. *The Privilege Against Self-Incrimination*

The Fifth Amendment to the United States Constitution provides that "no person . . . shall be compelled in any criminal case to be a witness against himself."[281] From the time of its adoption, until the Supreme Court decided *Chavez v. Martinez* in 2003,[282] the rule was almost universally considered to be non-conditional. It prohibited using compulsion to obtain testimony that could be used to provide a link to a chain of evidence that might incriminate the person from whom the government sought the information.[283]

277. *See id.* at 34 (citing PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 55 (1967)).

278. *Scott*, 440 U.S. at 382 (Brennan, J., dissenting).

279. *Id.* at 380 (Brennan, J., dissenting).

280. *Id.* at 373.

281. U.S. CONST. amend. V.

282. Chavez v. Martinez, 538 U.S. 760 (2003).

283. *Id.* at 791 (Kennedy, J., dissenting) ("The [Self-Incrimination] Clause protects an individual from being forced to give answers demanded by an official in any context when the answers might give rise to criminal liability in the future.").

Chavez reconfigured it. Now, when a government official like a police officer questioning a suspect in custody, a judge presiding over a grand jury, or counsel for a legislative committee questioning a witness, threatens or applies compulsion to get an incriminating answer, they have not violated the privilege against self-incrimination at all. They have merely set in motion a potential violation, which becomes complete only if, and when, the compelled testimony is introduced as evidence against its author.[284]

Chavez was a civil rights action under 42 U.S.C. § 1983 seeking damages for a violation of the plaintiff's right to substantive due process and to the privilege against self-incrimination.[285] Martinez, the plaintiff, was riding his bicycle by the scene of a narcotics investigation when he was stopped and frisked by police officers. An altercation broke out and Martinez was shot several times, his wounds severe enough to leave him permanently blind and paralyzed from the waist down. A patrol supervisor, Chavez, accompanied him to the hospital, and it is the interrogation that took place while Martinez was in the emergency room that gave rise to the civil rights suit.[286]

The due process claim, based on the allegation that Chavez intentionally inflicted mental anguish on the plaintiff by refusing to cease his questioning while Martinez was in severe pain and believed he was dying, was remanded to the lower courts.[287] The self-incrimination claim, however, did not fare as well because of the way a majority of the Court recast the rule.[288]

Martinez was never charged with a crime, and so the statements he made while Chavez interrogated him in the emergency room were never used as evidence against him at a criminal trial.[289] That led the Court to consider whether the rule implementing the privilege is a conditional one. "Statements compelled by police interrogations of

284. *Id.* at 767.
285. *Id.* at 765.
286. *Id.* at 763–64.
287. *Id.* at 776.
288. *See id.* at 773.
289. *Id.* at 764.

course may not be used against a defendant at trial," Justice Clarence Thomas wrote in his plurality opinion, "but it is not until their use in a criminal case that a violation of the Self-Incrimination Clause occurs."[290] Since Martinez was never tried, he suffered no infringement to his right under the privilege.

That makes the rule truly a conditional one. If a police officer coerces a statement from a suspect, and like in *Chavez*, future events do not unfold so that the statement is used as evidence against him, then the officer has not violated the privilege. On the other hand, if the statement is used at trial, then the logical implication of *Chavez* is not only that the defendant has been deprived of his right under the privilege, but also that the officer who coerced the statement has violated the rule.

Had *Chavez* meant to convey the message that the privilege simply does not restrict the actions of the person who compels the statement, but only the people who offer and allow it into evidence, there would have been no need for the opinions constituting the majority to focus on the fact that Martinez had not yet been tried. They simply would have pointed out that he picked the wrong defendant. But what the Court focused on was not the irrelevance of the privilege for those who compel suspects to talk, but the fact that the violation is not complete until the statements are used at trial.[291]

Justice Thomas's plurality opinion relied primarily on a textual analysis of the privilege to justify the conclusion that a courtroom use of the suspect's statement was a necessary ingredient.[292] Since the language in the Fifth Amendment restricted the application of the privilege to criminal cases ("No person . . . shall be compelled *in any criminal case*"),[293] for Justice Thomas the way to begin was to see if

290. *Chavez*, 538 U.S. at 767. This part of the plurality opinion was joined by Chief Justice Rehnquist and Justices O'Connor and Scalia. Justice Souter wrote his own concurring opinion, joined by Justice Breyer, in which he viewed the "basic" right protected by the privilege against self-incrimination to be the exclusion of the statement at trial, and the question presented by *Chavez* to be whether an "extension" of the bare guarantee was necessary to protect it against "the invasive pressures of contemporary society." *Id.* at 777–78.

291. *Id.*

292. *Id.*

293. U.S. CONST. amend. V.

what happened to Martinez occurred in the context of a criminal case. For this, he turned to the dictionary. According to the definition he found there, criminal cases require some formal initiation of legal proceedings, not just police questioning.[294] Textualism, then, compelled the Court to construe the privilege as a conditional rule.

This textualist view of the privilege, relying in part on a dictionary published in 1990, would have been strange, indeed, to lawyers practicing at the time that the privilege was made a part of the Constitution.[295] An eighteenth century lawyer would not have thought the privilege against self incrimination was needed in order to protect defendants from being compelled to testify against themselves in their own criminal cases. That really was not a problem that could have been on anyone's mind for the simple reason that defendants, as interested parties, were uniformly disqualified from testifying at all.[296] The only places where compelled testimony could have been worrisome were precisely in those forums that were outside the common understanding of a criminal case—for example, as a witness before a grand jury or in a civil case.

Indeed, precisely the argument Justice Thomas made was rejected by the Court in 1892, in *Counselman v. Hitchcock*.[297] The Government argued there that a grand jury witness could not rely on the privilege because "[i]t is only 'in a criminal case' that a witness can refuse to answer. An investigation before a grand jury is in no sense 'a criminal case.'"[298] *Counselman*'s response to this claim reaffirmed the non-conditional nature of the rule:

> It is impossible that the meaning of the constitutional provision can only be, that a person shall not be compelled to be a witness

294. *Chavez*, 538 U.S. at 766 (citing BLACK'S LAW DICTIONARY 215 (6th ed. 1990)).

295. For a discussion of the relationship between textualism and originalism, *see* Aileen Kavanagh, *Original Intention, Enacted Text and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 295-96 (2002); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 205–17 (1980).

296. *See* Ferguson v. Georgia, 365 U.S. 570, 574 (1961) ("Disqualification for interest was thus extensive in the common law when this Nation was formed. Here, as in England, criminal defendants were deemed incompetent as witnesses.") (citations omitted).

297. Counselman v. Hitchcock, 142 U.S. 547 (1892).

298. *Id.* at 562.

> against himself in a criminal prosecution against himself. It would doubtless cover such cases; but it is not limited to them. The object was to insure that a person should not be compelled, when acting as a witness in any investigation, to give testimony which might tend to show that he himself had committed a crime. The privilege is limited to criminal matters, but it is as broad as the mischief against which it seeks to guard.[299]

Now, none of the members of the majority opinion on the privilege issue in *Chavez* advocated requiring grand jury witnesses to give incriminating answers. Justice Thomas recognized the continued vitality of the principle that a witness could assert the Privilege outside the context of a criminal case.[300] But the cases that recognized this principle, he asserted, were not direct applications of the Constitution but prophylactic rules designed to "safeguard the core constitutional right."[301]

Two observations come to mind about this argument. First, it sounds very odd coming from someone who was one of the two dissenters in *Dickerson v. United States*.[302] *Dickerson* was decided only three years before *Chavez*, and it put the Court to the hard choice of either admitting that *Miranda* was a prophylactic rule that Congress could override or explaining why it had a sound constitutional basis.[303] The majority, in the view of the dissenting opinion of Justices Scalia and Thomas, never squarely answered this question. But the two dissenters, both of whom joined not only there but also in the pertinent part of the *Chavez* case, were not so reticent in their views on the legitimacy of the Court's constructing prophylactic rules. To give but a mild example:

> [T]hat this Court has the power, not merely to apply the Constitution but to expand it, imposing what it regards as useful

299. *Id.*
300. *See Chavez*, 538 U.S. at 772 n.3.
301. *Id.* at 761.
302. Dickerson v. United States, 530 U.S. 428 (2000).
303. *See id.* at 436–37.

> "prophylactic" restrictions upon Congress and the States . . . [i]s an immense and frightening antidemocratic power, and it does not exist.[304]

Second, prophylactic rules, legitimate or not, are entirely a creature of the mid-1960s.[305] It entails some degree of historical revisionism to attribute to the Court's writing opinions condemning the compulsion of witnesses before grand juries, legislative hearings and administrative proceedings, which date back at least to Chief Justice John Marshall's 1807 circuit opinion in *United States v. Burr*,[306] the construction of a prophylactic rule rather than the announcement of what they believed the Constitution itself required.

If it was not fidelity to history that drove the majority to the conclusion that the privilege against self-incrimination must be a conditional rule, then what explains the result? Well, making the privilege conditional was one way to relieve the defendants in *Chavez* of civil liability for failing to give the gravely injured suspect a *Miranda* warning.

One can see how the prospect of a lawsuit every time a suspect claimed he or she was questioned in violation of *Miranda* would have been daunting. *Chavez* has the potential of reducing almost to a nullity the class of potential plaintiffs who could successfully sue a police officer for using coercion to elicit an incriminating statement. Since the future consequence which defines the violation is use at trial, how will *Chavez* apply to someone who successfully suppressed his statement prior to trial? If all that happened is that the prosecutor unsuccessfully tried to use the defendant's coerced statement, it is hard to see the *Chavez* majority's finding a violation of the rule. That means the only people who will have a viable case will be those who made a statement in the face of police coercion, lost a suppression

304. *Id.* at 446 (Scalia & Thomas, JJ., dissenting).

305. *See* Dickerson v. United States, 530 U.S. 428, 457 (2000) (Scalia, J., dissenting) ("Indeed, the United States argues that 'prophylactic rules are now and have been for many years a feature of this Court's constitutional adjudication.' That statement is not wholly inaccurate, if by 'many years' one means since the mid-1960s.").

306. United States v. Burr, 25 F. Cas. 55 (C.C.D. Va. 1807).

motion, had the statement admitted at trial, and either were acquitted or got their conviction reversed on the ground that the statement should not have been allowed into evidence. There aren't many lawyers who would want to confine their practices to this universe of potential clients.

3. Government Interference with the Defendant's Sixth Amendment Right to Counsel

One of the corollaries of the Sixth Amendment right to counsel is the rule that prevents the government from interfering with an established attorney-client relationship. In the *Morrison* case discussed in Part I.B.vi, the Court assumed that it violated the Sixth Amendment for law enforcement officials to try to convince the defendant to abandon her attorney and cooperate with them by disparaging her lawyer.[307]

Another aspect of the lawyer-client relationship that has a constitutional dimension is the sanctity of privileged communications between the two. If the government listens in on a conversation about the case between a defendant and her lawyer, does it violate the Constitution? Again, the answer is that it depends—this time, it depends on what the unwanted listener does with the information.

The Court confronted this issue in *Weatherford v. Bursey*.[308] *Weatherford* was a Section 1983 civil rights action against an undercover agent for the South Carolina Law Enforcement Division.[309] Weatherford had sat in on discussions between Bursey and his attorney. The Bursey defense team was planning for an upcoming trial charging Bursey with malicious destruction of property for throwing a brick through the window of a Selective Service office. Bursey and his lawyer believed Weatherford, who had also been indicted for the same offense after participating in the brick throwing incident, was a legitimate codefendant. They invited him to

307. United States v. Morrison, 449 U.S. 361, 364 (1981).
308. Weatherford v. Bursey, 429 U.S. 545 (1977).
309. *Id.* at 547.

participate in their discussions, because they believed he could provide information and ideas that would benefit Bursey's defense.[310]

Because Weatherford wanted to maintain his undercover status so that he could continue to develop information on criminal behavior by other members of the anti-war movement at the local university, he attended the meetings without, of course, revealing his affiliation with the prosecution.[311] At these meetings, Bursey and his lawyer discussed with Weatherford the possibility of there being an informer in the midst of the group, but they never suspected how close he really was. Since no one ever asked him, Weatherford never had to deny his true affiliation.[312]

Weatherford's plans to remain undercover were frustrated when his affiliation with the prosecutor's office became known inadvertently and the prosecutor decided to use him as an eyewitness. He testified at Bursey's trial and was instrumental in obtaining the conviction which led to Bursey's serving an eighteen-month sentence. When Bursey got out, he sued the agent for depriving him of the effective assistance of counsel that the Sixth Amendment guaranteed.[313]

The trial court found that Weatherford never revealed any of the details of the conversation between Bursey and his lawyer, either in his testimony at trial or in his communications with the prosecutor.[314] That made aggregation the key to Bursey's claim. If one aggregated the undercover agent and the prosecutor for whom he worked and who directed his actions, it would be an easy case. Even the United States, in its amicus brief supporting Weatherford, conceded that it would violate the Sixth Amendment if the government:

> [R]eceives . . . privileged information pertaining to the defense of the criminal charges . . . because the Sixth Amendment's assistance-of-counsel guarantee can be meaningfully

310. *Id.* at 548.
311. *Id.* at 547.
312. *Id.* at 548.
313. *Id.* at 549.
314. *Weatherford*, 429 U.S. at 548.

> implemented only if a criminal defendant knows that his communications with his attorney are private and that his lawful preparations for trial are secure against intrusion by the government, his adversary in the criminal proceeding.[315]

On the other hand, if the Court aggregated the actions of the undercover agent over time, rather than across bureaucratic labels, Bursey's claim looked a lot different. And that is what the Court did. The opinion did not simply focus on Weatherford's actions actively hiding his allegiance to the prosecution and invading the attorney client relationship. It looked at his behavior after the fact to determine if he violated the rule. It construed the Sixth Amendment rule to prohibit not invading the attorney client relationship, but communicating what was learned, either at trial or to the prosecutor.[316]

The Court explained the rationale for its conditional rule:

> As long as the information possessed by Weatherford remained uncommunicated, he posed no substantial threat to Bursey's Sixth Amendment rights. Nor do we believe that federal or state prosecutors will be so prone to lie or the difficulties of proof will be so great that we must always assume not only that an informant communicates what he learns from an encounter with the defendant and his counsel but also that what he communicates has the potential for detriment to the defendant or benefit to the prosecutor's case.[317]

Clearly, the Court saw nothing wrong with Weatherford's presence at the meeting. Later in the opinion, it did point out that Weatherford had not actively sought to join Bursey and his lawyer, but had been invited and attended only in order to maintain his cover.[318] However, nothing in the rationale the opinion offered, which looked exclusively

315. *Id.* at 554 n.4.
316. *Id.* at 558.
317. *Id.* at 556–57.
318. *Id.* at 557.

at Weatherford's behavior after the fact, would make this factor determinative.

