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Accountability Solutions in the Consent Search and Seizure Wasteland

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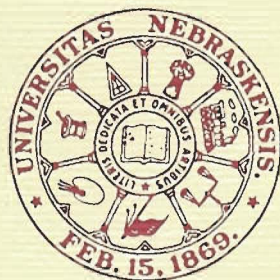
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ACCOUNTABILITY SOLUTIONS IN THE
CONSENT SEARCH AND SEIZURE WASTELAND

JOSÉ FELIPÉ ANDERSON

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[L]aws will not eliminate prejudice from the hearts of human beings. But this is no reason to allow prejudice to continue to be enshrined in our laws to perpetuate injustice through inaction.¹

Roper: So now you'd give the Devil benefit of the law.

More: Yes. What would you do? Cut a great road through the law to get after the Devil?

Roper: I'd cut down every law in England to do that.

More: Oh? And when the last law was down—and the Devil turned round on you—where would you hide, Roper, the laws all being flat?²

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1. MY SOUL LOOKS BACK, 'LESS I FORGET 233 (Dorothy Winbush Riley ed., 1991)(quoting SHIRLEY CHISHOLM, UNBOUGHT AND UNBOSSED (1970)).
2. ROBERT BOLT, A MAN FOR ALL SEASONS 56 (1960)(stage directions omitted)(recounting the famous dialogue of St. Thomas More).

I. INTRODUCTION

The legal and social issues that have emerged out of the doctrine that people in America have a right against unreasonable government instituted searches and seizures³ have dominated the dialogue and controversy in the American criminal justice system over the last three decades.⁴ A large portion of the debate has centered around the controversial exclusionary rule,⁵ which frees the sometimes unmistakably guilty because of irregularities in police procedure.⁶

3. The Fourth Amendment of the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

For an extensive historical examination of the Fourth Amendment see NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937)(discussing the adoption of the Fourth Amendment and its early constitutional jurisprudence).

The Fourth Amendment embodies what has popularly become known as the "right to be let alone," particularly by government officials. That right has been described as "perhaps the most personal of all legal principles. It is also one of the newest, since only more sophisticated of societies have the interest and the ability to nurture the subtle and most personal possession of man, his dignity." MORRIS L. ERNST & ALAN U. SCHWARTZ, *PRIVACY: THE RIGHT TO BE LET ALONE* 1 (1962).

The focus on such a sophisticated right is consistent with United States constitutional history at the time of the American Revolution, at least for those participants who were not operating under the limitations of racial oppression or slavery. "Americans knew they were probably freer and less burdened with cumbersome feudal and hierarchical restraints than any part of mankind in the eighteenth century." GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 3 (1969).

4. When the Supreme Court embarked on the task of applying the Fourth Amendment to the states thirty years ago, it "catapulted" the search and seizure controversy into a position at the core of the Supreme Court debate on criminal justice. See Jacob W. Landynski, *Search and Seizure*, in 1 *THE RIGHTS OF THE ACCUSED* 29, 47 (Stuart S. Nagel ed., 1972).
5. The exclusionary rule is the judicially created doctrine that prevents evidence that has been obtained in violation of the Constitution from being admitted into evidence. It often has been criticized by leading conservatives because it "bars probative evidence that the police are judged, often on the sheerest technicality, to have obtained improperly." ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 104 (1996).
6. Repealing the so-called "exclusionary rule" would not make the police any more effective in their "war" against crime. Despite loud and frequent complaints, the police have not been handcuffed by the rulings of the Warren Court. Except for minor drug offenses, there is no evidence to suggest that policemen make fewer arrests, or that prosecutors secure fewer convictions, because of the Supreme Court decisions safeguarding the rights of the accused; on the contrary, the evidence runs the other way.

The notion that society suffers when criminals go free because of the constable's blunder has struck a decidedly political note in the discussion over criminal justice reform.⁷ Many observers are quick to note that the protections of a free society are to benefit the law abiding as well as the criminal.⁸ Yet others point out that the offender should not be able to behave lawlessly at the expense of others and with the assistance of the law. On the other side of the issue is the painful reality that the power asserted over citizens has often been exercised and abused on racial,⁹ ethnic¹⁰ and economic¹¹ terms.

CHARLES E. SILBERMAN, *CRIMINAL VIOLENCE, CRIMINAL JUSTICE* 201 (1978) (footnote omitted).

7. The oft quoted question of "whether the criminal is to go free because the constable had blundered" was first formulated by the legendary Benjamin Cardozo while he was a judge on the New York Court of Appeals in an opinion rejecting the application of the exclusionary rule to that State. *People v. Defore*, 242 N.Y. 13, 19-25 (1926).
8. The media often tells citizens that courts are reacting to police violations of "legal technicalities" when they overturn criminal defendants' convictions. However, as one commentator has observed:

The rules, or "legal technicalities," as they are sometimes called by persons disgusted with a particular outcome, are not devised solely with an eye to ascertaining guilt or punishing the guilty; that could be done expeditiously with the thumbscrew and very efficiently and inexpensively in our pharmacological age with one sort of drug or another. . . . The reason for this is not hard to find. The forms of due process may protect the criminal, but, more importantly, they also protect the innocent.

WALTER BERNS, *TAKING THE CONSTITUTION SERIOUSLY* 185 (1987).

9. One insightful observer asserted that "[a]ny honest chronicler of American legal history must acknowledge that the legal system in its treatment of blacks has been characterized by inequality." LOIS G. FORER, *CRIMINALS AND VICTIMS: A TRIAL JUDGE REFLECTS ON CRIME AND PUNISHMENT* 226 (1980). Another critic of the inequality in the criminal justice system has surmised that "[t]he racial divide is attributable, at bottom, to the criminal justice system's pervasive reliance on double standards. While criminal justice is explicitly based on the promise of equality before the law, the administration of criminal law — from the officer on the beat to state legislators to the Supreme Court — is in fact predicated on the exploitation of inequality." David Cole, *Race, Policing, and the Future of the Criminal Law*, 26 *HUMAN RIGHTS* 2 (1999).
10. In the annals of the administration of justice are many cases of improper treatment of Negroes, Puerto Ricans, Spanish-American and other minority groups. There is widespread belief that blacks, particularly, are frequently subjected to illegal arrest, arrest on weak suspicion, illegal detention and corporal handling by the police. Compared to whites, they are jailed more than bailed.
Marvin E. Wolfgang & Bernard Cohen, *Crime and Race, in RACIAL DISCRIMINATION IN THE UNITED STATES* 284, 287 (Thomas F. Pettigrew ed., 1975).
11. Ironically, minorities and the poor are still overwhelmingly the victims of crime and poverty. Some scholars have reminded us that problems of crime are "closely intertwined with issues of discrimination." See Peter E. Edelman, *Toward a Comprehensive Anti-poverty Strategy: Getting Beyond The Silver Bullet*, 81 *Geo. L.J.* 1697, 1698 (1993).

In recent years, the United States Supreme Court has entered this debate with its search and seizure decisions that make a dramatic turn in favor of police discretion¹² and away from the more liberal leanings it favored during the Warren Court years.¹³ While some of these decisions involve the traditional police street and vehicle encounter,¹⁴ many have expanded the rules for employee drug testing¹⁵

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12. It would be unreasonable to believe that police would not feel at least somewhat constrained by decisions which place additional obligations on their law enforcement goals.

The police are organized around a dominant organizational goal of apprehending wrongdoers and stopping crime. The court, in handing down such rulings . . . represents an attempt by an outside agency to intrude a value—fair play to the “criminal”—that is almost impossible to reconcile with the organization’s dominant goal: “collaring” wrongdoers.

CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 242 n.* (1975).

13. Very early in the tenure of Chief Justice Earl Warren the Supreme Court was criticized for attempting to impose more control over local law enforcement. “The Conference of State Chief Justices in 1958 went so far as to pass a resolution condemning the Warren Court for its erosion of federalism and its tendency ‘to adopt the role of policymaker without proper judicial restraint.’” DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 306-07 (1986).
14. See *Maryland v. Wilson*, 519 U.S. 408 (1997)(permitting broad latitude in the stopping of a vehicle and the detecting of occupants).

In its brief, the State of Maryland argued that police safety justified the imposition on passengers:

If anything, the danger inherent in roadside encounters increases when passengers are present. Like drivers, passengers have access to weapons that may be inside the passenger area of a car. Thus, ordering the driver alone to exit does not erase the danger. Moreover, a passenger might well act in concert with the driver or other passengers to ambush the officer, or act alone to do so while the officer is dealing with the driver. The dangers that attend any traffic stop multiply with each additional occupant.

Permitting officers as a matter of routine to control the movements of all occupants in a vehicle lawfully stopped for a traffic violation is the only efficacious means of addressing the concern for officer safety. It is simply impracticable to require the officer to have particularized suspicion of danger before acting to protect himself. By the time the officer detects the threat, the passenger may already have secured a tactical advantage. Indeed, the officer could be wounded or killed before any sign of danger presents itself.

Brief for Petitioner at 18-19, *Maryland v. Wilson*, 519 U.S. 408 (1997)(No. 95-1268) (footnote omitted).

15. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995)(validating drug testing in a high school, even without suspicion).

Under a discretionary random testing policy, management is vested with unfettered discretion to require employees to submit to a drug test at any time for good reason, bad reason, or no reason at all. Labor unions and civil rights organizations have reserved their most vocal vitriolic criticism for such policies. One federal district court described such testing as “draconian” and an “invasion[] of privacy . . . almost unheard of in

and high technology surveillance,¹⁶ as well as those that assist the police in forfeiting the assets of citizens suspected of criminal activity.¹⁷ Nothing in these recent opinions indicates the possibility of a return to the broader, more protective search and seizure doctrines that characterized the defendant friendly doctrines of the Warren Court.¹⁸

During its most recent terms, the Supreme Court has taken a particularly acute right turn in its search and seizure jurisprudence,¹⁹ which has left many scholars wondering whether the Constitution offers any protection at all.²⁰ The Court's opinions raise concerns that the once well regarded freedom from unreasonable search and seizure has become a wasteland without even an occasional oasis of judicial protection.

a free society" in the course of issuing a temporary restraining order blocking the implementation of a random testing policy.

ROBERT P. DECRESCE ET AL., *DRUG TESTING IN THE WORKPLACE* 136 (1989)(quoting IBEW Local Union No. 1900 v. Potomac Elec. Power Co., 121 L.R.R.M. (BNA) 3071, 3072 (D.D.C. 1986)); see *Murray v. Brooklyn Union Gas Co.*, 122 L.R.R.M. (BNA) 2057 (N.Y. Sup. Ct. 1986).

16. See, e.g., *California v. Ciralo*, 476 U.S. 207 (1986)(approving high tech police observation of a residence from an airplane under the plain view doctrine).