If one takes a different view of the effect of undercover agents insinuating themselves into the bosom of the defense team, the logic of a conditional rule is less attractive. Justice Marshall's dissent considered the effect of condoning the placement of prosecution witnesses into otherwise private meetings between a defendant and defense counsel:

> [E]ven if the witnesses cannot divulge the information to the prosecution . . . [they] are in a position to formulate in advance answers to anticipated questions, and even to shade their testimony to meet expected defenses. Furthermore, because of these dangers defendants may be deterred from exercising their right to communicate candidly with their lawyers if government witnesses can intrude upon the lawyer-client relationship with impunity so long as they do not discuss what they learn with the prosecutor. And insofar as the Sixth Amendment establishes an independent right to confidential communications with a lawyer, that right by definition is invaded when a government agent attends meetings of the defense team at which defense plans are reviewed.[319]

The dissent was also less willing to assume that defendants would be in a position after the fact to learn that an informer had communicated to the prosecutor the details of a privileged discussion. Surely, it reasoned, it would be unlikely for the informer to offer up such information. And, it would require a prosecutor of uncommon virtue to report such an event, given the likely consequences not only in terms of civil liability as in *Weatherford,* but also with respect to the real possibility that it would prevent the case against the defendant from going forward.[320]

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319. *Id.* at 564 (Marshall, J., dissenting).
320. *Weatherford*, 429 U.S. at 565.

4. Identification Procedures, the Right to Counsel and Due Process

If you see enough crime stories on television or film, you'll come across a scene where the police take a suspect into custody and, in order to sew up the case, have the victim view him in a lineup or take a peek at him sitting in handcuffs in the back of a police car. When the scene shifts to the trial, it typically includes the little bit of manufactured drama when the victim takes the stand, looks around the courtroom and then points to the guy sitting next to the defense attorney as the person who committed the crime.

When these events occur in real life, it implicates two constitutional doctrines. One is relevant if the identification procedure occurred after the defendant has been formally charged with a crime. If so, then the right to counsel has attached, and the defendant is entitled under the Sixth Amendment to have a lawyer present.[321] The other stems from the possibility that the way the police have arranged the encounter made it unnecessarily suggestive. When that happens there is a substantial risk that the witness mistakenly identified the wrong person. This raises a concern under the Due Process Clause.[322]

The first of these constitutional rules, the one dealing with the right to counsel, places a direct obligation on the police to respect the suspect's right to counsel. The other one, dealing with suggestive identification procedures, is conditional. The rule does not directly govern the behavior of the police at all. The Supreme Court has disaggregated the actors in the process so that the police do not violate the Constitution by conducting an unnecessarily suggestive identification procedure. Rather, it is the prosecutor at trial who does so if he or she elicits testimony about what happened.

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321. Kirby v. Illinois, 406 U.S. 682, 683 (1972) (quoting Gilbert v. California, 388 U.S. 263, 272 (1967) ("[A] post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth [and Fourteenth] Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup.").

322. *See* Stovall v. Denno, 388 U.S. 293, 301–02 (1967).

The Supreme Court announced both the right to counsel and due process doctrines governing identification procedures on the same day in 1967, in a trilogy of cases: *United States v. Wade*,[323] *Gilbert v. California*,[324] and *Stovall v. Denno*.[325] The first two dealt with the consequence of the police's conducting a lineup or a show-up without affording the defendant the right to have an attorney present.[326] *Wade* made clear that the Sixth Amendment was violated at the lineup itself:

> Since it appears that there is grave potential for prejudice, intentional or not, in the pretrial lineup, which may not be capable of reconstruction at trial, and since presence of counsel itself can often avert prejudice and assure a meaningful confrontation at trial, there can be little doubt that for Wade the post-indictment lineup was a critical stage of the prosecution at which he was 'as much entitled to such aid [of counsel] . . . as at the trial itself.'[327]

If any doubt remained about whose conduct the Sixth Amendment addressed in the identification context, *Gilbert* laid it to rest:

> [P]olice conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth [and Fourteenth] Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup.[328]

While *Wade* and *Gilbert* established a rule that applied to the police, there were implications for what happened in the courtroom as well.

323. United States v. Wade, 388 U.S. 218 (1967).
324. Gilbert v. California, 388 U.S. 263 (1967).
325. Stovall v. Denno, 388 U.S. 293 (1967).
326. A lineup involves placing the suspect among a group of other people and having the witness view the group. A show-up, on the other hand, is a one on one confrontation between the suspect and the witness.
327. *Wade*, 388 U.S. at 236–37.
328. *Gilbert*, 388 U.S. at 272.

If the prosecutor attempted to introduce evidence of a tainted identification at trial, it called for the remedy of exclusion as a way of ensuring police compliance with the Sixth Amendment:

> Only a *per se* exclusionary rule as to such testimony can be an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup.[329]

Stovall required the Court to consider the due process implications of an identification procedure, because the Sixth Amendment rule the Court adopted in *Wade* and *Gilbert* was not an available tool.[330] *Stovall* came to the Court as a habeas corpus case, unlike *Wade* and *Gilbert*, and as a result could benefit from the Sixth Amendment rule the latter two announced only if it would be given retroactive effect. The Court concluded that it would not,[331] but went on to consider if the confrontation between Stovall and the witness was "so unnecessarily suggestive and conducive to irreparable mistaken identification" that it denied the defendant due process of law.[332] "This is a recognized ground of attack upon a conviction," the Court announced, "independent of any right to counsel claim."[333] In a very brief discussion, the Court concluded that the identification was not unnecessarily suggestive, despite the fact that the encounter was a one-person show-up. This was so, the Court explained, because the circumstances the police confronted left them no reasonable alternative. The identifying witness was the victim of a brutal knife attack and was on the edge of death in a hospital room. A more impartial procedure, like a lineup, simply was not possible.[334]

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329. *Id.* at 273; *see also Stovall*, 388 U.S. at 297 ("*Wade* and *Gilbert* fashion exclusionary rules to deter law enforcement authorities from exhibiting an accused to witnesses before trial for identification purposes without notice to and in the absence of counsel.").

330. *Stovall*, 388 U.S. at 296.

331. *Id.*

332. *Id.* at 302.

333. *Id.*

334. *Id.*

In the years immediately following *Stovall*, there was reason to believe its due process rule applied to the police, just as did *Wade*'s right to counsel rule. In a case that came to the Court five years later, *Kirby v. Illinois*,[335] holding that suspects subject to identification procedures prior to the formal initiation of charges had no right to counsel, the plurality opinion for the Court described *Stovall* that way: "The Due Process Clause of the Fifth and Fourteenth Amendments forbids a lineup that is unnecessarily suggestive and conducive to irreparable mistaken identification."[336] It is the police, after all, who conduct lineups. So it was reasonable to take away from *Kirby* the idea that it was the police to whom the due process rule of *Stovall* was directed.

The resolution of this issue had some practical consequences. If *Stovall* applied directly to the police, then it bolstered an interpretation that created a *per se* rule prohibiting unnecessarily suggestive identification procedures without regard for factors that might indicate the identification was nevertheless reliable, such as the amount of time the witness had to observe the person committing the crime. On the other hand, if *Stovall* merely regulated the type of evidence the prosecutor could introduce, then it would be much easier to incorporate into the rule these sorts of reliability factors.

This issue came to a head in *Manson v. Brathwaite*.[337] Arrayed before the Court were the two choices. As the majority saw them, the advantage of the *per se* approach was "the elimination of evidence of uncertain reliability, deterrence of the police and prosecutors, and the stated 'fair assurance against the awful risks of misidentification.'"[338] The other alternative, to permit evidence of a suggestive identification if it possessed "certain features of reliability," had the

335. Kirby v. Illinois, 406 U.S. 682 (1972).

336. *Id.* at 691.

337. Manson v. Brathwaite, 432 U.S. 98 (1977). The Court also considered this issue earlier, in *Neil v. Biggers*, 409 U.S. 188, 198–99 (1972), and indicated that the majority would not accept a rule that did not take into account factors that might make an unnecessarily suggestive identification reliable. But *Biggers* involved a pre-*Stovall* identification, and the opinion hinted that a different result might be appropriate for post-*Stovall* situations. *Neil*, 409 U.S. at 199; *see also Manson*, 432 U.S. at 107 ("One perhaps might argue that, by implication, the Court suggested that a different rule could apply post-*Stovall*.").

338. *Manson*, 432 U.S. at 110.

attraction of serving "to limit the societal costs imposed by a sanction that excludes relevant evidence from consideration and evaluation by the trier of fact."[339] While the majority recognized that the *per se* approach would be a better vehicle for shaping police behavior in the direction of avoiding unnecessarily suggestive identification procedures,[340] its view of the audience to whom the Due Process Clause was directed dictated its choice:

> Unlike a warrantless search, a suggestive preindictment identification procedure does not in itself intrude upon a constitutionally protected interest. Thus, considerations urging the exclusion of evidence deriving from a constitutional violation do not bear on the instant problem. See *United States ex rel. Kirby v. Sturges,* 510 F.2d 397, 406 (CA 7 1975).[341]

The cite to the Seventh Circuit case was from an opinion that Justice Stevens wrote before he joined the Court. In it, he explained:

> [A] showup does not itself violate any constitutional right of the suspect. Unlike a warrantless search, which may violate a constitutionally protected interest in privacy, the identification of a suspect—whether fair or unfair—does not necessarily affect any constitutionally protected interest of the suspect. The due process clause applies only to proceedings which result in a deprivation of life, liberty or property. The due process issue, therefore, does not arise until testimony about the showup—or perhaps obtained as a result of the showup—is offered at the criminal trial. If that evidence is unfairly prejudicial, the trial judge may have a constitutional obligation to exclude it, or possibly to mitigate its impact by an appropriate cautionary instruction to the jury. But if a constitutional violation results

339. *Id.*
340. *Id.* at 112.
341. *Id.* at 113 n.13.

> from a showup, it occurs in the courtroom, not in the police station.[342]

Justices Marshall and Brennan were the only dissenters. They clearly did not want a conditional rule. As they saw it:

> *Stovall* . . . established a due process right of criminal suspects to be free from confrontations that, under all the circumstances, are unnecessarily suggestive. The right was enforceable by exclusion at trial of evidence of the constitutionally invalid identification.[343]

Brathwaite thus made *Stovall* a conditional rule. The police themselves could not violate it. They merely set the table for what a prosecutor might do. Aside from affecting the contour of the rule itself, as in *Brathwaite*, there was another practical consequence. This characterization of the rule means that a suspect who has been wrongfully convicted on the basis of an impermissibly suggestive identification procedure the police arranged cannot sue the police for a civil rights violation, since there is no underlying constitutional rule regulating the police.[344]

5. The Due Process Right of a Defendant to Present Exculpatory Evidence at Trial

The Sixth Amendment is the part of the Bill of Rights that appears to be the most relevant to the question of what limitations a judge may place on a defendant's efforts to place evidence before the jury. On its face, the Amendment's Confrontation Clause looks like the provision that should govern any dispute over the the scope of the

342. United States *ex rel.* Kirby v. Sturges, 510 F.2d 397, 406 (7th Cir. 1975).

343. *Manson*, 432 U.S. at 120; *see also id.* at 122 ("Where the prosecution sought to use evidence of a questionable pretrial identification, *Stovall* required its exclusion, because due process had been violated by the confrontation, unless the necessity for the unduly suggestive procedure outweighed its potential for generating an irreparably mistaken identification.").

344. *See, e.g.*, Wray v. City of New York, 490 F.3d 189 (2d Cir. 2007).

cross-examination of prosecution witnesses.[345] And if an issue arose about the relevance of questions a defense attorney could ask on direct examination, one would think the judge should turn to the Amendment's provision dealing with the right to compulsory process for an answer.[346] In *Chambers v. Mississippi*,[347] however, the Court confronted a case presenting a combination of these two problems and concluded that taken together, they amounted to a violation of the Due Process Clause. In reaching this result, the Court relied on a conditional rule that depended on the coexistence of two events, one of which followed the other.

Chambers was convicted of murdering a police officer. Key to his defense strategy was presenting the jury with evidence that someone else, McDonald, did it.[348] McDonald had admitted the crime to Chambers's attorney but later disavowed the confession, saying he was cajoled into it by a promise that he would be able to share in the proceeds of a civil suit that Chambers would bring against the town.[349] However, he also repeated the confession to several other witnesses.[350] At trial, the prosecution did not present McDonald as a witness, since he did not purport to have anything relevant to say about why the jury should convict Chambers. It was the defense that called McDonald to the stand, and through him introduced his confession to the attorney into evidence. However, on cross examination, McDonald repudiated the confession. When Chambers's attorney asked the trial judge to permit him to examine McDonald on redirect as a hostile witness, the judge refused, relying on a Mississippi evidentiary doctrine, the "voucher" rule, which prevented the proponent of a witness from impeaching him or her.[351] This ruling effectively prevented Chambers from confronting

345. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.").

346. *Id.* ("In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor.").

347. *Chambers*, 410 U.S. at 284.

348. *Id.* at 289.

349. *Id.* at 288. Chambers had been shot in the aftermath of the melee that resulted in the police officer's killing.

350. *Id.* at 292.

351. *Id.* at 295.

McDonald with the incriminating statements he made to other witnesses or challenging his renunciation of the confession.[352] Chambers was also thwarted in his effort to present the testimony of three of the witnesses to whom McDonald had admitted shooting the officer. The judge sustained an objection to this testimony on hearsay grounds, since Mississippi recognized only statements against pecuniary, not penal, interest as an exception.[353]

The Supreme Court found that what had happened in Chambers's trial violated the Constitution.[354] But it was not the parts of the Bill of Rights that most narrowly addressed the two problems about which Chambers complained, his inability to cross examine McDonald or to present the testimony of his three witnesses. The Court did not rely on either the Confrontation Clause or the Compulsory Process Clause as the basis for its decision. The reason was that Chambers had never preserved a federal claim in the state court system on either of these two grounds. The only federal claim that he did properly present to the Supreme Court was a post trial assertion that his conviction denied him the fundamental fairness guaranteed by the Fourteenth Amendment.[355] It was, in other words, a general due process claim. Given the context in which the federal question came to the Court, the Justices had to consider "the cumulative effect of [the] rulings in frustrating [Chambers's] efforts to develop an exculpatory defense."[356] This had the effect of making the claim a conditional one, because it could only have been raised after the conclusion of all of the evidence.[357]

The Court did separately discuss what was wrong with the two types of rulings the trial judge made. It called the voucher rule "archaic and irrational,"[358] and rejected the state's argument that

352. *Id.* at 291.

353. *Chambers*, 410 U.S. at 292.

354. *Id.* at 285.

355. *Id.* at 290 n.3. The Court's later views of the Due Process Clause make it very unlikely that it would use it as a vehicle for addressing concerns such as these. *See* Dowling v. United States, 493 U.S. 342, 352 (1990) ("Beyond the specific guarantees enumerated in the Bill of Rights, the Due Process Clause has limited operation.").

356. *Chambers*, 410 U.S. at 290 n.3.

357. *Id.*

358. *Id.* at 296 n.8.

McDonald's testimony was not adverse to Chambers.[359] However, the opinion never took the final step of declaring that the trial judge violated the Constitution at the time he made the ruling limiting the questioning of McDonald. "We need not decide," Justice Powell wrote for the Court, "whether this error alone would occasion reversal since Chambers's claimed denial of due process rests on the ultimate impact of that error when viewed in conjunction with the trial court's refusal to permit him to call other witnesses."[360]

It was harder for the Court to condemn as severely the trial judge's ruling preventing Chambers from calling the witnesses who would have testified that they overheard McDonald confess to the crime. That ruling was based on the hearsay doctrine, in particular the feature of Mississippi evidence law that refused to recognize an exception for statements against penal interest.[361] At the time that *Chambers* came to the Court, federal law, on the authority of *Donnelly v. United States*, also refused to recognize this hearsay exception.[362] Nevertheless, the *Chambers* Court concluded that the circumstances of the hearsay statements before it "provided considerable assurance of their reliability,"[363] and that "the hearsay rule may not be applied mechanistically to defeat the ends of justice."[364] But yet again, it refused to announce a non-conditional rule:

> We conclude that the exclusion of this critical evidence, *coupled with* the State's refusal to permit Chambers to cross-examine McDonald, denied him a trial in accord with traditional and fundamental standards of due process. In reaching this judgment, we establish no new principles of constitutional law. Nor does our holding signal any diminution in the respect traditionally accorded to the States in the establishment and implementation

359. *Id.* at 297.
360. *Id.* at 298.
361. *Id.* at 299.
362. Donnelly v. United States, 228 U.S. 243, 273–74 (1913).
363. *Chambers*, 410 U.S. at 300.
364. *Id.* at 302.

> of their own criminal trial rules and procedures. Rather, we hold quite simply that *under the facts and circumstances of this case the rulings of the trial court deprived Chambers of a fair trial.*[365]

As the holding in *Chambers* depended on the conjunction of two events, it is hard to see how the rule could be anything but conditional. The opinion went out of its way to say that neither of the two state court rulings that it considered independently violated due process. Since trials are sequential affairs, whichever ruling comes first, one has to wait for the other shoe to drop in order to say that *Chambers* condemns what has happened.

II. EVALUATING CONDITIONAL RULES

A. The Negative Side of Conditional Rules

1. The Effect in Shaping Behavior

Conditional rules are difficult to apply before all of their constituent events have taken place. *Chambers v. Mississippi* illustrates this conundrum.[366] The case gives little guidance to trial judges and lawyers who have to know in advance what evidence the Constitution renders admissible despite the existence of state evidence prohibitions. Lower courts have differed over whether *Chambers* contains two nonconditional rules that trial judges can apply in advance of an attempt to introduce evidence (in ruling on the admission of statements against penal interest,[367] or an attempt by a proponent of a witness to impeach his or her credibility[368]) or a

365. *Id.* at 302–03 (emphasis added).

366. *See Chambers*, 410 U.S. 284 (1973).

367. *See* Skillicorn v. Luebbers, 475 F.3d 965, 970 (8th Cir. 2007) ("In *Chambers*, the Supreme Court held that a defendant has a constitutional right to proffer exonerating statements, that would otherwise be hearsay, if they were made under circumstances providing 'considerable assurance of their reliability.'") (quoting Chambers v. Mississippi, 410 U.S. 284, 300 (1973); Washington v. Renico, 455 F.3d 722, 734–35 (6th Cir. 2006); Su Chia v. Cambra, 360 F.3d 997, 1006 (9th Cir. 2004); United States v. Camuti, 78 F.3d 738, 743 (1st Cir. 1996).

368. Cikora v. Dugger, 840 F.2d 893, 898 (11th Cir. 1988) ("[T]he Supreme Court held in *Chambers* . . . , that a state trial court denied Chambers due process when it refused to allow Chambers to show to the jury that another person had repeatedly confessed to the crime. The state trial judge excluded this

contextually based ruling that combines the effect of the excluded evidence on the ability of the defendant fairly to present his case.[369]

The confusion is understandable. One ordinarily thinks of Supreme Court decisions as useful vehicles for providing guidance on how to avoid a similar problem in the future. There is, concomitantly, an inevitable pressure to try to find in any decision a rule that one can actually apply. However, if one recognizes that *Chambers* used a conditional rule, it has little value as a guide to behavior useful to a trial judge. It is perhaps this difficulty that led Professor Peter Westen, a prominent evidence scholar and the lawyer who represented Chambers in the Supreme Court,[370] to write shortly after the case came out that "it is difficult to derive a clear standard from *Chambers*,"[371] and led Justice Scalia to express doubt that one could meaningfully extract any holding from the case.[372]

What made *Chambers v. Mississippi* such a difficult case revealed one of the reasons that an appellate court may prefer to announce a conditional rule. If a court wanted to reverse a conviction without having to create a precedent for how state actors should exercise power in the future, incorporating a prejudice requirement into the rule is a good way to do it. This, in fact, is how Professor Westen[373] and Justice Scalia[374] have portrayed *Chambers*.

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testimony because Chambers had called that person as his witness, and Mississippi rules of evidence did not permit defendants to cross-examine their own witnesses."); Sharlow v. Israel, 767 F.2d 373, 376 (7th Cir. 1985).

369. *See* United States v. Walling, 486 F.2d 229, 238 (9th Cir. 1973).

370. Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 151 n.383 (1974).

371. *Id.* at 151; *see also* Janet C. Hoeffel, *The Sixth Amendment's Lost Clause: Unearthing Compulsory Process*, 2002 WIS. L. REV. 1275, 1301 (2002) ("[O]ne would be hard-pressed to locate a single case that cites *Chambers* as precedent for its holding. *Chambers* also offered no solid advice on the method a court could use for tackling the clash of the Constitution and evidentiary rules."); David Robinson, Jr., *From Fat Tony and Matty the Horse to the Sad Case of A.T.: Defensive and Offensive Use of Hearsay Evidence in Criminal Cases*, 32 HOUS. L. REV. 895, 929–30 (1995) (the *Chambers* rule remains unclear).

372. *See* Montana v. Englehoff, 518 U.S. 37, 53 (1996) ("[T]he holding of *Chambers*—if one can be discerned from such a fact-intensive case—is certainly not that a defendant is denied 'a fair opportunity to defend against the State's accusations' whenever 'critical evidence' favorable to him is excluded, but rather that erroneous evidentiary rulings can, in combination, rise to the level of a due process violation.").

373. Westen, *supra* note 370, at 152 ("[T]he Court may simply have meant that it was deciding the case on its facts. The Court, when it enters uncertain and unexplored territory, frequently limits its judgment to the particular facts under consideration. This permits it to indicate what it believes to be the

Rules, however, serve as more than vehicles for justifying why courts can reverse criminal convictions. They also act as a mechanism to guide the behavior of those who are their target. Indeed, the primary purpose of a rule has to be to affect behavior, otherwise it is not a rule.[375] Whether a rule limits the way a police officer exercises her authority to seize an individual on the street, requires a judge to allow a defendant to litigate in the absence of the jury the issue of whether the defendant's confession was not voluntary, or directs an appellate court to automatically reverse a conviction if the defendant was denied the right to have a lawyer represent him at trial, it must provide some meaningful guidance on how to exercise power under a grant of government authority.

However, conditional rules, to put it simply, are lousy at guiding behavior. Indeed, when legislative bodies, administrative agencies, or advisory groups promulgate rules to guide the behavior of government actors, they do not put them in a conditional format. The rules of professional responsibility that govern prosecutors do not incorporate a prejudice requirement in describing the obligation to reveal exculpatory evidence.[376] Court rules dealing with severance do not instruct judges facing a potential *Bruton* problem to withhold judgment because in the latter stages of the trial the codefendant who confessed may take the stand and eliminate the Confrontation Clause problem.[377] And police manuals do not instruct officers to draw their guns on suspects without any reason to believe they have committed a crime, hoping that the suspect will run away rather than submit.[378]

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correct result without committing itself to a definitive rule for unforeseen variants of the immediate case . . . .").

374. *Englehoff*, 518 U.S. at 52 ("*Chambers* was an exercise in highly case-specific error correction.").

375. *See* Larry Alexander & Emily Sherwin, *The Deceptive Nature of Rules*, 142 U. PA. L. REV. 1191, 1194 (1994) ("[A] 'rule' is a prescription for conduct, applicable to a range of actors, which is designed to promote an end or protect a right, but does not simply recite its objective."); Margaret Jane Radin, *Reconsidering the Rule of Law*, 69 B.U. L. REV. 781, 786 (1989) (stating that rules must be capable of being understood and followed by those to whom they are addressed); Lawrence M. Friedman, *Legal Rules and the Process of Social Change*, 19 STAN. L. REV. 786, 788 (1967) ("All rules are directed toward conduct . . . .").

376. MODEL RULES OF PROF'L CONDUCT R. 3.8(d) (2006).

377. FED. R. CRIM. P. 14(b).

378. *See* BOSTON POLICE DEP'T RULES AND PROCEDURES R. 303, § 5 (2003) ("Officers shall not point firearms at persons except when reasonably justified under the circumstances.").

Conditional rules do not make sense in these contexts because they do not tell the people who look to the rules for guidance how to act at the time they must make decisions about their behavior. Nor do they make sense as part of the Constitution. Those sections of the Bill of Rights that regulate the criminal justice system were the result of a fear of the potential misuse of government power.[379] The Bill of Rights, and in particular the Due Process Clause, was a direct descendant of that mother of all constitutional limits on the exercise of force that is the criminal law, the Magna Carta,[380] a document with which all educated people in 18th century America would have been acquainted.[381] The Magna Carta was both a political manifesto and a statement of rules that the King had to obey to ensure that he would not engage in abusive behavior in the future.[382] This notion that an important function of a fundamental declaration of rights was to guide the future behavior of those with the power to threaten those rights would naturally have been part of the world-view of the Framers. Clear, easy to apply rules were, in their view, best suited to this end.[383] Conditional rules are not an appropriate way to address this concern.

Rules, of course, are not always easy to apply for the actors who must look to them for guidance. Questions of interpretation are an inherent problem. Making a rule conditional, however, detracts significantly from a rule's ability to affect the behavior of those to whom it is directed. And that is true whether you think that the people the rules are designed to limit view them as aspirations or hindrances.

379. Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993) ("[T]he central meaning of the Fourth Amendment is distrust of police power and discretion."); Ronald J. Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529, 558 (1978) ("Sensitivity to the dangers of unchecked power and totalitarianism arose in the years immediately preceding the American Revolution.").

380. Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 948 ("The ancestry of the due process clause is universally traced to chapter 39 of the Magna Carta . . . .").

381. *See id.* at 969.

382. *Id.* at 949.

383. John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 77 n.117 (1996) ("[T]he Framers were practical thinkers who understood that the Constitution had to draw clear distinctions capable of fairly mechanical application even if these distinctions did not capture the complexity of each individual situation.").

Imagine how a conditional rule looks from the vantage point of a government official who does not internalize what she understands to be the constitutional limits on her power. When faced with a choice about how to act in a situation governed by a rule, she simply makes a utilitarian calculation about whether the benefit she will receive, either institutionally or personally, if she violates the rule, outweighs the potential disadvantage of whatever sanction a rule violation entails. The negative consequence that this Holmesian "bad official"[384] must take into consideration depends, of course, not only on how much she wants to avoid it but also on the probability that it will ever come to pass.[385] By adding into the definition of the rule some future consequence that may never occur, by necessity it lowers the probability that a sanction will be imposed.

Take, for example, the conditional rule dealing with the prosecutor's obligation to reveal exculpatory evidence. How does the conditional *Brady* rule affect this type of prosecutor? Perhaps she has in her hands a piece of exculpatory information, say the fact that a key witness was the beneficiary of a promise to drop pending charges against him in return for his testimony, that she does not want to turn over to the defense. The existence of a prejudice requirement as part of the rule means that the incentive to disclose the information is diminished, in some proportion, by the degree to which she foresees the defendant's being unable to establish prejudice. The correlation may be not proportional, but it is certainly positively correlated.[386]

There are a lot of ways that this prosecutor could realistically believe that the defendant would ultimately fail to establish prejudice.

384. *See* Justice Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897) ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else.").

385. *Cf.* Walter F. Dellinger, *Of Rights and Remedies: The Constitution As a Sword*, 85 HARV. L. REV. 1532, 1563 (1972) ("In the absence of the exclusionary rule, the law enforcement officer and the public generally are enticed to view the Constitution as Justice Holmes' 'bad man' viewed the obligation of contracts.").

386. *See* United States v. Agurs, 27 U.S. 97, 117 (Marshall, J., dissenting) ("[T]he [majority's] rule reinforces the natural tendency of the prosecutor to overlook evidence favorable to the defense, and creates an incentive for the prosecutor to resolve close questions of disclosure in favor of concealment."); George C. Thomas III, *History's Lesson for the Right to Counsel*, 2004 U. ILL. L. REV. 543, 544; Michael E. Gardner, *Note: An Affair to Remember: Further Refinement of the Prosecutor's Duty to Disclose Exculpatory Evidence*, 68 MO. L. REV. 469, 479 (2003).

The most likely is if the defendant pleads guilty, as do ninety percent or so of all those charged with a crime. If the case is pled out, a common view of *Brady* insulates the prosecutor from any sanction for withholding the information:

> Because a *Brady* violation is defined in terms of the potential effects of undisclosed information on a judge's or jury's assessment of guilt, it follows that the failure of a prosecutor to disclose exculpatory information to an individual waiving his right to trial is not a constitutional violation.[387]

Even if the case goes to trial, the conditional nature of the rule makes it difficult for the defendant to establish prejudice. In the relatively rare likelihood that the defendant is acquitted, there is literally no *Brady* violation about which to complain. Since *Brady*'s prejudice requirement looks to the probability of a more favorable outcome had the prosecutor not hidden the exculpatory evidence, a defendant who benefits from the most favorable outcome possible cannot point to a better result. The venal prosecutor's effort may have been in vain, but at least the loss at trial insulates her from any charge that she violated the defendant's constitutional rights.[388]

In the more common event that the trial ends in conviction, the psychological phenomenon known as hindsight bias makes it difficult to prove prejudice. Hindsight bias is the tendency to view something that has already happened as having been inevitable.[389] Since resolving a claim of a *Brady* violation can realistically only take place after the trial has occurred, convictions are the inevitable context in which these decisions are made. When judges are called upon to decide whether a *Brady* violation has occurred after a

387. Matthew v. Johnson, 201 F.3d 353, 361–62 (5th Cir. 2000); *see also* McKune v. City of Grand Rapids, 842 F.2d 903, 907 (6th Cir. 1988) (no *Brady* violation where charges were dropped); Nygren v. Predovich, 637 F. Supp. 1083, 1087 (D. Colo. 1986) (no *Brady* violation where charges were dismissed).