For a detailed discussion of the scope and application of the plain view doctrine, see Howard E. Wallin, *The Uncertain Scope of the Plain View Doctrine*, 16 U. BALT. L. REV. 266, 267-68 (1987)(stating that the plain view doctrine "does not in and of itself justify the intrusion").

17. See *Bennis v. Michigan*, 516 U.S. 442 (1996)(upholding forfeiture of an automobile that was the site of an act of prostitution against a claim by the client's wife).
18. Although Chief Justice Earl Warren and the Court he led received criticism for eroding police authority in the search and seizure area, Warren himself did not operate without respect for the need for effective law enforcement. Indeed, one account of the Supreme Court conference of the famous case *Terry v. Ohio*, 392 U.S. 1 (1968), indicates his great concern for the safety of police in the field. See BERNARD SCHWARTZ & STEPHEN LESHER, *INSIDE THE WARREN COURT* 258-60 (1983). This account notes that Warren wrote a draft opinion in which he stated that the policeman "was entitled to take reasonable measures to protect himself. . . . A police officer is not required to sacrifice his life on the altar of a doctrinaire judicial scholasticism which ignores the deadly realities of criminal investigation and law enforcement." *Id.* at 259. After some suggestions from other Justices, Warren was finally offered and accepted a substitute draft written by Justice William Brennan "which omitted much of the Chief's pro-police rhetoric." *Id.* at 260.
19. See, e.g., *Ohio v. Robinette*, 519 U.S. 33 (1996)(holding that when police stop a driver and decide to release him, they need not inform him that he has a right to leave before requesting consent to conduct a search of his vehicle).
20. See David A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 557 (1998)(discussing the Supreme Court's visible trend for the last two decades of "steadily increasing police power and discretion over cars and their occupants" and stating that "the Court has conferred upon the police nearly complete control over almost every car on the road and the people in it").

This Article is an attempt to offer a meaningful look at the current state of search and seizure principles being applied (or not being applied) by the Supreme Court.²¹ It also will attempt to offer some solutions to the primary problem of search and seizure law — the absence of protection from abuse of police discretion,²² particularly during the situation in which the police allegedly obtain consent to search suspects. While police must have some measure of discretion,²³ they must also behave reasonably and honestly in the execution of their duties.²⁴ The current judicial retreat from the imposition of specific rules of conduct on police has left a void in privacy protection and presents the opportunity for search and seizure overreaching.²⁵

The Supreme Court has made clear that it no longer will be in the business of fashioning search and seizure “codes”²⁶ for the police of-

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21. *See id.* One Supreme Court observer has noted that the addition of conservative justices to the Court during the mid 1990s has moved the Court to re-examine “[l]ong-held assumptions about the authority of the federal government, the relationship between Washington and the states. . . .” Linda Greenhouse, *Farewell to the Old Order in the Court*, N.Y. TIMES, July 2, 1995, § 4, at 1.
 22. *See generally* JEROME H. SKOLNICK & JAMES J. FYFE, *ABOVE THE LAW: POLICE AND THE EXCESSIVE USE OF FORCE* (1993)(discussing in detail the use of force and the control of police discretion).
 23. Clearly, without some measure of discretion police may be subject to physical harm. I do not suggest that all Supreme Court decisions demand second-guessing of police, particularly when it may involve their own safety or the safety of others. *See, e.g.*, *New York v. Quarles*, 467 U.S. 649 (1991)(holding that asking a man suspected of having a gun where the gun is located is not a violation of the Fifth Amendment because of the danger to public safety).
 24. Some scholars have examined the due process model of criminal rights and have concluded that since “power is open to abuse and fact-finding is inherently error-prone, proponents of the due process model argue that constraints ought to be placed on the discretion exercised by officials of the state.” JAMES M. INVERARITY ET AL., *LAW AND SOCIETY: SOCIOLOGICAL PERSPECTIVES ON CRIMINAL LAW* 247 (1983).
 25. *See* ELLEN ALDERMAN & CAROLINE KENNEDY, *THE RIGHT TO PRIVACY* 6 (1995)(recounting police abuses in search and seizure including the policy of the Chicago police “to take people to the lockup for even trivial traffic violations” and to perform strip searches for minor traffic offenses).
 26. The Supreme Court has recently demonstrated its unwillingness to impose concrete standards on police in order to control their almost limitless discretion to stop vehicles. For example, in *Whren v. United States*, 517 U.S. 806 (1996), the Supreme Court held that pretextual traffic stops were reasonable under the Fourth Amendment, even where an officer follows an individual he wants to arbitrarily stop until the driver violates “any one of the innumerable, often inane, traffic code sections that exist in all jurisdictions.” *See* Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 554 (1997)(describing the decision in *Whren* as “myopic in its understatement of the danger that pretext stops pose to the goal of nondiscriminatory, and hence legitimate, law enforcement”).

ficer in the field except in the most general terms.²⁷ Some scholars have gone so far as to consider much of the Fourth Amendment to be “dead letter”²⁸ due to the exceptions²⁹ and modifications that have eroded the host of Warren Court decisions.³⁰ The rise of a strong law and order movement³¹ and a host of conservative appointments to the Supreme Court³² have made expansion of search and seizure protection unlikely.

In this Article, I propose a legislative solution that will balance the need for controlled discretion in search and seizure situations with the desire for a high level of accountability for police officers on the street and those responsible for policy, supervision, and the training of street level officers.³³ In the pursuit of reaching a consensus on the proper balance between personal freedom and crime control, particularly where racial bias might be alleged,³⁴ a useful starting point is to adjust the burden of proof³⁵ in certain types of search cases and to require police departments to keep records of police-citizen encounters.

27. *See Wyoming v. Houghton*, 526 U.S. 295 (1999)(requiring courts to inquire into whether the police action was in fact a seizure before determining whether there was a Fourth Amendment violation).

28. *See Harris*, *supra* note 20.

29. *See United States v. Leon*, 468 U.S. 897 (1984)(establishing good faith exception to the probable cause requirement for police who have obtained a warrant).

30. *See generally Rakas v. Illinois*, 439 U.S. 128 (1978).

31. Even Chief Justice Warren recognized the “law and order” backlash against his criminal justice jurisprudence. He wrote:

Because the court, over the years, sought to make our criminal procedures conform to the relevant provisions of the Constitution and be a reality for the poor as well as the rich, it was made the target for widespread abuse Because police and indignant citizens were overwhelmed with the wave of violence that flooded the land, they found in the Court a stationary target and made us responsible for the increasing crime rate. We were “soft on criminals,” they said.

EARL WARREN, *THE MEMOIRS OF CHIEF JUSTICE EARL WARREN* 316 (1977).

32. The appointments of Justice Anthony Kennedy by Republican President Ronald Reagan on February 11, 1988, and Justice Clarence Thomas by Republican President George Bush on October 16, 1991, tilted the balance of the Court to a solid conservative majority.

33. “Police officers require extensive training in the use of force, as well as the ability to implement non-violent, problem-solving skills. These are critical to the optimum functioning of police officers in the communities they serve.” JOHN L. BURRIS & CATHERINE WHITNEY, *BLUE VS. BLACK: LET’S END THE CONFLICT BETWEEN COPS AND MINORITIES* 215 (1999).

34. Racial problems that occur between citizens and police are often difficult to prove. As the Supreme Court recently observed in an opinion by Justice Clarence Thomas, “[o]utright admission of impermissible racial motivation are infrequent and plaintiffs often must rely upon other evidence.” *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999)(involving a suit that challenged a voter redistricting plan that was allegedly drawn in a racially motivated manner in violation of the Equal Protection Clause).

35. Various standards of proof are used in the law. In the trial of criminal cases . . . it is a requirement of due process that the defendant be proven

More "structural accountability"³⁶ is needed to operate as a check on broad police discretion and to allow the police to reasonably predict how the courts will review their behavior when they conduct searches.³⁷ We will begin to strike the appropriate balance between citizens and law enforcement only by removing the focus from the courts, returning to the privacy expectations of citizens, and demanding more local review.³⁸ More accountability is particularly needed to reduce the racial discrimination that seems to be a dominant and recurring theme in the search and seizure controversy.³⁹ If confidence that the police can conduct themselves fairly and effectively cannot be

guilty beyond a reasonable doubt. In civil cases, by contrast, the standard usually is a preponderance of evidence, commonly defined as proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence. But in certain circumstances a standard somewhere between these two is utilized; it is usually called the clear and convincing evidence standard, and means that the factfinder must be persuaded that the truth of the contention is highly probable."

WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* 508 (2d ed. 1992). "In large measure, the choice of the standard is a matter of local law, but at least in some circumstances the Constitution may compel use of something beyond the preponderance standard." *Id.*

36. Police accountability should be understood as a system of structures that help to shape the conduct of both individual officers and police departments in order that they may comply with standards of practice that respect the constitutional rights of individuals. It has been observed that the user of deadly force in a police department had more to do with the police chief's philosophy than with rates of crime or violence. See Gerald Uelman, *Varieties of Police Policy: A Study of Police Policy Regarding the Use of Deadly Force in Los Angeles County*, 6 *LOY. L.A. L. REV.* 1, 15 (1973).
37. The job of a police officer is to provide public safety and to restrain persons who are a threat to public safety. These tasks are unpleasant, but they are necessary for a civil society. See generally James Q. Wilson, *Police and Their Problems: A Theory*, in *PUBLIC POLICY: YEARBOOK OF THE GRADUATE SCHOOL OF PUBLIC ADMINISTRATION, HARVARD UNIVERSITY* 189, 220-21 (Carl J. Friedrich & Semour E. Harris eds., 1963).
38. Writer James Baldwin has vividly described the often volatile relationship between police and citizens, particularly in ethnic communities:
- [T]he only way to police a ghetto is to be oppressive. None of the Police Commissioner's men, even with the best will in the world, have any way of understanding the lives led by the people they swaggered about in twos and threes controlling. Their very presence is an insult . . .
- . . . He moves through Harlem, therefore, like an occupying soldier in a bitterly hostile country . . .
- JAMES BALDWIN, *NOBODY KNOWS MY NAME* 65-66 (1962).
39. Discrimination is often based on stereotyping. One insightful observer has explained that "[f]or better or worse, stereotypes creep into every aspect of our lives. They stem from our desire to simplify a world made up of a diverse sea of human faces. . . . Our complicated, often chaotic world becomes a more orderly place when we tag whole groups of people with common characteristics based on skin color, ethnicity, age, [or] gender." M. Dion Thompson, *Trying to Move Past Stereotypes*, *BALT. SUN*, Jan. 16, 2000, at 1C.

restored in urban communities where crime is most severe, our objective of a free society will not be meaningfully realized.⁴⁰

In recent years, the Supreme Court has cut down the trees planted by the Warren Court that were designed to protect criminal suspects from unfair police practices. Subsequent, more conservative Courts have largely ignored the doctrines protecting search and seizure, making that body of jurisprudence a constitutional wasteland.

II. RIGHT WITHOUT REMEDY: THE ACCOUNTABILITY PROBLEM AND THE FORGOTTEN LEGACY OF *WOLF v. COLORADO*

Most discussions of the Fourth Amendment focus on the Warren Court and its 1960s jurisprudence as a starting point for assessing the current state of search and seizure law.⁴¹ However, I believe a proper perspective can only be obtained by reaching back at least to the pre-Warren Court era of the late 1940s.⁴²

Fifty years ago, abortions were still illegal in many states and Dr. Julius Wolf of Colorado stood accused of performing them. *Wolf v. Col-*

40. Huge amounts of financial resources have been committed to crime control, primarily drug related crime in major cities. See John A. Powell & Eileen B. Hershenov, *Hostage to the Drug War: The National Purse, the Constitution and the Black Community*, 24 U.C. DAVIS L. REV. 557 (1991).

41. Consistency has rarely been a virtue of the Supreme Court, and under Warren its record in this regard was no worse than in the past. The question of consistency, or, rather, the lack of it, does point to a fact about the Warren Court that is often obscured by stressing its affirmations of Bill of Rights freedoms. On balance, liberal activism characterized the work of the Court during its sixteen years under Warren; but there were many decisions that libertarians deplored as encroachments on constitutionally protected freedoms.

Leonard W. Levy, *Introduction*, in *THE SUPREME COURT UNDER EARL WARREN* 17 (Leonard W. Levy ed., 1972).

If courts try to be faithful to the text of the Constitution, they will for that very reason be forced to decide between competing conceptions of political morality. So it is wrong to attack the Warren Court, for example, on the ground that it failed to treat the Constitution as a binding text. On the contrary, if we wish to treat fidelity to that text as an overriding requirement of constitutional interpretation, then it is the conservative critics of the Warren Court who are at fault, because their philosophy ignores the direction to face issues of moral principle that the logic of the text demands.

RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 136 (1978).

42. Prior to the 1940s, civil rights groups complained about the problem of police abuse. "In 1939 and 1940 NAACP lawyers persuaded the Supreme Court to reverse three convictions on the ground that confessions had been coerced. The cases involved confessions that had been produced by severe beatings extending over several days." MARK V. TUSHNET, *MAKING CIVIL RIGHTS LAW: THURGOOD MARSHALL AND THE SUPREME COURT, 1936-1961*, at 50 (1994). This litigation was the catalyst for examination of other police misconduct issues.

orado,⁴³ decided by the Supreme Court on June 27, 1949, opened a legal debate about what the legal system should do when law enforcement violates the Fourth Amendment. The main question in that debate was whether prosecutors should be permitted to use illegally seized evidence in court.⁴⁴

The Denver police suspected Dr. Wolf, who was an obstetrician, of performing abortions.⁴⁵ Without any warrants, representatives of the District Attorney went to Dr. Wolf's office, took him into custody and searched his office.⁴⁶ During the search, they seized his daybooks, which recorded the patients who consulted him.⁴⁷ From this information the prosecutor obtained leads, questioned former patients, and was able to build his case.⁴⁸ Dr. Wolf appealed to the United States Supreme Court claiming that the patient information taken from his office should not have been used against him because state officials violated his Fourth Amendment rights.⁴⁹

While *Wolf* is not as well known as other Supreme Court cases, its central issue has been the touchstone of a debate around the so called "exclusionary rule,"⁵⁰ which prevents a prosecutor from using illegally seized evidence. By 1914, the Supreme Court had ruled that such evidence could not be used in federal court trials.⁵¹ By the time the Supreme Court heard the *Wolf* case, however, there was a difference of opinion among the states as to whether the rule excluding evidence applied to state trials.⁵²

In a 6-3 opinion, Justice Felix Frankfurter reasoned that the Constitution did not necessarily require the exclusion of the evidence from

43. 338 U.S. 25 (1949).

44. Put differently, should a court reward police officers acting in "open defiance of the prohibitions of the Constitution?" *Weeks v. United States*, 232 U.S. 383, 394 (1914).

45. See T.S.L. Perlman, *Due Process and the Admissibility of Evidence*, 64 HARV. L. REV. 1304, 1304 (1951).

46. See *Wolf*, 338 U.S. 25 (1949).

47. See *id.*

48. See *id.*

49. See *id.*

50. The rule had grown out of two theories: first, that the only way to deter police from violating the Fourth Amendment's protection against "unreasonable searches" was to prohibit the use in prosecution of whatever they had illegally obtained; second, that evidence obtained illegally would taint a trial and make the courts partners in lawless police conduct.

BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 113-14 (1979).

51. See *Weeks v. United States*, 232 U.S. 383 (1914)(stating that in federal trials, the Fourth Amendment bars the use of evidence unconstitutionally seized by federal officers).

52. See *Wolf*, 338 U.S. at 34.

Wolf's trial⁵³ even though the Fourth Amendment was a fundamental right that applied to the states, and even though Dr. Wolf's rights were therefore violated.⁵⁴ Justice Frankfurter suggested that civil lawsuits and "the internal discipline of the police, under the eyes of an alert public opinion,"⁵⁵ were enough to deter police from illegal searches. In short, the Court ruled that Dr. Wolf's rights were violated but the police could still use the evidence obtained to convict him.⁵⁶ The dissenting Justices took issue with that result, fearing that without excluding the evidence, there was effectively no sanction at all against police who had clearly violated the law.⁵⁷

Dissenting Justice Murphy, who was critical of Justice Frankfurter's belief, wrote that "[s]elf scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered."⁵⁸ In a similar vein, an article published in the *Harvard Law Review*⁵⁹ shortly after the *Wolf* case noted that the Supreme Court had performed the "unprecedented[] feat of simultaneously creating a constitutional right and denying the most effective remedy for violation of that right."⁶⁰

The "exclusionary rule" was not fully applied to a state official until 1961 when a more liberal Court led by Chief Justice Earl Warren⁶¹ decided the case of *Mapp v. Ohio*.⁶² However, the battle over the

53. See *id.* at 29.

54. See *id.* at 30.

55. *Id.* at 31.

56. See Wayne R. LaFave, *Mapp Revisited: Shakespeare, J., and Other Fourth Amendment Poets*, 47 STAN. L. REV. 261, 265 (1995)(stating that the exclusion of evidence removes the incentive to disregard the Fourth Amendment).

57. See generally Fred Gilbert Bennett, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule*, 20 UCLA L. REV. 1129 (1973)(discussing the justifications for the exclusionary rule and arguing for its expansion).

58. *Wolf*, 338 U.S. at 42 (Murphy, J., dissenting).

59. See Perlman, *supra* note 45.

60. *Id.* at 1304.

61. One professor has said that

[e]minent scholars from many fields have commented upon [the Warren Court's] tendency towards over-generalization, the disrespect for precedent, even those of recent vintage, the needless obscurity of opinions, the discouraging lack of candor, the disdain for the fact finding of the lower courts, the tortured reading of statutes, and the seeming absence of neutrality and objectivity.

Milton Handler, *The Supreme Court and the Antitrust Laws: A Critic's View Point*, 1 GA. L. REV. 339, 350 (1967).

62. 367 U.S. 643 (1961). The change in policy reflected in the *Mapp* decision, which overruled *Wolf*, was a direct result of a change in vote by Justice Hugo Black from his earlier position on the exclusionary rule. No constitutional issue highlighted the antagonism between Felix Frankfurter and Hugo Black more than the

Fourth Amendment did not end with the *Mapp* decision. Even though the Supreme Court continued to strengthen the Fourth Amendment until the late 1970s,⁶³ the appointment of Warren Burger as Chief Justice,⁶⁴ and other conservative appointments thereafter,⁶⁵ marked the beginning of a dramatic conservative turn in the Supreme Court's

Fourth Amendment. Their battles led to further destabilizations of the Court's exclusionary rule direction. One scholar described their stalemate in this way:

Black had effectively exposed the weakness in Frankfurter's "natural law" approach that relied on the Justices' sense of fairness and decency. In later cases Frankfurter would decide whether police conduct violated the Fourteenth Amendment if it "shocked the conscience." Whose conscience? asked Hugo Black. But Frankfurter would counter that Black's theory that the Fourteenth Amendment incorporated all of the Bill of Rights and made them applicable to the states, in addition to being historically flawed, delivered an awesome amount of power to the Justices At the same time, Frankfurter's opposition to the incorporation theory was seen as further evidence of his anti-libertarian sympathies.

JAMES F. SIMON, *THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA* 179 (1989).

Another scholar describes the conflict between Frankfurter and Black in this way:

Repelled by the old "laissez-faire" abuse, Mr. Justice Black tries to purify and stabilize the law by clear, categorical rules. The purpose, plainly, is to minimize judicial discretion, provide a high degree of predictability as to the outcome of litigation, and leave basic policy changes to the democratic processes. But to curb judicial discretion is to curb its potential for good as well as for evil. Hence the wooden rules and their author's unwillingness to follow them. The Justice has not found a way to limit the discretion of other judges without limiting himself. Rejecting orthodox precepts and finding his own substitutes inadequate, he is left in difficult cases with little but *ad hoc* grounds for decision. In this impasse he is guided apparently by his own benevolent ideals — just as some of the "nine old men" were guided evidently by their more spartan principles.

Mr. Justice Frankfurter avoids this embarrassment. For him discretion is inevitable in constitutional decisions, because the basic law is necessarily imprecise.

WALLACE MENDELSON, *JUSTICES BLACK AND FRANKFURTER: CONFLICT IN THE COURT* 73 (1961).

63. The concept of judges denying police access to seized evidence reflects our general suspicion that police cannot police themselves entirely. "[H]aving judges decide what police conduct violates the Fourth Amendment reflects a distrust of society's ability or willingness to apply the Fourth Amendment properly." George C. Thomas III & Barry S. Pollack, *Saving Rights from a Remedy: A Societal View of the Fourth Amendment*, 73 B.U. L. REV. 147, 149 (1993).
64. Warren Burger was nominated Chief Justice in May 1969 and confirmed by the Senate on June 9, 1969.
65. One commentator has observed that Chief Justice Rehnquist's rather conservative voting record helped to change the position of the court from the days of the Warren Court. See Jeffrey A. Segal & Harold J. Spaeth, *Decisional Trends on the Warren and Burger Courts: Results from the Supreme Court Data Base Project*, 73 JUDICATURE 103, 106 tbl.4 (1989) (noting that Justice Rehnquist took civil libertarian positions only 19.6% of the time as compared with 77.2% for Justice Brennan).

search and seizure jurisprudence.⁶⁶ In a host of cases decided over the

66. In the midst of the Supreme Court's debate over the exclusionary rule, President Ronald Reagan's Task Force on Victims of Crime published its final report. *See PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, FINAL REPORT 24-28 (1982)*. It included the following lengthy and scathing critique of the doctrine:

Executive and Legislative Recommendation 5: Legislation should be proposed and enacted to abolish the exclusionary rule as it applies to Fourth Amendment issues.