388. *See* Morgan v. Gertz, 166 F.3d 1307, 1310 (10th Cir. 1999) (no *Brady* violation where defendant acquitted).

389. *See* Keith A. Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 317.

conviction, they already know the result of the trial. It is difficult to get a judge to agree that there was a reasonable probability that a guilty verdict would not have occurred if only the prosecutor had revealed the exculpatory information in a timely way.[390]

Even from the perspective of a prosecutor who wants to abide by the restriction of the *Brady* rule, its conditional nature creates an environment that fosters instances where exculpatory information is withheld.[391] While *Brady* is defined *ex post*, prosecutors have to make decisions about how to avoid *Brady* violations *ex ante*. By giving them the responsibility for identifying the occasions on which they must limit their own power, the *Brady* rule puts them in a position of doing a job which sets them at cross purposes with themselves.

Few, if any, law-abiding prosecutors would try to convict someone whom they believed innocent. That being the case, every time a prosecutor has to make a decision about whether to turn over *Brady* material, what is at stake is doing what the Constitution may require at the cost of increasing the chance that a defendant who deserves to be punished will be acquitted. Despite the universal platitude after every not guilty verdict that the prosecutors' office seeks only justice and justice is served by acquittals as well as convictions, losing is never in the real interest of a line prosecutor. Since the *Brady* doctrine requires prosecutors to evaluate not only the way that a jury might be affected by a piece of information but the overall impact of that information in the context of the entire case the prosecutor expects to present, it is easy to see how the significance of something that is marginally exculpatory on its face may fail to receive an objective evaluation. No social psychologist would be surprised to learn that prosecutors are no better than anyone else in avoiding the phenomenon of cognitive dissonance, the psychological mechanism

390. *See id.* at 322.

391. *Cf.* Daryl J. Levinson, *Rights Essentialism and Remedial Equilibrium*, 99 COLUM. L. REV. 857, 911 (1999) (noting that while a government official's view of the requirements of a constitutional rule plays a role in compliance, respect for individual rights is less likely when remedies are lacking).

that downplays the significance of information that conflicts with a preexisting opinion.[392]

Justice Marshall illustrated this point in his dissenting opinion in *Bagley*, as support for his criticism of the majority's making the *Brady* rule conditional.[393] Justice Marshall recounted an incident five years after the *Brady* opinion became law, when a large group of New York state prosecutors was asked if they would reveal to defense counsel the fact that one eyewitness to a bank robbery had definitively said the defendant was not the culprit if there were five other witnesses who made a positive identification. Now, at the time this group was asked their opinion, it was not at all clear that the *Brady* rule was conditional. *Agurs* had not yet been decided and it was *Agurs* that recast the rule to require prejudice. However, even in that environment, only two prosecutors indicated that they would turn the information over to the defense.[394]

Even without the effect of cognitive dissonance, putting a rule in conditional form makes it harder for the actors who are subject to its mandate to determine exactly what they may and may not do. Whether they have to make a judgment about the potential prejudicial effect of their decisions, or anticipate the reaction of the person whose rights are implicated by them, or predict how they or others with whom they act in concert will behave in the future in light of the decision they make in the present, there is another layer of complexity involved. Actors with a stake in the outcome are particularly poor candidates to make this assessment.[395]

Even trial judges, who presumably do not have an interest in the outcome, are more likely to engage in behavior that is subject to a conditional rule than one put in a non-conditional format. Justice

392. Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 655 (2002).

393. *See* United States v. Bagley, 473 U.S. 667, 685 (1985) (Marshall, J., dissenting).

394. *Id.* at 697.

395. Arthur B. Laby, *Differentiating Gatekeepers*, 1 BROOK. J. CORP. FIN. & COM. L. 119, 121 n.9 (2006) ("[S]ubtle but powerful psychological factors skew the perceptions and judgments of persons . . . who have a stake in the outcome of those judgments.") (quoting Revision of the Commission's Auditor Independence Requirements, Securities Act Release No. 7919, 65 Fed. Reg. 76008, 76016 (Dec. 5, 2000)).

White apparently thought so. In his concurring opinion in *Delaware v. Van Arsdall*,[396] he agreed with the government's contention that the Confrontation Clause rule that prevents judges from prohibiting cross examination designed to show the bias of a prosecution witness should be a conditional one that incorporates an "outcome determinative" prejudice requirement.[397] His rationale for wanting the rule to be conditional was the effect he thought it would have on the behavior of trial judges. Making the rule non-conditional, he believed, would "undermine [their] authority . . . to restrict cross-examination."[398] The non-conditional rule that *Van Arsdall* propounded, in Justice White's view, would, in close cases, influence trial judges to "permit the examination rather than risk being guilty of misunderstanding the constitutional requirements of a fair trial."[399]

2. *Vehicles for Ex Ante Prevention*

Conditional rules are not only ineffective as instruments to control behavior. They also present a barrier to a court's using the rule as a basis for action designed to avoid violations in the future.

The conditional rules where this phenomenon arises are the ones that incorporate a requirement of prejudice. The *Strickland* rule is a good example.[400] A defendant cannot establish a violation of the rule requiring effective assistance of counsel unless he raises a reasonable probability that the shortcoming about which he complains adversely affected the result. Given the contextual judgment that the rule requires, the only practical way to apply it is after the fact. But that does not mean it is impossible to spot in advance institutional structures and individual practices that are highly likely to result in violations of the rule when it comes time to make the *post hoc* evaluation. The conditional nature of the *Strickland* rule, however, makes it difficult to ask a court to entertain an *ex ante* claim.

396. 473 U.S. 667 (1985).
397. *Id.*, 473 U.S. at 685 (White, J., concurring).
398. *Id.* at 686.
399. *Id.*
400. Strickland v. Washington, 466 U.S. 668, 686 (1984).

Say you are a defendant in the middle of your trial and you believe that your defense attorney's performance has failed to meet the constitutionally mandated standard. In all but the rarest examples where it is clear that the lawyer's shortcoming will inevitably and fatally taint the verdict, your complaint will have to wait until you are convicted. As the District of Columbia Court of Appeals put it in holding that *Strickland* claims must await the conclusion of the trial:

> The problem with applying the *Strickland* test in the middle of an ongoing trial is that the "result" or "outcome" of the proceeding has yet to be determined. Thus the trial court would be required to assess prospectively the likely prejudicial effect of counsel's alleged errors before it has had an opportunity to hear all the evidence in the case, and before the jury, if there is one, has even begun to deliberate.[401]

Defendants seeking to use *Brady* as the source for having a court order the prosecution to deliver material that is facially exculpatory prior to trial will encounter a similar problem. In the Second Circuit, for example, a District Judge may not order the government to produce *Brady* material upon request by the defendant, because the conditional nature of the rule does not create the opportunity for the judge to enforce a constitutional mandate before the requirement of prejudice is met:

401. Johnson v. United States, 746 A.2d 349, 354 (D.C. Cir. 2000). A related problem can arise when a defendant, prior to the conclusion of the case, seeks to have the trial court supply some remedial relief for the defense attorney's ineffective representation in plea negotiations. *See* Thomas v. Reyes, 153 P.3d 1040 (Ariz. 2007). For example, in *Thomas*, defense counsel failed to convey a plea offer to her client in time to meet the prosecutor's deadline. The defendant discovered this lapse prior to trial and sought to have the judge apply a state law remedy for ineffective assistance of counsel in plea negotiations that required the prosecutor to reoffer the plea. The court concluded, however, that the defendant could not establish that his right to effective assistance of counsel had been violated prior to trial since it was possible that he would eventually be acquitted or receive a sentence no less favorable than the plea offer. *See also* United States v. Gray, 382 F. Supp. 2d 898, 910 (E.D. Mich. 2005) (stating that a claim of ineffective assistance of counsel relating to plea negotiations, is "grossly premature" before "conviction and sentencing").

> Although the government's obligations under *Brady* may be thought of as a constitutional duty arising before or during the trial of a defendant, the scope of the government's constitutional duty—and, concomitantly, the scope of a defendant's constitutional right—is ultimately defined retrospectively, by reference to the likely effect that the suppression of particular evidence had on the outcome of the trial.[402]
>
> . . . .
>
> . . . It is not feasible or desirable to specify the extent or timing of [the] disclosure *Brady* and its progeny require, except in terms of the sufficiency, under the circumstances, of the defense's opportunity to use the evidence when disclosure is made.[403]

The conditional nature of a rule not only makes it difficult for a court to address the problem in a particular case *ex ante*; it also stands as a barrier to claims for institutional reform. For example, the way that some jurisdictions have structured the provision of defense services for indigent defendants in criminal cases raises serious doubts about its ability to meet the constitutional standard of reasonably effective counsel. Jurisdictions that starve their defender programs of resources and overload their attorneys are likely to spawn cases that would meet the *Strickland* prejudice test after the fact. But, prior to a conviction, criminal defendants facing pending charges lack standing to use *Strickland* as the basis for asking a court to order the changes necessary to avoid the risk. As one court explained:

> Here, [a criminal defendant facing a pending charge] seeks to enjoin the Marion County public defender system because it effectively denies indigents the effective assistance of counsel. However, a violation of a Sixth Amendment right will arise only after a defendant has shown he was prejudiced by an unfair trial.

402. United States v. Coppa, 267 F.3d 132, 140 (2d Cir. 2001).
403. *Id.* at 142 (quoting Leka v. Portundo, 257 F.3d 89, 100 (2d Cir. 2001)).

> This prejudice is essential to a viable Sixth Amendment claim and will exhibit itself only upon a showing that the outcome of the proceeding was unreliable. Accordingly, the claims presented here are not reviewable under the Sixth Amendment as we have no proceeding and outcome from which to base our analysis.[404]

3. Misleading Messages

Conditional rules send a misleading message to the public about what sort of protection they can expect when dealing with officials in the criminal justice system. All but the most sophisticated observers of the Supreme Court are likely to come away with the impression that it is the predicate behavior itself that the Constitution prohibits and not the predicate plus whatever future event serves to complete the violation. That was part of the difficulty with *Chambers,* where the audience construing the message consisted of appellate judges. The problem is much more severe when it is the general public.

Consider, for a minute, the one rule in constitutional criminal procedure that likely has the most widespread currency in popular culture, the *Miranda* rule. It is fair to conclude that most people think that *Miranda* is a direction to the police that when they interrogate a suspect in their custody, they have to deliver the familiar four-part warning.[405] However, now that the Court has made the privilege against self-incrimination conditional, if the public is truly to understand *Miranda*'s effect on the police, they have to be aware that *Miranda* violations don't occur in the police station but in the courtroom.

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404. Platt v. State, 664 N.E.2d 357, 363 (Ind. Ct. App. 1996), *cert. denied sub nom,* Platt v. Indiana, 520 U.S. 1187 (1997); *see also* People v. District Court of El Paso County, 761 P.2d 206, 209, 211 (Colo. 1988) (holding that it was error for trial judge to rule prior to trial that low fees paid to appointed counsel denied defendant the right to effective assistance of counsel since the defendant had no way of establishing prejudice). *See e.g.*, Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988), *cert. denied,* 495 U.S. 957 (1990), *rev'd on abstention grounds sub nom* ("[T]he *Strickland* standard [is] inappropriate for a civil suit seeking prospective relief."); Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992).

405. My thirty-five years' experience as a defense attorney have exposed me to many clients who were so ingrained in the concept that *Miranda* is a rule directed to the police that they were irate at not being given a *Miranda* warning, despite never being questioned.

The full implication of the misleading nature of talking about one's *Miranda* rights was made clear in a case the Court decided the year after *Chavez*, *United States v. Patane*.[406] In *Patane*, the Court refused to apply the "fruit of the poisonous tree" doctrine and suppress a pistol the police found as a result of interrogating a suspect without giving him a complete *Miranda* warning.[407] While conceding that the defendant's statements were not admissible at trial as a result of the *Miranda* violation, the prosecutor did propose to introduce the pistol into evidence.[408]

Justice Thomas, the author of *Chavez*, wrote for the plurality decision that held the introduction of the pistol would not violate the Constitution: "The *Miranda* rule is not a code of police conduct, and police do not violate the Constitution (or even the *Miranda* rule, for that matter) by mere failures to warn."[409] The statement in the parenthesis is startling in its implication. It means that even deliberate decisions by the police to question a suspect without obeying *Miranda*'s dictate do not, under this view, violate the *Miranda* rule. "Potential violations occur, if at all," Justice Thomas continued in *Patane*, "only upon the admission of unwarned statements into evidence at trial."[410]

Now, it would be unrealistic to expect members of the public to understand the debate over whether *Miranda* is a prophylactic rule or one that the Constitution directly requires. But it is certainly fair to conclude that a casual observer of the criminal justice system would think *Miranda* means something more than just a direction to the prosecutor about when the state may admit statements that resulted from custodial interrogation.

Consider how this will appear to someone taken into police custody who has a layman's familiarity with the *Miranda* warnings. It is unlikely that he will know that *Patane* has given the police the imprimatur to ignore *Miranda*. According to *Patane*, police can

406. *See generally* United States v. Patane, 542 U.S. 630 (2004).
407. *Id.* at 631–32.
408. *Id.* at 643.
409. *Id.* at 637.
410. *Id.* at 641.

question a suspect without giving him a *Miranda* warning, and presumably they are just as free to question someone who has received one but who says that he wants to assert his right to remain silent or right to have a lawyer present.[411]

How would we expect a conscientious police officer to react if a suspect sought to end an interrogation by asserting what we now know is inaccurately called one's *Miranda* rights? Since continuing the interrogation violates neither the Constitution nor the *Miranda* rule, it would be foolish to stop. Stopping ensures the police end up with neither a statement nor a lead to any physical evidence. So, the reasonable, and legitimate, thing to do is to continue.

Well, to a suspect who is not versed in the conditional nature of *Miranda*, it can only appear that the police who control the environment in which he finds himself are lawless. The police will know that they are staying within the limits of a conditional rule. The suspect almost certainly will not. One may defend this "acoustic separation"[412] on the ground that it is socially desirable for police to gain access to physical evidence that a suspect has committed a crime. But, it can only be gained at the cost of deception. It says something about our system of criminal justice if a doctrine describing the rights of individuals is designed to be effective by hiding from those whom it is supposed to protect, the true dimension of the protection.