.... Anyone evaluating the exclusionary rule must constantly keep this basic premise in mind. The framers of the Constitution did not create the exclusionary rule for violations of the Fourth Amendment. They could have done so. They did in the Fifth Amendment, which clearly provides that information forcefully taken from a suspect cannot be used against him. This constitutional adoption of the exclusionary principle was specifically not relied upon in setting out the Fourth Amendment. The exclusionary rule is instead a judicially created rule of procedure that fails to serve the goals it seeks, and fails at a tremendous cost.

.... Great emotion is generated in any discussion of the rule because its proponents treat the rule itself with the same sanctity as the rights it purports to protect. Unlawful government intrusion is like disease; no one is in favor of it. It must be remembered that the exclusionary rule is a remedy only, and not a very good one. It thus rewards the criminal and punishes, not the police, but the innocent victim of the crime and society at large for conduct they may not condone and over which they have little or no control.

.... Courts have created an incredibly complex body of Fourth Amendment law. Cases turn on minute factual distinctions, and courts, including the Supreme Court, will frequently disagree on what the requirements actually are. Indeed, judges within the same court often disagree. This intricate, extensive, and ever-changing set of rules must be digested and applied by a police officer, who is not a lawyer, and who must decide in the confusion and danger of the moment if he can detain a suspect, look into his car, or pat-search him for weapons in an attempt to avoid being shot.

The situation has been likened to an inverted pyramid. At the broadest part is the Supreme Court, which often takes months to analyze the problem and even then the justices may not agree. Before the case arrives at that level a court of appeals will have considered it for weeks or months. Before that, lawyers will have spent days or weeks marshalling arguments and writing briefs for preliminary hearing and trial court judges. In the course of this scrutiny, each reviewer looks with calm contemplation over the shoulder of the officer in the field, who, at the point of the pyramid, is expected to make the right decision instantly.

The judicial system purports to be based on the truth. A trial is defined as a search for the truth; and by relying on the truth, it is said, justice will be found. However, the exclusionary rule results in lies. Evidence that has been seized and is highly probative of the defendant's guilt is excluded. From that point on everyone must pretend that it does not exist. . . .

.... Not only does the exclusionary rule benefit the guilty while failing to protect the innocent, the existence and operation of the rule has a disabling effect on the entire justice system. It is sometimes argued that the

last twenty years, the Court has not only created a multitude of exceptions to the Fourth Amendment, which have limited the definition of what constitutes a search,⁶⁷ but has also made a court's consideration of the intentions⁶⁸ of even aggressive police officers in performing searches more difficult,⁶⁹ which has limited the circumstances in which the exclusionary rule can apply. The exclusionary rule battleground has resulted in a lack of clarity in the application of what would otherwise be the plain meaning of the Fourth Amendment's warrant requirement⁷⁰ and reasonableness provisions.⁷¹ Consequently, justifying a search, particularly one conducted without a warrant, should be the government's burden.⁷²

The lingering question that remains from the *Wolf* case is whether citizens will more closely scrutinize police searches or whether police will continue to enjoy greater flexibility from the Supreme Court in their pursuit of crime. The issue is particularly important at the local level since ninety-five percent of all crimes are prosecuted in state courts.⁷³ Since today's Supreme Court is clearly becoming less inter-

rule can be tolerated because motions to suppress are granted in only a small proportion of cases. Such an analysis attempts to reveal the size of the iceberg by measuring its tip. However, even when suppression motions are not granted, the provision for them hobbles honest and effective law enforcement at every step and imposes an enormous burden on an already overtaxed system.

....

The Task Force has concluded that the exclusionary rule does not work, severely compromises the truth-finding process, imposes an intolerable burden on the system, and prevents the court from doing justice. Accordingly, we recommend that the exclusionary rule as it applies to Fourth Amendment issues be abolished.

Id. at 24-28.

67. See *California v. Hodari*, 499 U.S. 621 (1991).

68. See *Whren v. United States*, 517 U.S. 806 (1996).

69. See *supra* note 8.

70. The Fourth Amendment requires that searches be based on probable cause and a warrant. Thus, warrantless searches are presumptively unreasonable.

71. The Fourth Amendment contains a reasonableness clause that assumes that all searches should be conducted in a manner consistent with the goals of the Constitution.

72. See, e.g., *Camara v. Mun. Court*, 387 U.S. 523 (1967).

73. See JAMES A. STRAZZELLA, AMERICAN BAR ASSOCIATION, *THE FEDERALIZATION OF CRIMINAL LAW* 19 (1998). This recently released American Bar Association study examined the frequency of federal prosecutions to reach some conclusions about the impact on the prosecution of local crimes.

To assess the extent to which federalization of criminal law has the potential to impact crime in general and local crime in particular, the Task Force first examined available data to assess the comparative frequency of federal and state prosecutions. The key point is that federal prosecutions comprise less than 5% of all the prosecutions in the nation. The other 95% are state and local prosecutions.

Id.

ested in monitoring local police⁷⁴ — a position similar to that embraced by the *Wolf* majority opinion fifty years ago — citizens will have to take more of an interest in police conduct if they intend to curb potential discrimination and abuse.⁷⁵ If police are to be more accountable to the public they serve, legislation at both the federal and state level will be required.⁷⁶ As far as the exclusionary rule is concerned, we may be no closer to resolving the controversy of whether the rule is a good idea than we were when Dr. Wolf's office was illegally searched over five decades ago.⁷⁷

That the guilty occasionally benefit because of the constable's blunder⁷⁸ is an uncomfortable cost that may have to remain a fixture in our law in order to protect liberty. This is particularly so since there may be no other effective alternative that will discourage illegal police conduct.⁷⁹ Ironically, Dr. Wolf would not even be the subject of a criminal prosecution today because of the now constitutionally protected woman's right to choose,⁸⁰ a fact that reminds us that the sands

74. See generally Craig M. Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquist Begun?*, 62 IND. L.J. 273 (1987)(discussing Justice Rehnquist's views and the effect he will have on the Court).

75. See New York Civil Liberties Union, *NYCLU Special Report, Five Years of Civilian Review: A Mandate Unfulfilled July 5, 1993—July 5, 1998*, at <<http://www.nyclu.org/fiveyears.html>>, [hereinafter *NYCLU*](“A weak civilian review agency emboldens police officers with a propensity to abuse their power, and gives false assurance to civilians who file a complaint of police misconduct with the expectation justice will be done.”).

76. See *id.*

77. Perhaps part of the problem with reaching firm conclusions about the validity of the exclusionary rule lies in the almost schizophrenic policy consideration that the criminal procedure rule produces. On the one hand, the guilty go unpunished, which has always been considered repugnant to those who think justice should be consistent with respect to punitive consequences. On the other hand, a fundamental part of our justice system is to attempt to create accountability so that the police are encouraged to follow the rules that reflect the fundamental values of our society. As Professor Peter Arnella explains:

One can take American criminal procedure's protection of fair process norms at face value as an ethical prerequisite of a just legal system that places some substantive and procedural restraints on the state's exercise of power. Or, one can explain this legitimation function from an instrumentalist perspective. To perform its dispute-resolution function effectively, American criminal procedure must provide a mechanism that settles the conflict in a manner that induces community respect for the fairness of its processes as well as the reliability of its outcomes. From this instrumentalist perspective, the most important consideration is how the process appears to the community.

Peter Arnella, *Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies*, 72 GEO. L.J. 185, 202 (1983).

78. See *supra* note 8.

79. See generally Roger Goldman & Steven Puro, *Decertification of Police: An Alternative to Traditional Remedies for Police Misconduct*, 15 HASTINGS CONST. L.Q. 45 (1987)(discussing alternatives to the exclusionary rule).

80. See *Roe v. Wade*, 410 U.S. 113 (1973).

of law are always shifting. Perhaps another important idea that emerges from our fifty-year odyssey with the exclusionary rule controversy is that, like it or not, freedom is rarely free.⁸¹ The attempts by post-Warren Courts to undermine the scope of the exclusionary rule have diminished protection against unreasonable search and seizure and in many instances have made the Fourth Amendment as meaningless as it was when *Wolf* was decided.

III. STRUCTURAL ACCOUNTABILITY AND THE UNDERVALUED DOCTRINE OF *MIRANDA v. ARIZONA*

It would be no stretch of legal analysis to state that *Miranda v. Arizona*⁸² is the most controversial criminal procedure case ever decided by the Supreme Court. It was the grist for both legal scholars and politicians from the moment it was decided. It has become an icon of popular culture, with its familiar warnings more recognizable to the average citizen than Shakespeare's poetry.⁸³ Recently, however, the Fourth Circuit directly challenged the legal basis of the decision, but was rejected by the Supreme Court,⁸⁴ despite the fact that some com-

81. Judge and scholar Richard Posner has written that "unless the resources devoted to determining guilt and innocence are increased, the only way to reduce the probability of convicting the innocent is to reduce the probability of convicting the guilty as well." RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 216 (1990).

82. 384 U.S. 436 (1966). Although most observers view *Miranda* as a departure from accepted legal principles, not all of them agree that it dramatically changed the legal landscape. Indeed, one observer wrote:

[A]ll the *Miranda* decision did was assure to the uninformed and the poor the same rights that reasonably knowledgeable and prosperous citizens had asserted all along. But bitter and persistent attacks—originated in large measure by policeman and prosecutors who had failed to do their jobs properly in the first place, and then taken up by the right wing as a handy weapon to belabor the "Warren Court" with for a number of its decisions—finally convinced most conservatives and even many moderates that the Court had done something wildly radical.

RICHARD HARRIS, *JUSTICE: THE CRISIS OF LAW, ORDER, AND FREEDOM IN AMERICA* 235 (1970).

83. During the 1960s, television made *Miranda* legendary. The decision "dismayed some policemen, embittered some prosecutors, and baffled some judges." KARL MERRINGER, *THE CRIME OF PUNISHMENT* 9 (1968). Shortly after the decision was handed down, actors Jack Webb, of the popular television show *Dragnet*, and Ben Alexander addressed a meeting of 500 prosecutors in Denver, Colorado.

"Puffing his *Felony Squad* show, Alexander said: 'The Supreme Court says we can't interrogate crooks anymore. So what choice do we have?' His answer: 'We shoot 'em. On our show the viewers will see the crime committed, so they know the guy's guilty. That way, nobody gets upset when we shoot him.'" *Id.* (quoting *TV Solves Miranda*, *TIME*, Aug. 26, 1996, at 79).

84. The Fourth Circuit held that confessions in federal court were not governed by the *Miranda* decision, but rather, by a federal statute, 18 U.S.C. § 3501 (1985), which provides that such confessions should be reviewed under the pre-*Miranda*

mentators believe that the case may be ripe to overrule.⁸⁵ It has continually been a favorite target of conservative politicians and groups since it was decided.⁸⁶ Without a doubt, the decision's linkage to the Fifth Amendment's right against self-incrimination and explicit exclusionary provision has made it a central battleground in the criminal procedure debate.⁸⁷ Like its Fourth Amendment cousin, the Fifth Amendment shares a common history in the founding of this nation.⁸⁸

criteria for voluntariness. See *United States v. Dickerson*, 166 F.3d 667 (4th Cir. 1999), *overruled by* 120 S. Ct. 2326 (2000). In fashioning this theory, the court relied heavily on Congress' action to modify the effects of the *Miranda* decision shortly after it was announced. "Congress sought to circumscribe [*Miranda*] in the Omnibus Crime Control and Safe Streets Act of 1968 by declaring that voluntary confessions were admissible in evidence in Federal courts and directing Federal trial judges to determine voluntariness on the basis of certain statutory criteria." WILLIAM F. SWINDLER, *COURT AND CONSTITUTION IN THE 20TH CENTURY: A MODERN INTERPRETATION* 200 (1974)(footnotes omitted).

The Supreme Court rejected the Fourth Circuit's reasoning and left the *Miranda* decision intact. See *Dickerson v. United States*, 120 S. Ct. 2326 (2000)(holding that *Miranda's* warning based approach could not be overruled by legislative action).

85. See Paul G. Cassell & Richard Fowles, *Hand Cuffing the Cops?: A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement*, 50 STAN. L. REV. 1055 (1998).
86. Like many other moderate conservatives in the legal profession in the 1960s, Powell was publicly critical of the Warren Court's most controversial decisions in the criminal law field, such as *Miranda*. "Powell believed that fairness to criminal defendants could be preserved without broad-based rules that could frustrate the police and prosecution, as he thought the Court had done with its *Miranda* decision." JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* 182 (1995).
87. *Miranda* was not the first opinion to advance the concept that confessions were subject to constitutional scrutiny. In the late nineteenth century, the Supreme Court held that "[i]n criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because [it is] not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'" *Bram v. United States*, 168 U.S. 532, 542 (1897) (quoting U.S. CONST. amend. V). However, the Court did not directly rely on *Bram's* holding in subsequent cases. In fact, in early 1951, the Court questioned its validity. See *United States v. Cardigan*, 342 U.S. 36, 41 (1951).

By the time the Fifth Amendment was made applicable to the states by the Warren Court in *Malloy v. Hogan*, 378 U.S. 1 (1964), the Supreme Court had once again expressly embraced the *Bram* rule and extended it two years later in *Miranda*.

88. The late Justice William O. Douglas wrote:

[A]lthough torture was long used to solve crimes, experience proved that it was not an honorable way for government to deal with its citizens But the protection of the Fifth Amendment transcends the use of torture by the police. It outlaws all forms of physical, legal, or moral compulsion utilized to make a man convict himself.

WILLIAM O. DOUGLAS, *THE RIGHT OF THE PEOPLE* 145 (1958). He reminded us that "[t]hose who would attach a sinister meaning to the invocation of the Fifth Amendment have forgotten that history." *Id.* at 146.

Scholars disagree on whether the *Miranda* warnings are constitutionally required,⁸⁹ but the accountability problems that led the Supreme Court to issue its decision cannot be denied. Most people who can recite the warnings have little appreciation for the remainder of the extraordinary opinion.⁹⁰ However, this is where people have undervalued its reasoning and where the opinion's strength in the accountability framework is demonstrated.⁹¹

In *Miranda*, the Supreme Court held that the failure to advise the defendant of his right to an attorney required the exclusion of his confession at his trial.⁹² In order to understand *Miranda's* true value, one must understand its unique contribution to constitutional jurisprudence. It is essentially a procedure case born out of a problem that required exceptional accountability measures. In the voluminous opinion, the Court explained that it was dealing "with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself."⁹³ The need for the opinion arose out of concerns about violent police abuse during questioning. Relying on the Wickersham Re-

89. See Cassell & Fowles, *supra* note 85.

90. In *Spano v. New York*, 360 U.S. 315 (1959), Chief Justice Warren said:

The abhorrence of society to the use of involuntary confessions does not turn alone on their inherent untrustworthiness. It also turns on the deep-rooted feeling that the police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves.

Id. at 320.

91. The concepts advanced in *Miranda* were not only known prior to the decision, they were also practiced by some well-regarded law enforcement agencies. As Justice William O. Douglas reminded us, "[t]he cry went up that *Miranda* made the police helpless and ineffective. But the FBI had lived under those standards, and it was probably the most efficient police force in the world." WILLIAM O. DOUGLAS, *THE COURT YEARS 1939-1975*, at 387 (1980).

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

93. *Id.* at 439. One commentator explained that

the [United States] system of justice is based on accusation, not inquisition. In an accusatory system, a person is innocent until proven guilty beyond a reasonable doubt. The State must investigate and present evidence to a jury to prove its case even though interrogating and torturing the suspect would clearly be more efficient. As one nineteenth-century English legal commentator put it, 'It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence.'

ELLEN ALDERMAN & CAROLINE KENNEDY, *IN OUR DEFENSE: THE BILL OF RIGHTS IN ACTION* 171 (1991)(quoting SIR JAMES FITZJAMES STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* (1883), quoted in EDWARD BENNET WILLIAMS, *ONE MAN'S FREEDOM* 125 (1977)).

port filed with Congress in the 1930s,⁹⁴ the Court expressed concerns that police often “resort to physical force to obtain confessions.”⁹⁵

The secrecy of the interrogation room and the lack of accountability that circumstances created were what made violence possible. The Court wrote that “[p]rivacy results in secrecy and this in turn results in a gap in our knowledge as to what in fact goes on in the interrogation rooms.”⁹⁶ In making its pitch for a procedural solution, the Supreme Court urged that “[u]nless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be a product of his free choice.”⁹⁷ The Supreme Court expressed its rationale for accountability solutions in monitoring law enforcement interrogation practices⁹⁸ when it stated that “[a]s a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.”⁹⁹ In order to accomplish its protective goal, the Court reasoned that “un-

94. See *Miranda*, 384 U.S. at 445-46.

95. *Id.* at 446 (quoting COMMISSION ON CIVIL RIGHTS, JUSTICE 17 (1961)).

96. *Id.* at 448.

97. *Id.* at 458. Ironically, after *Miranda* was paroled in 1972, he was arrested again on drug and weapon charges in 1974. “In early 1976, now 34, he was slain in a Phoenix, Arizona, skid row bar in a quarrel over a card game.” HENRY J. ABRAHAM, *FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES* 127 (4th ed. 1982).

Marvin E. Frankel, a former law professor and United States District Court judge, has questioned the logic of permitting “station house” interrogations at all. He wrote,

why should a court ever allow self injuring confessions to the cops as evidence against the defendant It is difficult to see why questioning before a neutral magistrate, with a lawyer present, should not be infinitely preferred to being all alone in the police station answering the insistent queries of a ring of officers.

MARVIN E. FRANKEL, *PARTISAN JUSTICE* 96, 99 (1980).

98. Confessions are a vital part of effective police work. “[C]riminal cases that are litigated represent only a fraction of all case dispositions. Of those disposed of without full trial, there are many in which there has been a confession[, otherwise] the prosecutor would frequently not be in a position to bargain effectively for a guilty plea.” KEVIN TIERNEY, *COURTROOM TESTIMONY: A POLICEMAN’S GUIDE* 196 (1970).

99. *Miranda*, 384 U.S. at 461. Not all criminals embrace their *Miranda* rights upon being arrested.

[T]he largest group of suspects who failed to take advantage of *Miranda* rejected it not out of cynicism but because they believed it was better to cooperate with the police. They accepted the legitimacy of the warnings, but decided that their best interests were served by not adjusting to the options *Miranda* offered. There are several reasons why suspects might come to a decision. One, of course, might be conscience: “I did it and I’m sorry.” Or a suspect might perceive that he or she couldn’t hide guilt anyway — witnesses might testify or damning evidence might already be available — and might as well get it over with. Closely related to this

less other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored," procedural safeguards are the only way to adequately protect the important constitutional rights involved.¹⁰⁰

The Court began limiting the scope of the *Miranda* decision shortly after it was decided. For example, in *Michigan v. Tucker*,¹⁰¹ the Court stated that the *Miranda* rights "were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected."¹⁰² The *Tucker* Court further explained that the decision was not intended to "create a constitutional straightjacket."¹⁰³ Although *Tucker* reflected an erosion of *Miranda*, the decision's core reasoning embraced the notion that the Constitution mandated the creation of procedural rules to protect a procedural constitutional right that was the logical result of

might be a suspect's calculation that he or she risks more — perhaps a longer sentence — by defiance than by cooperation.

Most suspects quite naturally believed that refusing to talk or insisting upon the presence of an attorney would be a tacit admission of guilt. It follows that such behavior would only intensify police suspicion and investigation. The best course, then, would be to deflect suspicion from oneself by appearing to be cooperative. So in order to avoid detection and punishment, some suspects take the risk of lying or telling less than the whole truth.

CHARLES A. JOHNSON & BRADLEY C. CANON, JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT 121-22 (1984).

100. *Miranda*, 384 U.S. at 478-79.

101. 417 U.S. 433 (1974).

102. *Id.* at 444.

103. *Id.* (quoting *Miranda v. Arizona*, 384 U.S. 436, 467 (1966)). There is a difference of opinion regarding whether *Miranda* has made police policy better. One commentator has observed:

Did the Warren Court criminal justice decisions have any real effect on the behavior of the police? Some have suggested that the criminal justice decisions were a failure. It has been argued that while some Supreme Court decisions have resulted in allowing concededly guilty defendants to go free, there has been no demonstrable beneficial change in police practices. Some suggest that the police will always find their own ways to evade constitutional rules; others maintain that even in the best of circumstances the Supreme Court is just too distant from the day-to-day decisions of the policeman on the beat or in the station house to have any systematic effect on police behavior.

Yet we have come gradually to recognize that the culture of police departments varies widely, depending on whether there is organizational leadership as well as serious training and education of recruits in the values of civil liberties. This certainly suggests that different institutional practices and values can produce widely different organizational attitudes toward obeying the law.

If we ask whether the culture of the police station has changed since the Warren Court, the answer appears to be positive. Before the Warren Court, several generations of official commissions had documented and condemned the widespread brutality toward criminal suspects that had become standard operating procedure in many police departments.