Conditional rules can be misleading not just for outsiders, but for insiders also. Criminal trial lawyers talk about *Brady* material prior to trial, when the concept must act as a guide to what the prosecutor must actually do, without realizing that until the trial is over, in a strictly accurate sense there is no such thing. As a result, a prosecutor may deny having *Brady* material despite knowing that the state has in its possession information that is exculpatory on its face, so long as the prosecutor does not believe that the information would be significant enough in the overall context of the evidence to affect the

411. *Id.*

412. *See generally* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984).

result. This may seem to be a metaphysical distinction that only the congenitally hyper-technical or deceptive may use. But it is a perfectly legitimate way to translate the Court's doctrine into practical terms. At least, that is what Justices Thomas and Scalia would have us believe, from their dissent in *Banks v. Dretke*.[413]

One of the questions the Court had to resolve in *Banks* was whether the defendant had sufficient cause to excuse his failure to present his *Brady* claim to the state courts. Banks's ability to offer evidence in federal court to support the *Brady* claim depended on whether he could establish that the fault for not presenting it to the state courts lay with the State and not with his laxity or neglect.[414]

At issue was the prosecutor's failure to turn over to Banks prior to trial information that one of the state's key witnesses was not only a paid police informant but had encouraged, at the behest of his police masters, a course of action that the prosecutor relied on in the penalty phase of the trial to convince the jury to sentence Banks to die.[415] In his state collateral attack on his conviction, Banks alleged "'upon information and belief' that 'the prosecution knowingly failed to turn over exculpatory evidence as required by *Brady*.'"[416] The state explicitly denied this claim and as a result, Banks never pursued the investigation in this stage of the case that later on led him to discover the facts about the witness's relationship to the police.

The majority found that the prosecutor's deceptive answer to Banks's allegation in his state collateral attack was among the factors supporting their conclusion that he established cause for failing to present the new evidence that he wanted the federal court to consider. Justice Thomas, on the other hand, was far more willing to assume a semantically fastidious prosecutor than was the majority:

> [T]he State could have been denying only that it had failed to turn over evidence *in violation of Brady*, *i.e.*, that any evidence the prosecution did not turn over was not material (a position

413. Banks v. Dretke, 540 U.S. 668, 706–11 (2004).
414. *Id.* at 675–76.
415. *Id.* at 698.
416. *Id.* at 682 (quoting Strickler v. Greene, 527 U.S. 263, 281 (1999)).

> advanced by the State throughout the federal habeas process). . . . [S]trictly speaking, there is never a real '*Brady* violation' unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict.[417]

Lawyers, like laymen, have to learn to think about rules like *Miranda* and *Brady* in conditional terms.

There is another way in which the conditional nature of a rule contributes to confusion. *Greer v. Miller*[418] illustrates the problem. *Greer* was the case that held a prosecutor does not violate a defendant's rights simply by asking a question on cross examination about whether the defendant remained silent after receiving a *Miranda* warning, so long as the defendant does not react by supplying the answer. The Court held that this behavior did not violate the rule it had earlier announced in *Doyle v. Ohio*.[419] *Doyle* was based on a conclusion that it was fundamentally unfair to use as evidence a defendant's invited silence after a *Miranda* warning, in part because the defendant's failure to talk to the police was too ambiguous to serve as reliable proof of guilt.

After *Greer* disposed of the claim based on *Doyle*, it went on to consider whether, despite the fact that the prosecutor never violated the *Doyle* rule because the defendant never answered the question, the prosecutor's behavior nevertheless "so infec[ted] the trial with unfairness as to make the resulting conviction a denial of due process."[420] As examples of such cases, the Court cited *Agurs*,[421] as well as *Donnelly v. DeChristoforo*,[422] a case in which the prosecutor deliberately misled the jury in his final argument to convey the false impression that the defendant had unsuccessfully tried to plead guilty to a lesser charge.[423] In considering this question, the Court posed the

417. *Banks*, 540 U.S. at 710 (Thomas, J., dissenting).
418. Greer v. Miller, 483 U.S. 756 (1987).
419. *Id.* at 756–57; Doyle v. Ohio, 426 U.S. 610, 619 (1976).
420. *Greer*, 483 U.S. at 765 (quoting Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974)).
421. *Greer*, 483 U.S. at 765 (citing United States v. Agurs, 427 U.S. 97, 108 (1976)).
422. *Greer*, 483 U.S. at 765 (citing *Donnelly*, 416 U.S. at 639).
423. *Donnelly*, 416 U.S. at 639.

problem this way: "Although the prosecutor's question did not constitute a *Doyle* violation, the fact remains that the prosecutor attempted to violate the rule of *Doyle* by asking an improper question in the presence of the jury."[424]

Consider, for a minute, exactly what the Court is saying the prosecutor did that potentially is so unfair that it might conceivably have tainted the trial. Why, the Court tells us, the prosecutor "attempted to violate the rule of *Doyle*." It is, however, a little disingenuous to talk about the prosecutor's action as an attempted *Doyle* violation. Prosecutors, by themselves, do not have the ability to violate *Doyle*. Violations only occur when the witness answers the prosecutor's question and the judge allows the jury to consider the answer as part of the evidence. It's a little like charging someone with an attempt to commit a conspiracy. Such behavior may constitute a completely separate wrong, like solicitation, but it requires some category bending to fit it into the contours of an attempt.[425]

If the label of "attempted *Doyle* violation" isn't quite accurate, it does serve a purpose. It makes one think that the Court vigilantly disapproves of what the prosecutor did, while communicating, with a wink to those in the know, that not only will no one do anything about it if either the judge or the defense attorney steps in to prevent the tainted answer from appearing but that simply asking the question does not, by itself, violate the defendant's constitutional rights or any rule limiting the prosecutor's power.

4. The Problem of Prejudice

There are two additional objections unique to all of the conditional rules that rely on prejudice as the consequence that identifies a violation of the Constitution. For one thing, the Court has been remarkably inconsistent in deciding when prejudice is a component of an underlying constitutional right. For another, they ignore all of

424. *Greer*, 483 U.S. at 765.

425. *Cf.* Lorenz, *Conspiracy in the Proposed Federal Criminal Code: Too Little Reform*, 47 TUL. L. REV. 1017, 1031 (1973) (noting the "theoretical conflicts inherent in an 'attempted conspiracy'").

the process values inherent in the Constitution, shunning them in favor of accuracy.

a. Inconsistency

In the first conditional rule case, *Snyder v. Massachusetts*,[426] the Court explained that where a rule is neither explicitly mentioned in the Constitution nor obviously fundamental, one can only define the rule in situational terms by looking at the overall fairness of the entire proceedings.[427] This rationale, however, has hardly led to coherent results.

The Supreme Court has found in the Due Process Clause a wide variety of freestanding rules, not specifically mentioned in the Constitution, that are not conditional. Due process is the basis for a rule that bans the introduction of evidence that the defendant was silent after receiving a *Miranda* warning,[428] prohibits a jury instruction that shifts the burden of proof to the defendant,[429] requires the application of the standard of proof beyond a reasonable doubt,[430] bars the use of coerced confessions as evidence,[431] mandates that judges first determine the question of a confession's voluntariness,[432] requires judges to be impartial,[433] insists that discovery in criminal cases be reciprocal if the defendant has to reveal information to the

426. Snyder v. Massachusetts, 291 U.S. 97 (1934).

427. *Id.* at 116–18. In Donnelly v. DeChristoforo, 416 U.S. 637 (1974), the Court held that an isolated remark in a prosecutor's closing argument suggesting that the defendant unsuccessfully tried to plead guilty to a lesser charge did not violate due process because it did not prejudice the defendant. *Id.* The Court adopted the same reasoning as it did in *Snyder*, though without citing it: "This is not a case in which the State has denied a defendant the benefit of a specific provision of the Bill of Rights, such as the right to counsel, Argersinger v. Hamlin, 407 U.S. 25 (1972) or in which the prosecutor's remarks so prejudiced a specific right, such as the privilege against compulsory self-incrimination, as to amount to a denial of that right. Griffin v. California, 380 U.S. 609 (1965). When specific guarantees of the Bill of Rights are involved, this Court has taken special care to assure that prosecutorial conduct in no way impermissibly infringes them. But here the claim is only that a prosecutor's remark about respondent's expectations at trial by itself so infected the trial with unfairness as to make the resulting conviction a denial of due process. We do not believe that examination of the entire proceedings in this case supports that contention." *Donnelly*, 416 U.S. at 643.

428. Doyle v. Ohio, 426 U.S. 610, 618 (1976).

429. Mullaney v. Wilbur, 421 U.S. 684, 702 (1975).

430. *In re* Winship, 397 U.S. 358, 361 (1970).

431. Payne v. Arkansas, 356 U.S. 560, 568 (1958).

432. Jackson v. Denno, 378 U.S. 368, 389 (1964).

433. Tumey v. Ohio, 273 U.S. 510, 523 (1927).

prosecution,[434] and prevents judges from intimidating witnesses.[435] None of these rules incorporates a showing of prejudice. Indeed, in none of these cases was there even a discussion about this issue, much less a convincing rationale for why cases are sorted into one category or another.[436]

One can see the malleability of the criteria a Justice can use to determine whether a rule requires a prejudice component or not by looking at the dilemma Justice Scalia faced in *United States v. Gonzalez-Lopez*.[437] The issue in *Gonzalez-Lopez* was whether a defendant who claimed he had been denied the right to have counsel of his own choosing appear for the defense also had to show prejudice. The defendant in *Gonzalez-Lopez* had the money to hire his own lawyer, but the trial judge improperly refused to allow the lawyer to appear *pro hac vice*, forcing the defendant to hire a local lawyer to represent him.

The government's brief in the Supreme Court argued that a "defendant who claims that he was improperly deprived of counsel of choice must establish prejudice in order to overturn his conviction."[438] In supporting this contention, the brief quoted from one of Justice Scalia's opinions, *Mickens v. Taylor*: "defects in assistance [of counsel] that have no probable effect upon the trial's outcome do not establish a constitutional violation."[439]

434. Wardius v. Oregon, 412 U.S. 470, 475–76 (1973).

435. Webb v. Texas, 409 U.S. 95, 97–98 (1972).

436. *Cf.* Stacy & Dayton, *supra* note 60, at 119 ("[T]he Court has not articulated a convincing rationale for distinguishing when courts ought to define a right to obtain or present evidence at trial in terms of a strict outcome-oriented prejudice test from when they ought to use a lesser prejudice test, subject to post-trial harmless error review."); Michael T. Fisher, Note, *Harmless Error, Prosecutorial Misconduct, and Due Process: There's More to Due Process Than the Bottom Line*, 88 COLUM. L. REV. 1298, 1304 (1988) ("Courts have employed inconsistent approaches to define due process violations that stem from prosecutorial misconduct. For some types of prosecutorial misconduct, the courts have applied an outcome-determinative analysis; for other types of misconduct, courts have applied more traditional concepts of fairness to define due process violations and reserved outcome-determinative analysis for use as a harmless error test. No rationale has been set forth to justify the coexistence of two such inconsistent approaches.").

437. *See generally* United States v. Gonzalez-Lopez, 548 U.S. 140 (2006).

438. Brief for Petitioner at 8, United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (No. 05-352), 2006 U.S. S. Ct. Briefs LEXIS 261.

439. *Id.* at 14 (quoting Mickens v. Taylor, 535 U.S. 162, 166 (2002)).

Justice Scalia wrote the opinion in *Gonzalez-Lopez*, rejecting the argument that this part of the right to counsel had a prejudice component: "the right at stake here is the right to counsel of choice, not the right to a fair trial; and that right was violated because the deprivation of counsel was erroneous. No additional showing of prejudice is required to make the violation 'complete.'"[440]

One might well ask why this is so. If the violation of the Sixth Amendment is complete when a judge prevents a defendant's attorney of choice from appearing at trial, why is it that in the Sixth Amendment contexts that *Strickland* and *Mickens* present the violation is not complete until all of the evidence is in and prejudice rears its ugly head? After all, the right to counsel, unlike the rule announced in *Snyder*, is explicitly mentioned in the Constitution.[441]

Justice Scalia's explanation was to find a new way to characterize the Sixth Amendment's concern for the effective assistance of counsel. *Strickland* and *Mickens*, he said, were both derived from a due process case, *McMann v. Richardson*,[442] which first articulated the proposition that "the right to counsel is the right to the effective assistance of counsel."[443] *McMann* dealt with the validity of a guilty plea in the face of a contention by the defendant that the procedure the trial court used at the time to determine the voluntariness of a confession had subsequently been declared unconstitutional.[444] *McMann* held that so long as the defendant had been represented by a lawyer who was reasonably effective in evaluating the admissibility of the confession, there was no constitutional violation in accepting the defendant's guilty plea.[445] Having traced the first concern with

440. *Gonzalez-Lopez*, 548 U.S. at 146.

441. In another case based on a specific provision of the Constitution, *Delaware v. Van Arsdall*, the Court rejected the government's argument that there should be a prejudice component to the rule of the Confrontation Clause that a judge must allow the defendant to cross examine a prosecution witness for bias. The Court's explanation was that the focus of the Confrontation Clause was "on individual witnesses" rather than the fairness of the trial as a whole. Delaware v. Van Arsdall, 475 U.S. 673, 679–80 (1986) ("It would be a contradiction in terms to conclude that a defendant denied any opportunity to cross-examine the witnesses against him nonetheless had been afforded his right to '[confrontation]' because use of that right would not have affected the jury's verdict.").

442. *See generally* McMann v. Richardson, 397 U.S. 759 (1970).

443. *Gonzalez-Lopez*, 548 U.S. at 147 (quoting *McMann*, 397 U.S. at 771 n.14).

444. *McMann*, 397 U.S. at 766.

445. *See id.* at 770 n.13.

the quality of a lawyer's performance to a due process case dealing with the validity of a guilty plea, Justice Scalia went on to try to show its relevance for a Sixth Amendment case about the right to an attorney of one's choice:

> Having derived the right to effective representation from the purpose of ensuring a fair trial, we have, logically enough, also derived the limits of that right from that same purpose. The requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there—*effective* (not mistake-free) representation. Counsel cannot be "ineffective" unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Thus, a violation of the Sixth Amendment right to *effective* representation is not "complete" until the defendant is prejudiced.[446]

The rabbit pulled from the hat in this explanation is the very second word: "derived." If "derived" means the Sixth Amendment doctrine depends for its legitimacy on the earlier recognition of the due process principle, then it makes sense that the limits placed on the latter apply as well to the former. But the Sixth Amendment right to the effective assistance of counsel exists quite independently of the Due Process Clause. It isn't so much "derived" from the latter as it is "suggested by" it. That being so, there is no reason why the due process necessity of including a prejudice component must be imported into the Sixth Amendment's specific provision of the guarantee of effective assistance of counsel. The values that underlie the Sixth Amendment's guarantee of effective assistance of counsel exist quite apart from the due process concerns that underlie the limits that surround a defendant's ability to attack a guilty plea conviction.

The end result of Justice Scalia's peregrination seems to boil down to something like this. Requiring a defendant with money to sit

446. *Gonzalez-Lopez*, 548 U.S. at 147 (internal citations omitted) (emphasis in original).

through a trial where her lawyer performed magnificently infringes on a Sixth Amendment value if the lawyer is not the one whom she would have hired except for the court's erroneous disqualification. But, requiring an indigent defendant to sit through a trial where a lawyer appointed by the court performs so poorly that it violates all professional standards does not offend the Sixth Amendment unless some other lawyer would have not only performed in a professionally competent way, but likely would have gotten a more favorable result.

b. Narrow Focus

The conditional rules that rely on prejudice are narrowly focused on protecting only one of the possible values that the underlying provision might serve. They each presuppose the sole reason served by the rule is its effect in assisting the trial process accurately to identify those individuals who committed the crimes with which they are charged. Nothing else seems to matter.