MORTON J. HORWITZ, *THE WARREN COURT AND THE PURSUIT OF JUSTICE* 96 (1998).

the Fifth Amendment right against compelled testimony. If law enforcement wished to have the fruit of custodial interrogations, it needed clear direction to help it take the affirmative steps necessary to ensure that confessions were not illegally obtained.

IV. THE ACCOUNTABILITY VACUUM AND THE FLAWED CONSTITUTIONAL CONSENT JURISPRUDENCE

There is no subject in which the Supreme Court has rendered predictable results more unlikely than in the subject of searches and interrogations based on alleged or legally constructed voluntary consent. Ideas regarding consent have long been riddled with controversy. The invisible dividing line between consent and coercion has been a mainstay of police investigative technique,¹⁰⁴ and a source of confusion for the average citizen.¹⁰⁵ Over half a century ago, the Supreme Court

104. See *Hoffa v. United States*, 385 U.S. 293, 304 (1966) (recognizing that an undercover agent believed to be a friend does not invalidate a confession); see also Richard A. Leo, *From Coercion to Deception: The Changing Nature of Police Investigation in America*, 18 CRIME, L. & SOC. CHANGE 35, 35 (1992) (discussing how police interrogation has changed in the last half-century).

105. Police sponsored literature that allegedly explains citizen responsibility when confronted by police adds to the confusion. One such advisement suggests:

A traffic stop is one of the most frequent encounters between citizens and police. Usually, police officers will pull a vehicle over if they have reason to believe that some offense has occurred. You may feel anxious, irritated at the delay, or concerned about a possible citation. However, officers are also concerned about possible threats to their personal safety while performing their duties.

The following recommended procedures will ensure that the traffic stop can be completed quickly and safely.

When signalled [sic] by an officer, safely pull over to a place out of traffic flow.

Sit calmly, with your hands visible on the steering wheel. If you have passengers, ask them to sit quietly with their hands visible. (Avoid sudden movements or ducking in the seat; these actions can unnecessarily alarm the officer.)

If it is night, turn on your inside light when you pull the car over. For safety reasons, the officer will want to visually scan the car's interior before proceeding.

Do **not** get out of your car unless the officer asks you to step out. If you are asked to do so, comply in a calm manner.

A sure way to put an officer at ease is to communicate your actions in advance by telling the officer what you will be doing **before** you move. Also, you can ask to see the officer's identification.

If requested, you must give the officer your driver's license and vehicle registration. Tell the officer where it is **before** reaching for it—especially if it is tucked away in the glove box or some other unusual place.

If you are issued a citation, you will be asked to sign it. Signing is not an admission of guilt, but an acknowledgment that you have received the citation. While you may wish to clarify the circumstances of the citation, keep in mind that your guilt or innocence can only be determined in court. Arguments over or protests about the situation cannot be resolved in the street.

recognized the distinction between coercion and persuasion. In *Davis*

Baltimore County Police Dep't, *What to Do If You Are Stopped By a Police Officer* (advisement distributed by police department regarding stops, searches, and seizures)(emphasis in original).

Another pamphlet produced by a group of minority police officers along with some civil rights organizations advises the following:

Stay in the driver's seat with both hands in sight on the steering wheel. Do not exit your car unless asked to do so. Getting out of your car can be perceived as aggressive behavior and a threat to the officer's safety. Turn on your interior light if stopped at night.

Comply with the officer's request to see your driver's license and/or registration. If they are in the glove box or under the seat, state that and then retrieve them slowly.

If the officer has "probable cause," your car can be searched without a court-issued warrant. If you are the driver and/or owner of the car and do not want your vehicle searched, clearly inform the officer of your non-consent in a polite manner.

If you are issued a ticket, sign it. Signing a ticket is not an admission of guilt—only an acknowledgment of receiving the ticket. However, refusal to sign a ticket could result in your being arrested and facing additional charges.

If you are suspected of drunk driving, cooperate with the officer(s) on the scene. If you refuse to submit to breath, blood or performance tests, your refusal may be interpreted as an indication of guilt in later court proceedings. This could result in loss of driving privileges and/or heavy fines.

Get out of the automobile if asked to do so.

Most officers will not provide specific reasons for the stop until they have your license and registration in hand. Therefore, they will avoid having to debate the reason for the stop before they receive these items from you.

If you wish to offer an explanation of your circumstances when stopped, do so before the officer returns to his vehicle. The officer cannot void the ticket once it has been written. If you believe you have been treated unfairly, present your case in traffic court and not to the officer along the roadside.

• • •
If You are Arrested

When you are taken into custody, make sure that your house or car is secure.

Make sure you have been informed as to why you are being arrested. **NOTE: A lawyer should be called as soon as possible. The advice of an attorney is extremely important early in the process.**

Under no circumstances should you make incriminating statements which might be used against you at a later time.

In most states, you must be taken before a judge, magistrate, constable or court commissioner within 24 hours of your arrest. You should secure legal representation before this initial court appearance.

Ask to telephone your parent, guardian, or lawyer immediately. You have the right to make one phone call to the person of your choice; use it. You also have the right to privacy during the call. If this right is denied, do not cause a confrontation that might result in additional charges being filed against you.

You should always have the number of a lawyer or a person you can rely on to get you an attorney if your lawyer is unavailable. Keep a record of that number, as well as the name and number of a lawyer from the local Public Defender's office, in your wallet or purse.

v. United States,¹⁰⁶ a 1946 case, the defendant was said to have voluntarily agreed to a search and seizure after his arrest for selling gasoline coupons above the ceiling price.¹⁰⁷ The Court found that the officers had "persuaded" rather than "coerced" the defendant into consenting to the search, even though he had initially refused to open the enclosed room where the suspected coupons were hidden.¹⁰⁸ This early case set a broad policy of flexibility regarding what the Supreme Court considered appropriate consent.

By the late 1960s, the Supreme Court was not so willing to permit police assertions of consent, holding that "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given."¹⁰⁹ The Court commented, at least in the context of a search warrant, that not all police techniques used to obtain consent were necessarily appropriate. "When a law enforcement officer claims authority to search a home under a search warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion Where there is coercion there cannot be consent."¹¹⁰

Although it may have seemed that the burden of proving that consent was voluntary was well established, by the early 1970s, the consent doctrine regarding street and automobile encounters had been called into serious question. In the case of *Schneckloth v. Bus-*

NAACP et al., *The Law and You: Guidelines for Interacting with Law Enforcement Officials* (brochure produced in partnership by NAACP, National Organization of Black Law Enforcement Executives, and Allstate Insurance Company)(emphasis in original).

106. 328 U.S. 582 (1946).

107. *See id.* at 585.

108. *See id.* at 593.

109. *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968). When I speak of the police, one should understand that the prosecutor and police work as a team.

Together, the prosecutor and agent must plot strategy. The prosecutor serves as the legal adviser for the investigation. Investigators who execute search warrants improperly, fail to minimize electronic surveillance, entrap defendants, or take statements from putative defendants in violation of *Miranda* may jeopardize a prosecution; such investigative errors can lead to suppression of critical evidence during the pretrial stage. Prosecutors must therefore exercise close supervision of their agents. Moreover, the prosecutor must be mindful of the statutes which will serve as the basis of the prosecution. Working with the investigators, the prosecutor must seek to develop the evidence which will enable a jury to find a defendant guilty beyond a reasonable doubt. In each investigation, the dynamic between prosecutor and investigator will vary, and will reflect their individual experiences, knowledge, and personalities. Whatever the situation, a good prosecutor must be a talented amateur sleuth, while a good investigator must be a solid amateur lawyer.

GARY S. KATZMANN, *INSIDE THE CRIMINAL PROCESS* 95 (1991).

110. *Bumper*, 391 U.S. at 550.

tamonte,¹¹¹ the Supreme Court made "bright line" determinations of voluntary consent virtually impossible. The Court held that when a search subject was not in custody, the state must demonstrate that consent was voluntarily given.¹¹² In attempting to make the requisite showing, however, the subject's knowledge of his right to refuse is a factor to be taken into account, but not a prerequisite to establishing voluntary consent.¹¹³ Indeed, the Court characterized the precise question in the case as "what must the prosecution prove to demonstrate that a consent was 'voluntarily' given."¹¹⁴

In deciding the case, the Court adopted the "California rule" that "voluntariness is a question of fact to be determined from the totality of all the circumstances, and that the state of a defendant's knowledge is only one factor to be taken into account in assessing the voluntariness of a consent."¹¹⁵ Rejecting a "*Miranda* type test" that would require the informed consent of a subject who was under arrest prior to a search, the Court reasoned that the arrest situation discussed in *Miranda* was legally distinguishable. "The considerations that informed the Court's holding in *Miranda* are simply inapplicable in the present case. In *Miranda* the Court found that the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation."¹¹⁶ Also key to the Court's reasoning was its conclusion that "since consent searches will normally occur on a person's own familiar territory, the specter of incommunicado police interrogation in some remote station house is simply inapposite."¹¹⁷

A concurring opinion filed by Justice Powell, Chief Justice Burger and Justice Rehnquist made a scathing attack on the exclusionary

111. 412 U.S. 218 (1973).

112. *See id.* at 222.

113. *See id.* at 227.

114. *Id.* at 223.

115. *Id.*

116. *Id.* at 246-47.

117. *Id.* at 247.

The most infamous *Miranda* scam of recent years was the one FBI agents tried to pull on Richard Jewell, the security guard they suspected had planted the bomb he'd found in an Atlanta park during the 1996 Olympics. The agents told Jewell that they wanted him to come to the FBI office to help make a "training video" designed to teach agents how to interview crime scene witnesses. Jewell agreed. While taping the video, the agents pretended that their reading of *Miranda* and Jewell's signing of the waiver were merely demonstrations of proper interview techniques.

Later, after admitting that Jewell was innocent, the FBI issued a halfhearted apology for what it termed the "training video ploy," but then added that it "was not improper per se."

Ironically, the ploy backfired. Jewell, who had been eager to talk, got suspicious and called his lawyer.