There is no denying the importance of accuracy in the criminal trial process. But the single-minded focus on accuracy of a conditional rule relying on prejudice denigrates other values that one might find implicated in the underlying constitutional provision.[447] This is a theme that was sounded by the dissent in the very first conditional rule case, *Snyder*.[448] Justice Roberts wrote for the four members of the Court who opposed making the rule governing the presence of a defendant at a viewing conditional:

> [W]here the conduct of a trial is involved, the guarantee of the Fourteenth Amendment is not that a just result shall have been obtained, but that the result, whatever, it be, shall be reached in a fair way. Procedural due process has to do with the manner of the trial; dictates that in the conduct of judicial inquiry certain fundamental rules of fairness be observed; forbids the disregard

447. For example, the due process right to be free from an undue delay in the indictment process may also protect an individual from "[t]he anxiety and concern attendant on public accusation" before the formal initiation of criminal charges. United States v. Marion, 404 U.S. 307, 330–31 (1971) (Douglas, J., concurring).

448. *See generally* Snyder v. Massachusetts, 291 U.S. 97 (1934) (Roberts, J., dissenting).

> of those rules, and is not satisfied though the result is just, if the hearing was unfair.[449]

Fairness for its own sake, without regard for the degree of fit between the end result and empirical truth, not only evinces respect for the individual dignity of the defendants whom the state proposes to deprive of life or liberty. It stands as a beacon of the state's commitment to a certain standard of behavior. Where the reality as well as the perception of such a commitment prevails, the system can command a sense of legitimacy from the community that is not otherwise obtainable.[450]

Of course, an appellate court can preserve the value of accuracy without making a rule conditional by taking advantage of the harmless error doctrine. However, by resolving a case on the basis of a conditional rule that incorporates a prejudice requirement, the Court renders the harmless error doctrine irrelevant. In any case where prejudice exists as part of the rule, a determination that the rule was violated will by necessity meet the less stringent harmless error test. Aside from the standard used to determine the effect on the outcome, the fundamental difference between a conditional rule and the harmless error test is the allocation of the burden of proof. When the prejudice inquiry is built into the definition of the rule, the defendant bears the burden of proof on the issue.[451] If the rule was not conditional, and a court looked at the question of prejudice as part of

449. *Id.* at 137.

450. Mickens v. Taylor, 535 U.S. 162, 207 (2009) (Souter, J., dissenting) ("[T]he right against ineffective assistance of counsel has as much to do with public confidence in the professionalism of lawyers as with the results of legal proceedings."); Kentucky v. Stincer, 482 U.S. 730, 751 (1987) (Marshall, J., dissenting) (quoting Lee v. Illinois, 476 U.S. 530, 540 (1986)) ("[T]he right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails.").

451. *See* Mickens v. Taylor, 535 U.S. 162, 173–74 (2002) (defendant has burden of proving attorney's conflict of interest had an adverse effect); United States v. Bagley, 473 U.S. 667, 682 (1985) (defendant has burden of proving there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different); Strickland v. Washington, 466 U.S. 668, 694 (1984) (defendant has burden of proving "a reasonable probability that, but for counsel's unprofessional [conduct], the result of the proceedings would have been different"); United States v. Valenzuela-Bernal, 458 U.S. 858, 872 (1982) (defendant has burden of proving a reasonable likelihood that witness' testimony could have affected the judgment of the trier of fact).

a harmless error analysis, then the prosecutor would have to establish that the verdict would not have been different.[452] Relieving the prosecutor of the burden will often foreordain the result of the case.[453] Using a conditional rule that incorporates prejudice is a way for a court to be able to affirm more convictions than would be possible under a harmless error regime.[454]

B. The Case for Conditional Rules

If conditional rules have such serious drawbacks as means of social control, institutional reform, and public understanding, what explains their prevalence across such a wide range of constitutional provisions? To answer that question, let's try to identify the conditions under which it would make sense to craft a rule in conditional format.

First, focus on the predicate behavior that triggers the rule. If you view the behavior by itself as either benign or even socially useful, but want to control it only in the event that it causes some easily identified adverse consequence, then it would make sense to make the rule conditional. Another aspect of the predicate behavior that would make a conditional rule attractive is if you can't identify with any degree of precision what it is about the behavior that you object to but you can identify the consequence that you want to avoid. And, you would prefer a conditional rule if there is some unwanted collateral consequence like civil liability or the imposition of an unbearable drain on existing resources, which would be associated with the predicate behavior if it were not subject to a conditional rule.

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452. O'Neal v. McAninch, 513 U.S. 432, 440 (1995) (prosecutor bears burden of proof to show harmless error in habeas corpus cases); Chapman v. California, 386 U.S. 18, 24 (1967) (same on direct review).

453. *Cf.* Freeman v. Pitts, 503 U.S. 467, 503 (1992) (Scalia, J., concurring) ("[A]llocation of the burden of proof foreordains the results.").

454. *See* Kentucky v. Stincer, 482 U.S. 730, 754 (Marshall, J., dissenting) (requiring the defendant to show prejudice "unfairly shifts the burden of proving harm from this constitutional deprivation to the excluded criminal defendant, who was in no way responsible for the error and is least able to demonstrate what would have occurred had he been allowed to attend"); *Bagley*, 473 U.S. at 696 (Marshall, J., dissenting) (applying harmless error rather than making the rule conditional is more protective of the defendant).

Next, think about the future consequences that complete the violation. The easier it is for the actors subject to the rule and the people whom the rule is intended to protect to identify situations in advance when these consequences will occur, the more attractive a conditional rule will be. And, the more certain you are that the only reason to condemn the predicate behavior is because it results in the future consequence, the better fit you'll have with a rule in conditional format.

And last, since the context in which we are considering conditional rules is that of constitutional interpretation, the language of the Constitution may compel the choice of a conditional rule.

i. The Utility of the Underlying Behavior

Estelle v. Williams,[455] the prison clothes case, *California v. Hodari D.*,[456] the Fourth Amendment seizure case, *United States v. Valenzuela-Bernal*,[457] the compulsory process case, and *Weatherford v. Bursey*,[458] the intrusion on the attorney-client relationship case, all share one feature. In each, the rule that governed the underlying predicate behavior was one that the Court undoubtedly saw as having the potential to prohibit behavior that the Court thought socially useful. Thus, *Estelle* made the assumption that many defendants prefer to appear in court in prison clothes in order to garner the jury's sympathy.[459] In *Hodari D.*, Justice Scalia editorialized on how beneficial it was to an orderly society for everyone to cooperate with a police officer's direction to stop.[460] In *Valenzuela-Bernal*, the Court stressed the obligation of the executive to control illegal immigration and pointed out that prompt deportation is often the most effective means of securing the border.[461] And in *Weatherford*, the Court "recognized the unfortunate necessity of undercover work and the

455. Estelle v. Williams, 425 U.S. 501 (1976).
456. California v. Hodari D., 499 U.S. 621 (1991).
457. United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).
458. Weatherford v. Bursey, 429 U.S. 545 (1977).
459. *Estelle*, 425 U.S. at 508.
460. *Hodari D.*, 499 U.S. at 627.
461. *Valenzuela-Bernal*, 458 U.S. at 864.

value it often is to effective law enforcement. We have also recognized the desirability and legality of continued secrecy even after arrest."[462]

In each case, making the rule conditional has the effect of not so subtly encouraging the underlying conduct by sanctioning it so long as the future action that makes it unconstitutional never comes to pass.

ii. A Reluctance to Specify Rules of Behavior

The psychologist Abraham Maslow is credited as the source of the insight that if the only tool you have is a hammer, it is very attractive to view every problem you come across as a nail.[463] Well, if your whole institutional perspective is to evaluate a process after all of the relevant events have taken place and determine if the result is legitimate or not, the *post hoc* perspective that you enjoy may very well color your view of the type of rule you announce to justify your result.

For the Supreme Court, every problem that comes to it for action presents itself in the form of a judgment to be affirmed or reversed. The Court could perform that function without announcing any rules whatsoever. Of course, that would hardly be a responsible way for the Court to carry out its institutional role of the constitutional interpreter of last resort. The Court does write opinions that explain the reasoning behind the result.[464] But writing opinions sets two tasks before the Court. One is to explain why they reached the result that they did. The other, and harder, task is to explain to those who look to the Court for guidance how to avoid the problem in the future. That requires the Court to know more about the job of being a police

462. *Weatherford*, 429 U.S. at 557.

463. *See* Katherine Rosenberry, *Organizational Barriers to Creativity in Law School and the Legal Profession*, 41 CAL. W. L. REV. 423, 424 (1988) (citing Abraham Maslow, Famous People Quotations, http://quotations.about.com/od/stillmorefamouspeople/a/AbrahamMaslow1.htm (last visited Nov. 11, 2009)).

464. The practice of appellate courts announcing the reason for their decisions is one that has an ancient lineage. *See* Karl M. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L. Q. 186, 190 (1958). The first published opinion of the Supreme Court was Georgia v. Brailsford, 2 U.S. 402 (1792).

officer, prosecutor, defense attorney, or trial judge than the Court may feel comfortable with. And so, it may be attractive to explain the outcome of a case by applying a conditional rule that frees the Court from the job of providing any guidance for the future.

In both the ineffective assistance of counsel cases and the exculpatory evidence cases, the Court's choice of a conditional rule requiring prejudice is largely a function of the Court's reluctance to identify the predicate behavior that would violate the rule. *Strickland v. Washington*[465] bemoaned the infinite number of circumstances that might define adequate representation,[466] and *United States v. Agurs*[467] stressed the indeterminacy of the standard that prosecutors had to use to evaluate the evidence in their files.[468]

By incorporating into the definition of each rule a prejudice component, the Court has drastically limited the occasions when it would be called upon to make a judgment about whether the predicate behavior triggered the rule. It can simply deny relief by concluding that the defendant has not been able to establish prejudice. And even in those cases where it concludes that the rule has been violated, it does not have to do so by categorically condemning the predicate behavior. All it need do is to make a contextual judgment from which it may be difficult to generalize.

iii. Pragmatic Considerations

In *United States v. Valenzuela-Bernal*,[469] which dealt with the prosecutor's deporting a potential defense witness, *Chavez v. Martinez*,[470] the case that held that the privilege against self-incrimination is only relevant at trial, and in *Scott v. Illinois*,[471] the

465. Strickland v. Washington, 466 U.S. 668 (1984).

466. *See id.* at 688–89, 693 ("No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how to best represent a criminal defendant . . . . Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.").

467. United States v. Agurs, 427 U.S. 97 (1976).

468. *Id.* at 108 ("[W]e are dealing with an inevitably imprecise standard.").

469. United States v. Valenzuela-Bernal, 458 U.S. 858 (1982).

470. Chavez v. Martinez, 538 U.S. 760 (2003).

471. Scott v. Illinois, 440 U.S. 367 (1978).

right to misdemeanor counsel case, the Court explicitly referred to resource constraints as one factor influencing the choice of a conditional rule.

In *Valenzuela-Bernal*, the government argued that a non-conditional rule would create havoc:

> Because of budget limitations and the unavailability of adequate detention facilities, it is simply impossible as a practical matter to prosecute many cases involving the transportation or harboring of large numbers of illegal aliens, where all the aliens must be incarcerated for a substantial period of time to avoid dismissal of the charges, even though the prosecution's case may be overwhelming. As a consequence, many valid and appropriate prosecutions are foregone.[472]

The Court was obviously concerned about this aspect of the case, noting that "the detention of alien eyewitnesses imposes substantial financial and physical burdens upon the Government, not to mention the human cost to potential witnesses who are incarcerated though charged with no crime."[473]

In *Chavez*, Justices Souter and Breyer joined in a concurring opinion supporting the concept that the privilege against self incrimination establishes a conditional rule, and specifically referred to another kind of resource problem that they saw bound up in the case before them—the prospect of costly civil litigation:

> The most obvious drawback inherent in Martinez's purely Fifth Amendment claim to damages is its risk of global application in every instance of interrogation producing a statement inadmissible under Fifth and Fourteenth Amendment principles, or violating one of the complementary rules we have accepted in aid of the privilege against evidentiary use. If obtaining

472. *Valenzuela-Bernal*, 458 U.S. at 865 (quoting Brief for the United States at 21–22, United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) (No. 81–450)).

473. *Valenzuela-Bernal*, 458 U.S. at 865.

> Martinez's statement is to be treated as a stand-alone violation of the privilege subject to compensation, why should the same not be true whenever the police obtain any involuntary self-incriminating statement, or whenever the government so much as threatens a penalty in derogation of the right to immunity, or whenever the police fail to honor *Miranda*? Martinez offers no limiting principle or reason to foresee a stopping place short of liability in all such cases.[474]

And in *Scott,* the Court was concerned that requiring counsel in misdemeanor cases pursuant to a non-conditional rule would "impose unpredictable, but necessarily substantial, costs on 50 quite diverse States."[475]

Resource constraints of another type may also explain the Court's decision in *Mickens v. Taylor*,[476] the case that made the conditional rule for attorney conflict of interest cases where no one specifically objected to the conflicted lawyer's representation of the defendant. Justices Kennedy and O'Connor noted that:

> If [the rule] were otherwise, the judge's duty would not be limited to cases where the attorney is suspected of harboring a conflict of interest. The Sixth Amendment protects the defendant against an ineffective attorney, as well as a conflicted one. It would be a major departure to say that the trial judge must step in every time defense counsel appears to be providing ineffective assistance, and indeed, there is no precedent to support this proposition.[477]

Given the magnitude of the problem of ineffective lawyers, which would extend not only to those cases that are tried but also to the vastly larger number that are resolved on the basis of a guilty plea, it

474. *Chavez*, 538 at 778–79 (Souter, J., concurring).
475. *Scott*, 440 U.S. at 373.
476. Mickens v. Taylor, 535 U.S. 162 (2002).
477. *Id.* at 179 (Kennedy, J., concurring).

may have been a daunting prospect to require trial judges to become actively involved in trying to remedy the problem beforehand.

iv. Constitutional Language: The Text Made Me Do It

If the language of a constitutional provision were worded so that the only thing it did was to command the government to respond in a certain way if one of its agents committed a particular act, then it would make sense to construct a conditional rule to implement it. The Takings Clause of the Fifth Amendment has this character: "nor shall private property be taken for public use, without just compensation."[478]

The Takings Clause imposes two rules on the government, one of which is non-conditional and one which is conditional. [479] In a non-conditional format, it prohibits the government from ever taking property for a private purpose.[480] However, the government may seize private property for any public use without any constitutional restriction, subject to the future condition that it pay just compensation.[481] This second rule is clearly conditional. It creates a regime where a government official may make the decision about whether to take a citizen's property unconcerned with and indeed not authorized to make payment. Whether the taking violates the Constitution depends on what happens later on, in the payment stage.[482]

478. U.S. CONST. amend. V.

479. *See* Brown v. Legal Found. of Wash., 538 U.S. 216, 231–32 (2003) ("While it confirms the state's authority to confiscate private property, the text of the Fifth Amendment imposes two conditions on the exercise of such authority: the taking must be for a 'public use' and 'just compensation' must be paid to the owner.").