Peter Carlson, *Cops, Suspects and the New Art of Interrogation*, WASH. POST MAG., Sept. 13, 1998, at 6, 19.

rule.¹¹⁸ In suggesting that a Fourth Amendment challenge should not even be cognizable on habeas corpus review,¹¹⁹ the three concurring Justices quoted a study by Professor Oaks:

What is known about the deterrent effect of sanctions suggests that the exclusionary rule operates under conditions that are extremely unfavorable for deterring the police. The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task.¹²⁰

They also noted Professor Oaks's statement that "[o]nly a system with limitless patience with irrationality could tolerate the fact that where there has been one wrong, the defendant's, he will be punished, but where there have been two wrongs, the defendant's and the officer's, both will go free."¹²¹

Justice Douglas dissented, protesting that "verbal assent" to a search was not sufficient.¹²² He argued that "a reasonable person might read an officer's 'May I' as the courteous expression of a demand backed by force of law,"¹²³ and complained that "[a] considerable constitutional guarantee rides on this narrow issue."¹²⁴ In a separate dissent, Justice Brennan warned that under the majority's decision "an individual can effectively waive this right even though he is totally ignorant of the fact that, in the absence of his consent, such invasions of his privacy would be constitutionally prohibited."¹²⁵ His dissent concluded with a simple question that still emerges in the current Supreme Court search and seizure debate. He wrote, "[I]t wholly escapes me how our citizens can meaningfully be said to have waived something as precious as a constitutional guarantee without ever being aware of its existence."¹²⁶

In a final dissenting opinion, Justice Marshall suggested that the *Miranda* analysis should be used to determine whether the defendant

118. See *Schneekloth*, 412 U.S. at 250-75 (Powell, J., concurring).

119. This case represents a longstanding attack on habeas corpus that still continues today. Justice Rehnquist, who was a concurring judge in *Schneekloth*, has long encouraged limitations on a criminal defendant's access to the federal courts. As one writer explains: "At the time of his nomination [to the Supreme Court] Rehnquist had urged sharp cut-backs in federal habeas corpus . . ." EDWARD P. LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLES INSIDE THE SUPREME COURT* 105 (1998).

120. *Schneekloth*, 412 U.S. at 268 n.26 (Powell, J., concurring)(quoting Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665, 755 (1970)).

121. *Id.* (quoting Oaks, *supra* note 120).

122. See *id.* at 275 (Douglas, J., dissenting).

123. *Id.* at 275-76 (quoting *Bustamonte v. Schneekloth*, 448 F.2d 699, 701 (9th Cir. 1971)).

124. *Id.* at 276.

125. *Id.* at 277 (Brennan, J., dissenting).

126. *Id.*

had "knowingly relinquished a right to be free of compulsion."¹²⁷ Echoing the concerns of Justice Douglas, Justice Marshall reasoned that "[i]f consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search, it follows that his consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police."¹²⁸

Justice Marshall, however, went further than either Brennan or Douglas by suggesting that the majority had engaged in an unconstitutional allocation of the burden of proof.¹²⁹ He explained that "the question then is a simple one: must the Government show that the subject knew of his rights, or must the subject know of his rights, or must the subject show that he lacked such knowledge."¹³⁰ He opined that "any fair allocation of the burden would require that it be placed on the prosecution."¹³¹ In explaining how the prosecutor might proceed to question a defendant from whom he sought information, Marshall suggested that "[t]he burden on the prosecution would disappear, of course, if the police, at the time they requested consent to search, also told the subject that he had the right to refuse consent."¹³²

In his final complaint against the majority, Justice Marshall said that "[i]n the final analysis, the Court now sanctions a game of blindman's buff, in which the police always have the upper hand, for the sake of nothing more than the convenience of the police."¹³³

The Supreme Court's split in *Schneckloth* set the stage for the range of debate that would appear over the next three decades in lower court and Supreme Court search and seizure opinions dealing with consent.¹³⁴ In 1980, the Supreme Court reaffirmed the princi-

127. *Id.* at 281 (Marshall, J., dissenting).

128. *Id.* at 284-85.

129. *See id.* at 285.

130. *Id.*

131. *Id.*

132. *Id.* at 286.

133. *Id.* at 289-90.

134. Subsequent Supreme Court jurisprudence on the subject of consent has broadened the latitude of what can be interpreted as consent. *See, e.g., Florida v. Bostic*, 501 U.S. 429, 438 (1991) (holding that no seizure occurred when police boarded a bus, randomly approached passengers, and then sought their consent to search their belongings).

Schneckloth immediately generated a large body of scholarship that attempted to analyze its holdings. For example, in William Kluwin & Joseph Walkowski, *Valid Consent to Search Determined by Standard of "Voluntariness"*—*Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), 12 AM. CRIM. L. REV. 231 (1974), the authors questioned *Schneckloth's* interpretation of *Johnson v. Zerbst*, 304 U.S. 458 (1938), which led the Court to the conclusion that if *Johnson* was applied to consent to search issues, it would create a greater burden on police work. *See Kluwin & Walkowski, supra*, at 244-45. Furthermore, the authors attacked

ples of *Schneckloth* in *United States v. Mendenhall*.¹³⁵ In that case, agents who were wearing plain clothes approached Ms. Mendenhall in a public area of an airport and requested to see her identification and airline ticket.¹³⁶ After returning her airline ticket and driver's license, one of the agents asked Mendenhall "if she would accompany him to the airport DEA office for further questions. She did so, although the record does not indicate a verbal response to the request."¹³⁷ The officers testified that she became nervous after they

the actual outcome as broadening police power at the expense of civil liberties. *See id.* at 247-48.

Eugene E. Smary, Note, *The Doctrine of Waiver and Consent*, 49 NOTRE DAME L. REV. 891 (1974), was critical of the Court's refusal to extend *Johnson* and questioned that the knowing waiver is only applicable to the fairness of a trial. *See id.* at 902. He also wondered what "makes an uninformed waiver of a fourth amendment right fair, while the uninformed waiver of a trial right is unfair." *Id.*

In William R. Sage, Note, *Criminal Procedure—Standards for Valid Consent to Search*, 52 N.C. L. REV. 644 (1974), the author addressed the issues of consent and waiver and then examined the two policy considerations that go along with these issues: the policy of permitting citizens to choose whether or not they wish to exercise their constitutional right, and the policy of preventing coercion. *See id.* The author believed that waiver best addressed both of these considerations and that consent was the safeguard against coercion. *See id.*

Recent Development, *Criminal Procedure—Search and Seizures—Fourth Amendment Held Not to Require That One Giving Permission for a Consent Search Be Informed That He Has the Right to Withhold His Consent*, *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), 7 IND. L. REV. 592 (1974), criticized the disparity between the rights that protect the truth finding procedure and the rights that protect personal liberties. *See id.* This article also contended that the Court's assumption that requiring police to give warnings would be too great of a burden to police work was erroneous and then pointed to the fact that the FBI had been doing it for years. *See id.* at 597.

In William Mehlhaf, Recent Decision, *A Valid Consent to Search Does Not Require Knowledge of the Constitutionally Protected Right to Refuse—Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), 9 GONZ. L. REV. 845 (1974), the author attacked the *Schneckloth* decision and argued that the "the Fourth and Fifth Amendments run almost into each other" in their protections against state intrusions. *Id.* at 855 (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)). The author suggested that a standard like that in *Miranda* be employed to do away with the notion that consent is not a waiver of a constitutional right. *See id.* at 857.

Case Comment, *Constitutional Law—Search and Seizure—Validity of Consent to Pre-Arrest Search to be Determined by Total Circumstances Test*, 4 MEMPHIS ST. L. REV. 162 (1973), suggested that the Court's decision would lead to fishing expeditions on the part of the police because most people will not be aware that they can refuse such a search. *See id.* at 165.

The authors of *The Supreme Court, 1972 Term—Search and Seizure*, 87 HARV. L. REV. 196 (1973), felt that the lack of knowledge element was basically useless because of the virtual impossibility of obtaining reliable evidence of what was going on in a subject's mind at the time consent was sought. *See id.* at 220-21.

135. 446 U.S. 544 (1980).

136. *See id.* at 547-48.

137. *Id.* at 548.

began to question her.¹³⁸ In the midst of the questioning, the officers finally identified themselves as federal narcotic agents.¹³⁹ According to the officers, Mendenhall's behavior fit the so-called "drug courier profile."¹⁴⁰ The agents noted several factors that led them to this conclusion:

(1) the respondent was arriving on a flight from Los Angeles, a city believed by the agents to be the place of origin for much of the heroin brought to Detroit; (2) the respondent was the last person to leave the plane, "appeared to be very nervous," and "completely scanned the whole area where [the agents] were standing"; (3) after leaving the plane the respondent proceeded past the baggage area without claiming any luggage; and (4) the respondent changed airlines for her flight out of Detroit.¹⁴¹

"The [district] court concluded that the agents' conduct in initially approaching the respondent and asking to see her ticket and identification was a permissible investigative stop under the standards of *Terry v. Ohio* . . ." ¹⁴² The Court, however, believed that it should still analyze whether there was a violation of the Fourth Amendment "when she went from the concourse to the DEA office."¹⁴³ Noting that the question of whether consent was "voluntary or was the product of duress or coercion, express or implied, is to be determined by the totality of all the circumstances,"¹⁴⁴ the Court found that "the totality of the evidence in this case was plainly adequate to support the District Court's finding that the respondent voluntarily consented to accompany the officers to the DEA office."¹⁴⁵

Chief Justice Burger and Justice Blackman joined a concurring opinion by Justice Powell wherein he believed that the stop of Mendenhall did not constitute a seizure at all.¹⁴⁶ He wrote that "courts need not ignore the considerable expertise that law enforcement officials have gained from their special training and experience."¹⁴⁷ In a dissenting opinion, Justice White, who was joined by Justices Brennan, Marshall, and Stevens, rejected the majority's "voluntary consent" analysis.¹⁴⁸ He concluded that none of Mendenhall's conduct, "alone or in combination, [was] sufficient to provide reasonable suspicion that she was engaged in criminal activity."¹⁴⁹

138. *See id.*

139. *See id.*

140. *Id.*

141. *Id.* at 548 n.1.

142. *Id.* at 549.

143. *Id.* at 557.

144. *Id.* (citing *Schneekloth v. Bustamonte*, 412 U.S. 218, 227 (1973)).

145. *Id.* at 558.

146. *See id.* at 560 (Powell, J., concurring).

147. *Id.* at 566.

148. *See id.* (White, J., dissenting).

149. *Id.* at 572.

The Court's suggestion that no Fourth Amendment interest possessed by Ms. Mendenhall was implicated because she consented to go to the DEA office is inconsistent with *Dunaway* and unsupported in the record. There was no evidence in the record to support the District Court's speculation, made before *Dunaway* was decided, that Ms. Mendenhall accompanied "Agent Anderson to the airport DEA Office 'voluntarily in a spirit of apparent cooperation with the [agent's] investigation.' Ms. Mendenhall did not testify at the suppression hearing and the officers presented no testimony concerning what she said, if anything, when informed that the officers wanted her to come with them to the DEA office. Indeed, the only testimony concerning what occurred between Agent Anderson's "request" and Ms. Mendenhall's arrival at the DEA office is the agent's testimony that if Ms. Mendenhall had wanted to leave at that point she would have been forcibly restrained.¹⁵⁰

Three years later, the Supreme Court heightened the confusion over its consent doctrine when it decided *Florida v. Royer*.¹⁵¹ In yet another airport case, the Court invalidated a stop and search on Fourth Amendment grounds.¹⁵² With facts shockingly similar to those in *Mendenhall*, the Court held that Royer "was being illegally detained at the time of his alleged consent to search his luggage."¹⁵³ In a plurality opinion¹⁵⁴ announced by Justice White, the Court outlined the facts preceding the search:

On January 3, 1978, Royer was observed at Miami International Airport by two plainclothes detectives of the Dade County, Fla., Public Safety Department assigned to the county's Organized Crime Bureau, Narcotics Investigation Section. Detectives Johnson and Magdalena believed that Royer's appearance, mannerisms, luggage, and actions fit the so-called "drug courier profile." Royer, apparently unaware of the attention he had attracted, purchased a one-way ticket to New York City and checked his two suitcases, placing on each suitcase an identification tag bearing the name "Holt" and the destination, "La Guardia." As Royer made his way to the concourse which led to the airline boarding area, the two detectives approached him, identified themselves as policemen working out of the sheriff's office, and asked if Royer had a "moment" to speak with them; Royer said "Yes."