480. Thompson v. Consol. Gas Corp., 300 U.S. 55, 80 (1937) ("[O]ne person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid.").

481. *See* First English Evangelical Lutheran Church v. County of L.A., 482 U.S. 304, 314–17 (1987) ("[A]s the Court has frequently noted, this provision does not prohibit the taking of private property, but instead places a condition on the exercise of that power.").

482. One could recast this rule into a non-conditional format regulating the primary behavior of the official who took the property. The Takings Clause could have said, "No private property shall be taken for public use unless the state has paid its owner reasonable compensation." In this form, it would be reasonable to create a legal regime that required payment of reasonable compensation in advance of the taking, or at the very least would impose some obligation on the government official who took the property to ensure that reasonable payment was forthcoming.

It is possible to view the Due Process Clause in the same way. Carefully parsing the phrase "No person shall . . . be deprived of life, liberty or property without due process of law"[483] might lead one to conclude that it created only a conditional rule that simply focused on the consequence of government action, but left the government's agents free to do what they wished so long as their behavior did not result in the loss of someone's life, liberty or property. In fact, such an extreme reductionist view of the Due Process Clause is not altogether uncommon. A Second Circuit case, *Zahrey v. Coffey*,[484] is an illustration.

Zahrey was a Section 1983 case against an Assistant United States Attorney who allegedly conspired to fabricate evidence that he used to prosecute the plaintiff, a police officer, on conspiracy to commit robbery and other charges.[485] The ultimate source of the right the plaintiff relied on was the Due Process Clause, the basis for the Supreme Court's cases holding that a prosecutor may not knowingly use false evidence to obtain a conviction.[486] The problem for the plaintiff, though, was that he was not trying to set aside a guilty verdict, since his trial ended in an acquittal. He was suing for a violation of his civil rights. But where was the violation if at the end of the trial he walked away a free man?

In answering this question, the *Zahrey* court reasoned that whatever the Due Process Clause requires, it does not rise to the level of a constitutional command until someone loses his or her life, or is incarcerated or fined as a result of what had happened:

> The manufacture of false evidence, 'in and of itself,' . . . does not impair anyone's liberty, and therefore does not impair anyone's constitutional right . . . . If, for example, a prosecutor places in evidence testimony known to be perjured or a trial judge makes a racially disparaging remark about a defendant, no deprivation of

483. U.S. CONST. amend. V.

484. Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000).

485. *Id.* at 346.

486. Napue v. Illinois, 360 U.S. 264, 269 (1959); Pyle v. Kansas, 317 U.S. 213, 215–16 (1942); Mooney v. Holohan, 294 U.S. 103, 112 (1935).

> liberty occurs unless and until the jury convicts and the defendant is sentenced . . . . If the trial was aborted before a verdict, it could be said . . . that no constitutional right was violated.[487]

Under this view of the Due Process Clause, everything it requires of government officials is conditional, subject to a defendant losing the trial and eventually suffering a loss of life, liberty or property.[488]

Could it be that the Constitution would tolerate a trial process that completely ignored all of the rules that emanate from the Due Process Clause so long as the result was something other than a conviction? There is a historical precedent for a system that comes close to this: trial *de novo*. In early America, this method of handling minor criminal cases was a feature of the criminal justice systems in all of the New England states as well North Carolina.[489] It was a way of providing rough justice administered by a local magistrate, often not formally trained in the law, whose decisions to convict could be nullified by a defendant's choice to have a trial *de novo* in front of a circuit riding professional judge.[490] Trials in the first tier of a *de novo* system were not expected to provide all of the trappings of due process. If defendants wanted the panoply of protections the law

487. *Zahrey*, 221 F.3d at 348, 350; *see also* Landrigan v. City of Warwick, 628 F.2d 736, 744 (1st Cir. 1980) ("We do not see how the existence of a false police report, sitting in a drawer in a police station, by itself deprives a person of a right secured by the Constitution and laws."). The *Zahrey* court was uneasy about refusing to label the type of unseemly action the complaint alleged as constitutionally unobjectionable in the absence of a deprivation of liberty. It finessed this problem by referring to a prosecutor fabricating evidence in her investigative role as something that "violates the *standards* of due process," *id.* at 356 (emphasis added), and calling a resulting loss of liberty "a denial of a constitutional right." *Id.* The opinion never explained what it means to violate a standard. If the court meant that standards were requirements, then it is hard to reconcile with its reliance on language from one of Justice Scalia's concurring opinions that there is "no authority for the proposition that the mere preparation of false evidence, as opposed to its use in a fashion that deprives someone of a fair trial or otherwise harms him, violates the Constitution." *Id.* (Scalia, J., concurring) (quoting Buckley v. Fitzsimmons, 509 U.S. 273, 280 (1993)).

488. It is possible for criminal defendants to suffer a loss of liberty prior to trial, as a result of being held on bail. This, in fact, is what happened in *Zahrey* and it was the pretrial confinement that gave the plaintiff the factual predicate on which to base his due process claim. *Zahrey*, 221 F.3d at 348.

489. David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 539 (1990).

490. REPORT OF THE COMMITTEE ON JURIES OF SIX TO THE CHIEF JUSTICE OF THE DISTRICT COURT DEPARTMENT, ELIMINATION OF THE TRIAL DE NOVO SYSTEM IN CRIMINAL CASES 11 (1984).

provided, they could simply appeal for trial *de novo* where they would get all of the formal protection of the law. It was, in essence, a system based on an idea very similar to the conditional rules that the *Zahrey* court thought embedded in the Due Process Clause.

While the analogy to trial *de novo* is appealing on its face, it ignores history. The federal system never adopted trial *de novo*. In fact, a point in controversy over the ratification of the Constitution was the possibility the anti-federalists raised that Article III's grant of appellate jurisdiction to the Supreme Court might allow it to hold a trial *de novo* in criminal cases.[491] Even more telling is the way that the Court has dealt with arguments over the years that constitutional limitations do not apply in the first tier of a system of trial *de novo* simply because the state eventually offers the defendant a trial that contains the protection missing from the original proceeding. In the nineteenth century, *Callan v. Wilson* considered whether the Sixth Amendment's guarantee of trial by jury applied to the first tier of the trial *de novo* system in the local courts of the District of Columbia.[492] The government argued that so long as the defendant was given free access to a jury in the second stage of the *de novo* process, the District was free to shape the first tier trial free of this particular constitutional restraint.[493] The Court rejected the argument out of hand.[494]

Callan, of course, did not rest on the Due Process Clause. Therefore, its rejection of a conditional interpretation of the right to a jury does not directly address the point on which the *Zahrey* court rested its view: the fact that the language of the Clause specifically

491. Rossman, *supra* note 489, at 554.

492. Callan v. Wilson, 127 U.S. 540, 548 (1888).

493. *Id.*

494. *Id.* at 556 ("[A] judgment of conviction, not based upon a verdict of guilty by a jury, is void. To accord to the accused a right to be tried by a jury, in an appellate court, after he has been once fully tried otherwise than by a jury, in the court of original jurisdiction, and sentenced to pay a fine or be imprisoned for not paying it, does not satisfy the requirements of the Constitution."). *Ludwig v. Massachusetts*, 427 U.S. 618 (1976), upheld the Massachusetts trial *de novo* system against a similar claim, but left *Callan* in place for two reasons. The first was because the right to a jury in federal court had a basis in Article III, which did not apply to the states, as well as in the Sixth Amendment. The second was because the Massachusetts system allowed a defendant to circumvent the first trial by admitting to sufficient facts to support a guilty finding. *Id.* at 629–30.

refers to deprivations of life, liberty and property rather than to the means by which the state might accomplish those ends. However, the Court revisited this issue under the rubric of the Due Process Clause in *Ward v. Village of Monroeville*.[495] *Ward* dealt with whether the village mayor could act as the judge in the local criminal court in light of the fact that the fines the court collected formed a major part of the village's income. Whatever restrictions the Constitution placed on the use of a judge with a stake in the outcome of a criminal case stem directly from the Due Process Clause.[496] The government raised the same argument as in *Callan*—that the prospect of a trial de novo in front of an impartial judge was sufficient to meet the demands of the Constitution.[497] The Court again summarily rejected the suggestion: "[The] State's trial court procedure [is not] constitutionally acceptable simply because the State eventually offers a defendant an impartial adjudication. Petitioner is entitled to a neutral and detached judge in the first instance."[498]

Although these two Supreme Court decisions do not spell out the rationale for rejecting a conditional view of the constitutional rules that apply to the system of trial *de novo*, the results the Court reached fit with the way that the Framers of the Constitution likely conceived of the nature of the rights they enshrined in the first ten amendments.[499] The parts of the Constitution that regulate the

495. *See* Ward v. Vill. of Monroeville, 409 U.S. 57, 58 (1972).

496. Tumey v. Ohio, 273 U.S. 510 (1927) (It is a violation of due process for a judge to have a financial stake in the outcome of the trial.).

497. Brief for Respondent at 14, Ward v. Vill. of Monroeville, 409 U.S. 57 (1972) (No. 71-496), 1972 WL 136240 ("Respondent Village of Monroeville respectfully submits that the existing right to a trial de novo in a county court or a municipal court is a sufficient fair trial guarantee for any defendant who believes that his individual case was not fairly tried in mayor's court.").

498. *Ward*, 409 U.S. at 61–62.

499. In particular, the original understanding of the Due Process Clause was very likely more consistent with a focus on specific rules that the government had to follow, rather than a contextual assessment of the fairness of the process after it had concluded. "The gist of the Due Process Clause, as understood at the founding and since, was to force the Government to follow those common-law procedures traditionally deemed necessary before depriving a person of life, liberty, or property." Hamdi v. Rumsfeld, 542 U.S. 507, 556 (2004) (Scalia, J., dissenting). As noted historian Leonard Levy wrote, "The history of due process shows that it did mean trial by jury and many of the other traditional rights of accused persons that were specified separately in the Bill of Rights. Its framers were in many respects careless, even haphazard, draftsmen. They enumerated particular rights associated with due process and then added the due process clause itself, probably as a rhetorical flourish, a reinforced guarantee, and a genuflection toward traditional usage going back to medieval reenactments of Magna Carta." LEONARD

criminal justice system were the result of a deep mistrust of the central government.[500] The Bill of Rights was designed to limit the new federal entity the Constitution created. It was much more congenial to this objective, and to the notion of rights that was common at the time, for the Constitution to regulate government behavior rather than simply guard individuals against illegitimate results. The Anglo-American conception of rights was more concerned with the limitation of government power rather than vindicating individual injuries: "In the eighteenth century . . . many authorities would still have held that the primary holders of rights were not individuals but rather the collective body of the people. The real issue was . . . to protect the people at large from tyranny."[501]

Even under a conception of rights that focuses on the individual, however, the *Zahrey* model of due process creates a problem. It essentially treats the Due Process Clause as a collection of liability rules, allowing government actors, like the village judge in Monroeville, to ignore the protections the rules announce so long as the government is willing to pay a price later on, for example by

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W. LEVY, JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY 66 (1972). This view of the Due Process Clause is also consistent with the way the Supreme Court interpreted it in the first case applying it in the context of the criminal process. *See generally* Hurtado v. California, 110 U.S. 516 (1884). In *Hurtado*, the Court had to decide whether the Due Process Clause of the Fourteenth Amendment required the states to initiate criminal proceedings with a grand jury indictment. *Id.* at 520. In the pre-incorporation era, cases like *Hurtado* imposed on the states only those rules so fundamental that they represented, in the words Justice Cardozo first used in *Snyder*, the "immutable principles of justice." Snyder v. Massachusetts, 291 U.S. 97, 108 (1934). As a result, *Hurtado* recognized that the Due Process Clause in the Fourteenth Amendment, which is directed to the states, imposed the same limitations on the exercise of government power as did the Due Process Clause of the Fifth Amendment, which constrains the federal government. *Hurtado*, 110 U.S. at 535–36.

Although *Hurtado* concluded that the requirement of a grand jury indictment was not a part of due process, it did explain something about what the concept meant. *See id.* at 536. It prohibited specific exercises of government power, not just procedures that in retrospect were not fair: "acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation." *Id.* Due process, *Hurtado* said, "refers to certain fundamental rights . . . . If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty, or property, then the deprivation has not been by 'due process of law.'" *Id.* That is not language describing a generalized guarantee of fairness. It talks of concrete rights.

500. LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 159–62 (1988) (stating that Anti-Federalist insistence on a Bill of Rights stemmed from fear that federal government's power would be used to invade personal rights).

501. JUDD RAKOVE, DECLARING RIGHTS: A BRIEF HISTORY WITH DOCUMENTS 22 (Elizabeth M. Schaaf ed., 1998).

giving the defendant an impartial judge at a trial *de novo*. However, a system which essentially allows the government to purchase the ability to ignore the limits on its exercise of power is fundamentally inconsistent with the notion of rights designed to secure liberty.[502]

CONCLUSION

Until a phenomenon is given a name, it often goes unrecognized and unexamined.[503] So it is with conditional rules. Because up to now no one has pointed out the similarity among cases that announce conditional rules, neither the Court nor commentators has been able to assess in a systematic way the use of this device.

Taking the conditional rules cases as a whole does not reveal any insight that the Court has a coherent philosophy of when they are appropriate and when not. This is not surprising given the failure to recognize what cases as disparate in time and doctrine as *Snyder v. Massachusetts*,[504] *Chavez v. Martinez*,[505] and *Estelle v. Williams*—[506]

502. *See* Jules L. Coleman & Judy Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1339–40 (1986) ("If rights entail or secure liberties, then it is hard to see how liability rules protect them . . . . Because liability rules neither confer nor respect a domain of lawful control . . . the very idea of a 'liability rule entitlement,' that is of a right secured by a liability rule, is inconceivable."); James Boyd White, *Forgotten Points in the "Exclusionary Rule" Debate*, 81 MICH. L. REV. 1273, 1278 n.21 (1983) (stating that damages for violation of a constitutional right "would be a kind of forced exchange, and however appropriate that may be in a commercial context where all things are in principle exchangeable, it would be incompatible with the idea of a right specifically against the government, and with the reasons why such rights exist"); Dellinger, *supra* note 385, at 1563 (though liability protection might be appropriate for private law rights, "it is inconsistent with a constitutional system").

503. *Cf.* Judith Worell, *Feminism in Psychology: Revolution or Evolution?*, 571 ANNALS AM. ACAD. POL. & SOC. SCI. 183, 189 (2000) (giving a label to date rape and sexual harassment led to their recognition as a societal problem). The confusion that results from not recognizing that there is such a thing as a conditional rule was illustrated in the Supreme Court oral argument on November 4, 2009 in the case of Pottawattamie County v. McGhee, No. 08-1065. *Pottawattamie* was a § 1983 action against a prosecutor for allegedly having fabricated evidence that led to the defendant's conviction and incarceration. The same prosecutor also presented the case at trial. The question before the Court was complicated by the fact that Imbler v. Pachtman, 424 U.S. 429 (1976), provided absolute immunity for the prosecutor from liability concerning any actions he took in the trial stage of the prosecution. Questions from the bench and answers by the lawyers who argued the case showed a struggle with the problem of when the prosecutor actually violated the Constitution—and the view of the issue was as if it presented only two options. One would be at the time the prosecutor fabricated the evidence. The other would be the time when the prosecutor presented the fabricated evidence at trial. No one ever explicitly recognized that the rule was a conditional one, making the time that the violation occurred prior to trial but with the benefit of hindsight. Transcript of Oral Argument, Pottawattamie County v. McGhee, No. 08-1065, pp. 4–16 (U.S. argued Nov. 4, 2009).

504. *Snyder*, 291 U.S. at 97.

505. Chavez v. Martinez, 538 U.S. 760 (2004).

to choose just one conditional rule case from each category—all have in common. At times, the Court adopts a conditional rule without any recognition of what it is doing, such as in *Nelson v. O'Neil*.[507] And in the eleven cases in which the Court discussed whether to adopt either an aggregation or liability-type conditional rule, it never recognized that it had chosen a rule that shared its conditional nature with rules stemming from other provisions in the Constitution.[508] It is only in the ten cases where the Court explicitly considered whether prejudice should be an element of the underlying rule that one finds any discussion that refers to cases dealing with other parts of the process where there was a similar question. But even there, the Court has not been consistent in applying the reason why it says that prejudice must be a component of the rule.[509]

However, some things do stand out when you consider all the conditional rules cases together. Conditional rules almost always favor the state over the individual.[510] They allow state actors to

506. Estelle v. Williams, 425 U.S. 501 (1976).

507. Nelson v. O'Neil, 402 U.S. 622 (1971); *see* discussion *supra* Part I.B.iii.

508. The only example of the Court's recognizing in these eleven cases that it has adopted a conditional rule elsewhere is in United States v. Patane, 542 U.S. 630 (2004). *Patane* cites *Martinez*, a case the Court decided the year before, which also raised the question of whether the privilege against self incrimination could be the basis for civil liability on the part of police officers who acted prior to the initiation of a formal criminal case. *Patane*, 542 U.S. at 641 (recognizing that *Chavez*, 538 U.S. 760 established that "a mere failure to give *Miranda* warnings does not, by itself, violate a suspect's constitutional rights").

509. *See* discussion *supra* Part II.A.iv.a.

510. It is not surprising, therefore, that their opponents on the Court come from the Justices who are most sympathetic to claims based on individual liberties in criminal cases while their supporters come from those who view state power with a less jaundiced eye. Of the Justices who have sat on five or more cases presenting an issue of whether to adopt a conditional rule, Justices Marshall, Brennan, and Stevens are the only ones who voted against adopting a conditional rule more than half of the time, while Justices Stewart, White, and Burger were the most receptive, favoring them in over nine out of ten cases. *See* appendix B *infra*. The chart below shows how frequently those Justices who sat on at least five cases in which adopting a conditional rule was discussed in one of the opinions favored the adoption of a conditional rule.

Justice	Total Cases	Favored Conditional Rules
Stewart	8	100%
White	16	94%
Burger	12	92%
Rehnquist	15	87%
Powell	12	83%
Scalia	7	81%
Blackmun	14	79%

exercise power more freely, make the constitutional basis for institutional reform harder, and they make it easier to uphold convictions. Conditional rules also contribute to a lack of clarity and transparency in government. They make it harder for those who exercise government power to know what they can and cannot do, remove much of the incentive for them to avoid abusing their power, and they make it harder for the rest of us to understand when they cross a line drawn by the Constitution.

Other than in some of the more obscure areas in the worlds of regulating soccer, baseball, and football, it is hard to find examples of other regimes where conditional rules are attractive enough to be worth adopting. Their use in the realm of constitutional adjudication is not worth the cost they bear.

O'Connor	10	70%
Stevens	15	40%
Brennan	13	36%
Marshall	14	27%

APPENDIX A

There are twenty-one cases in which the Supreme Court has either adopted a conditional rule or explicitly discussed whether to do so. They are listed here in two fashions. In the first, they appear in chronological order. After each case is a description of the conditional rule that the Court adopted or that was discussed in one of the concurring or dissenting opinions. In the second list, they are grouped according to whether the conditional rule applicable to the case was a prejudice rule, an aggregation rule or a liability rule.

1. Chronological List of Conditional Rule Cases

Snyder v. Massachusetts, 291 U.S. 97 (1934) (excluding the defendant from a view only violates due process if the defendant was prejudiced) (Conditional rule adopted by the Court)

United States v. Marion, 404 U.S. 307 (1971) (preindictment delay only violates due process if the defendant was prejudiced) (Conditional rule adopted by the Court)

Nelson v. O'Neil, 402 U.S. 622 (1971) (a prosecutor's introduction into evidence of an inculpatory statement by a codefendant only violates the Confrontation Clause if the codefendant does not eventually testify) (Conditional rule adopted by the Court)

Chambers v. Mississippi, 410 U.S. 284 (1973) (denying a defendant the right to present exculpatory evidence only violates due process if the defendant was prejudiced) (Conditional rule adopted by the Court)

Estelle v. Williams, 425 U.S. 501 (1976) (ordering a defendant to appear in front of the jury wearing distinctive prison clothing only violates due process if the defendant objects) (Conditional rule adopted by the Court)

United States v. Agurs, 427 U.S. 97 (1976) (a prosecutor's withholding exculpatory evidence only violates due process if the defendant was prejudiced) (Conditional rule adopted by the Court)

Weatherford v. Bursey, 429 U.S. 545 (1977) (a state agent who deliberately overhears a privileged conversation between a criminal defendant and defense counsel only violates the Sixth Amendment's guarantee of the assistance of counsel if the prosecutor eventually learns the content of the conversation) (Conditional rule adopted by the Court)

Manson v. Brathwaite, 432 U.S. 98 (1977) (an unnecessarily suggestive pretrial identification procedure only violates due process if it results in an identification by a witness who eventually testifies in a criminal trial) (Conditional rule adopted by the Court)

Scott v. Illinois, 440 U.S. 367 (1978) (refusing to appoint a lawyer for an indigent defendant charged with a misdemeanor only violates the Sixth Amendment if the defendant is sentenced to a term of incarceration) (Conditional rule adopted by the Court)

United States v. Valenzuela-Bernal, 458 U.S. 858 (1982) (a prosecutor's deporting a potential defense witness only violates due process if the defendant was prejudiced) (Conditional rule adopted by the Court)

Strickland v. Washington, 466 U.S. 668 (1984) (a defense attorney's inadequate performance only violates the Sixth Amendment's guarantee of effective assistance of counsel if the defendant was prejudiced) (Conditional rule adopted by the Court)

United States v. Bagley, 473 U.S. 667 (1985) (a prosecutor's withholding exculpatory evidence only violates due process if the defendant was prejudiced) (Conditional rule adopted by the Court)

Delaware v. Van Arsdall, 475 U.S. 673 (1986) (denying a defendant the opportunity to cross examine a witness to show bias should only violate the Confrontation Clause if the defendant was prejudiced) (Conditional rule, proposed by the dissent, not adopted by the Court)

Greer v. Miller, 483 U.S. 756 (1987) (a prosecutor's asking a defendant on cross examination if the defendant had remained silent after receiving a *Miranda* warning only violates due process if the defendant answers the question) (Conditional rule adopted by the Court)

Kentucky v. Stincer, 482 U.S. 730 (1987) (excluding the defendant from a competency hearing for a prosecution witness only violates due process if the defendant was prejudiced) (Conditional rule adopted by the Court)

Richardson v. Marsh, 481 U.S. 200 (1987) (a prosecutor's introduction into evidence of a statement by a codefendant that does not explicitly mention the defendant should violate the Confrontation Clause if other evidence the prosecutor subsequently introduces prejudices the defendant by making the statement inculpatory as to the defendant) (Conditional rule, proposed by the dissent, not adopted by the Court)

California v. Hodari D., 499 U.S. 621 (1991) (a police officer who tries to restrain a suspect by a show of force only comes under the restriction of the Fourth Amendment if the suspect complies) (Conditional rule adopted by the Court)

Mickens v. Taylor, 535 U.S. 162 (2002) (even where a defense attorney's conflict of interest is apparent to the judge who appoints the attorney to represent the defendant, it only violates the Sixth Amendment's guarantee of the assistance of counsel if the conflict affected the attorney's subsequent performance) (Conditional rule adopted by the Court)

Chavez v. Martinez, 538 U.S. 760 (2003) (a government official who uses compulsion to extract an incriminating testimonial statement from an individual only violates the Fifth Amendment's privilege against self incrimination if the state eventually uses the statement in a criminal trial) (Conditional rule adopted by the Court)

United States v. Patane, 542 U.S. 630 (2004) (a government official who uses compulsion to extract an incriminating testimonial statement from an individual only violates the Fifth Amendment's privilege against self incrimination if the state eventually uses the statement in a criminal trial) (Conditional rule adopted by the Court)

United States v. Gonzalez-Lopez, 548 U.S. 140 (2006) (if a judge, without a valid reason, denies the defendant the right to hire an attorney of the defendant's choice, it should only violate the Sixth Amendment's guarantee to the assistance of counsel if the defendant was prejudiced) (Conditional rule proposed by the dissent not adopted by the Court)

2. Conditional Rule Cases By Type of Rule

(i) Prejudice Rules

Snyder v. Massachusetts, 291 U.S. 97 (1934)
United States v. Marion, 404 U.S. 307 (1971)
United States v. Agurs, 427 U.S. 97 (1976)
United States v. Valenzuela-Bernal, 458 U.S. 858 (1982)
Strickland v. Washington, 466 U.S. 668 (1984)
United States v. Bagley, 473 U.S. 667 (1985)
Delaware v. Van Arsdall, 475 U.S. 673 (1986)
Kentucky v. Stincer, 482 U.S. 730 (1987)
Mickens v. Taylor, 535 U.S. 162 (2002)
United States v. Gonzalez-Lopez, 548 U.S. 140 (2006)

(ii) Aggregation Rules

Chambers v. Mississippi, 410 U.S. 284 (1973)
Weatherford v. Bursey, 429 U.S. 545 (1977)
Manson v. Brathwaite, 432 U.S. 98 (1977)
Scott v. Illinois, 440 U.S. 367 (1978)
Richardson v. Marsh, 481 U.S. 200 (1987)
Chavez v. Martinez, 538 U.S. 760 (2003)
United States v. Patane, 542 U.S. 630 (2004)

(iii) Liability Rules

Nelson v. O'Neil, 402 U.S. 622 (1971)
Estelle v. Williams, 425 U.S. 501 (1976)
Greer v. Miller, 483 U.S. 756 (1987)
California v. Hodari D., 499 U.S. 621 (1991)

APPENDIX B

This list indicates the vote of each Justice on every case in which conditional rules were either adopted or discussed. Opposed means that the justice wrote or joined an opinion (either a dissent or a concurring opinion) specifically rejecting the use of a conditional rule, rather than writing or joining a dissenting opinion that reached a result different from the majority, but on other grounds. Supporting means that the justice either wrote or joined an opinion (either a majority, concurring or dissenting opinion) specifically advocating the use of a conditional rule.

For those Justices who participated in five or more cases, the last column indicates the percentage of these cases in which the Justice favored the conditional rule.

Name of Justice	Opposed Conditional Rule in	Supported Conditional Rule in	% Favoring Conditional Rule
Cardozo		Snyder	
Van Devanter		Snyder	
Hughes		Snyder	
McReynolds		Snyder	
Stone		Snyder	
Roberts	Snyder		
Brandeis	Snyder		
Sutherland	Snyder		
Butler	Snyder		
Scalia	Richardson; Gonzalez-Lopez	Greer; Stincer; Hodari D.; Mickens; Chavez	81%
Souter	Mickens; Gonzalez-Lopez	Hodari D.; Chavez	

Stevens	Scott; Bagley; Van Arsdall; Greer; Stincer; Hodari D.; Mickens; Chavez; Gonzalez-Lopez	Agurs; Bursey; Manson; Valenzuela-Bernal; Strickland; Richardson	40%
White	Richardson	Marion; Nelson; Chambers; Estelle; Agurs; Bursey; Manson; Scott; Valenzuela-Bernal; Strickland; Bagley; Van Arsdall; Greer; Stincer; Hodari D.	94%
Burger	Van Arsdall	Marion; Nelson; Chambers; Estelle; Agurs; Bursey; Manson; Scott; Valenzuela-Bernal; Strickland; Bagley;	92%
Stewart		Marion; Nelson; Chambers; Estelle; Agurs; Bursey; Manson; Scott;	100%
Blackmun	Van Arsdall; Greer; Richardson	Marion; Nelson; Chambers; Estelle; Agurs; Bursey; Manson; Strickland; Bagley; Stincer; Hodari D.	79%
Douglas	Donnelly	Marion; Chambers	
Brennan	Estelle; Bursey; Manson; Scott; Valenzuela-Bernal; Bagley; Van Arsdall; Greer; Stincer	Marion; Chambers; Agurs; Strickland; Richardson	36 %

Marshall	Estelle; Bursey; Manson; Scott; Valenzuela-Bernal; Strickland; Bagley; Van Arsdall; Greer; Stincer; Hodari D.	Marion; Chambers; Agurs; Richardson	27%
Black		Nelson	
Harlan		Nelson	
Powell	Van Arsdall; Richardson	Chambers; Estelle; Agurs; Bursey; Manson; Scott; Valenzuela-Bernal; Strickland; Greer; Stincer	83%
Rehnquist	Van Arsdall; Richardson	Estelle; Agurs; Bursey; Manson; Scott; Valenzuela-Bernal; Strickland; Bagley; Greer; Stincer; Hodari D.; Mickens; Chavez	87%
O'Connor	Valenzuela-Bernal; Van Arsdall; Richardson	Strickland; Bagley; Greer; Stincer; Hodari D.; Mickens; Chavez	70%
Kennedy	Chavez	Hodari D.; Mickens; Gonzalez-Lopez	
Ginsburg	Mickens; Chavez; Gonzalez-Lopez		
Breyer	Mickens; Gonzalez-Lopez	Chavez	
Thomas		Mickens; Chavez; Gonzalez-Lopez	
Roberts		Gonzalez-Lopez	
Alito		Gonzalez-Lopez	