Upon request, but without oral consent, Royer produced for the detectives his airline ticket and his driver's license. The airline ticket, like the baggage identification tags, bore the name "Holt," while the driver's license carried respondent's correct name, "Royer." When the detectives asked about the discrepancy, Royer explained that a friend had made the reservation in the name of "Holt." Royer became noticeably more nervous during this conversation, whereupon the detectives informed Royer that they were in fact narcotic investigators and that they had reason to suspect him of transporting narcotics.

The detectives did not return his airline ticket and identification but asked Royer to accompany them to a room, approximately 40 feet away, adjacent to the concourse. Royer said nothing in response but went with the officers as he had been asked to do. The room was later described by Detective Johnson as a "large storage closet," located in the stewardesses' lounge and containing a

150. *Id.* at 575-76 (citations omitted).

151. 460 U.S. 491 (1983).

152. *See id.* at 492.

153. *Id.* at 501.

154. A plurality opinion results when the Court cannot agree on the reasoning for a decision, but a majority agrees with the result.

small desk and two chairs. Without Royer's consent or agreement, Detective Johnson, using Royer's baggage check stubs, retrieved the "Holt" luggage from the airline and brought it to the room where respondent and Detective Magdalena were waiting. Royer was asked if he would consent to a search of the suitcases. Without orally responding to this request, Royer produced a key and unlocked one of the suitcases, which one detective then opened without seeking further assent from Royer. Marihuana was found in that suitcase.¹⁵⁵

Justice White reasoned that the process of taking Royer from the airport concourse to a more private area was the root of the constitutional violation.¹⁵⁶

In his concurring opinion, Justice Powell relied on the Court's decision in *Mendenhall*.¹⁵⁷ Noting that he was the author of one of the opinions in that case, he felt a need to repeat his statement that "the public has a compelling interest in identifying by all lawful means those who traffic in illicit drugs for personal profit."¹⁵⁸ Nevertheless, he felt that the search in present case was invalid. In support of his belief, he stated that the present case was strikingly different from *Mendenhall* in that Royer was not free to walk away.¹⁵⁹

In a more detailed concurring opinion, Justice Brennan believed there was no need to reach the question of whether the initial stop was valid, for even if it was, the officers' subsequent actions were clearly illegal.¹⁶⁰ However, he noted that he did not believe that the initial stop was legal.¹⁶¹ "It is simply wrong to suggest that a traveler feels free to walk away when he has been approached by individuals who have identified themselves as police officers and asked for, and received, his airline ticket and driver's license."¹⁶²

Justice Blackmun dissented, arguing that "the police conduct in this case was minimally intrusive."¹⁶³ He stated that "[t]he special need for flexibility in uncovering illicit drug couriers is hardly debatable."¹⁶⁴ In another dissent, Justice Rehnquist, who was joined by Chief Justice Burger and Justice O'Connor, argued that the search was valid because it was "reasonable" as that term is used in the Fourth Amendment.¹⁶⁵ Also relying on *Mendenhall*, his opinion suggested that Royer was not coerced.¹⁶⁶ He argued that "[a]bsent any evidence of objective indicia of coercion, and even absent any claim of

155. *Id.* at 493-94 (footnotes omitted).

156. *See id.* at 505.

157. *See id.* at 508 (Powell, J., concurring).

158. *Id.*

159. *See id.* at 509.

160. *See id.* (Brennan, J., concurring).

161. *See id.* at 511-12.

162. *Id.* at 512.

163. *Id.* at 513 (Blackmun, J., dissenting).

164. *Id.* at 519.

165. *See id.* at 520 (Rehnquist, J., dissenting).

166. *See id.* at 532.

such indicia by Royer, the size of the room itself does not transform a voluntary consent to search into a coerced consent."¹⁶⁷

The *Royer* formulation, which placed emphasis on the coercive police conduct that involved the failure of the police officers to inform Royer of their intentions, is the desirable approach. The *Mendenhall* approach, however, which built on *Schneckloth's* flawed reasoning that minimized actual proof of consent, is the more logical approach. Unfortunately, the Supreme Court was only able to embrace a more accountable consent standard in a plurality opinion. In the consent jurisprudence of the Rehnquist Court that related to search and seizure matters, the logic of *Schneckloth* and *Mendenhall* ultimately became the standard for evaluating the adequacy of consent. Thus, since the law would rarely deny police the fruit of their aggressive investigations, the scales were tipped in their favor and they were thereby encouraged to press hard to obtain consent even though their conduct may well have been coercive to the average citizen. The Supreme Court's lukewarm regard for protecting citizens from aggressive police efforts to obtain consent to search during routine investigations created a severe accountability vacuum that encouraged police abuse.

V. PERCEPTION ACCOUNTABILITY: OF RACE AND MEN

No discussion of modern search and seizure jurisprudence would be complete without examining the role racial considerations play in law enforcement.¹⁶⁸ In many ways, the discussion is often considered repetitive and trite because so many voices speak on the subject.¹⁶⁹ This nation's inability to make progress on the issue of racial discrimination in law enforcement may be what leads us to constantly revisit the discussion. At least two inescapable questions emerge from an examination of the impact of discrimination. First, does law enforcement systematically use racial considerations improperly in enforcing

167. *Id.*

168. The Supreme Court has rarely given the question of race much weight in shaping its jurisprudence. One insightful scholar wrote that "social science data reflect[s] [that] the court has underestimated the extent to which racial factors affected an individual officer's perceptions, memory, and reporting, transforming what may be innocent behavior into indicia of criminality and the basis for a search or seizure." Anthony C. Thompson, *Stopping the Usual Suspects: Race and the Fourth Amendment*, 74 N.Y.U. L. Rev. 956, 1012 (1999).

169. See, e.g., Harris, *supra* note 20, at 558.

the law?¹⁷⁰ Second, are there any tools that can reduce discrimination in police search and seizure activities?¹⁷¹

The first of these questions is easier to answer than the second. At the outset, one should note that the Supreme Court has long grappled with the pervasive problem of racial discrimination in law enforcement and has acknowledged that it "remains a fact of life[] in the administration of justice."¹⁷² Racial bias on the part of police has been a primary concern in minority communities for a long time.¹⁷³ Considering that affluent communities often praise vigorous police enforcement against strangers in their neighborhoods;¹⁷⁴ that crime control repeatedly tops the list of major public concerns, particularly among the middle and upper class;¹⁷⁵ that political rhetoric on the issue of tough law enforcement has launched and sustained political careers;¹⁷⁶ and that the public is focused on attaining safe streets, schools, and work places, the criminal justice community has done a surprisingly poor job of removing the specter of racial discrimination from the equations used in the development of effective law enforce-

170. The United States imprisons African-American men at a rate six times that of white men. African-Americans are incarcerated at a rate of 1,947 per 100,000 African-American citizens compared to a rate of 306 per 100,000 for white citizens. African-American males make up less than 7 percent of the U.S. population, yet they comprise almost half of the prison and jail population. In 1992, 56 percent of all African-American men aged 18 to 35 in Baltimore were under some form of criminal justice supervision on any given day. In the District of Columbia, the figure was 42 percent. One out of every three African-American men between the ages of 20 and 29 in the entire country—including suburban and rural areas—was under some form of criminal justice supervision in 1994.

THE REAL WAR ON CRIME: THE REPORT OF THE NATIONAL CRIMINAL JUSTICE COMMISSION 102 (Steven R. Donziger ed., 1996).

171. Civil suits and the exclusionary rule have been questioned with regard to their effectiveness in curbing police abuses. "Pattern and practice suits against police departments, unfortunately, are very difficult to win." Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 798 (1993).
172. *Rose v. Mitchell*, 443 U.S. 545, 558 (1979).
173. See Thompson, *supra* note 39.
174. See generally *Koledner v. Lawson* 461 U.S. 352 (1983) (involving the constitutionality of a California statute that made it illegal for a person to loiter or wander around and then refuse to identify himself when requested to do so by the police).
175. As one commentator has explained, "the hated criminals whose rights the politicians refuse to countenance are the violent murderers, terrorists, and drug dealers who inspire fear and hatred in suburban voters whose status as 'swing voters' in the modern electoral calculus invites tough-on-crime posturing from both political parties." Scott Moss, *An Appeal By Any Other Name: Congress's Empty Victory Over Habeas Rights*, 32 HARV. C.R.-C.L. L. REV. 249, 249-50 (1996).
176. Aggressive zero tolerance policing policies have raised tensions in minority communities.

ment tools.¹⁷⁷ Indeed, the perception that discrimination is rampant may well be stronger now than at any time since the end of Jim Crow¹⁷⁸ and the modern civil rights era.¹⁷⁹

The use of race in police conduct has taken center stage as America enters the twenty-first century. Recently, African American automobile drivers have become the focus of national attention.¹⁸⁰ A recent Florida case is typical. Aaron Campbell, an African American Dade County Police Major, was stopped on the Florida Turnpike.¹⁸¹ Campbell alleged that he was a victim of racial stereotyping when he was cursed and grabbed by the arresting officer.¹⁸² He was charged with and acquitted of battery, but was convicted of two minor misdemeanor counts.¹⁸³ The trial judge ruled that Campbell was the victim of an illegal racial profile that Florida officers used to detain drug suspects.¹⁸⁴ The officers denied racism, but critics of the incident believed that the only crime Campbell committed was driving while Black.¹⁸⁵

The story is typical, with the minority detainee accusing the officer of racism and the officer denying any such claim. The reality of what took place gets neatly locked away in the heads of the participants and is rarely accessible to a judge or jury.¹⁸⁶ However, the frequency of

177. See generally Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?, 26 VAL. U. L. REV. 243 (1991).

178. Jim Crow describes the period of time when the segregation of minorities was legally mandated. See C. VAN WOODWARD, THE STRANGE CAREER OF JIM CROW (3d rev. ed. 1974).

179. The tensions between minorities and police have not diminished despite recent gains in civil rights. Events like the New York police shooting of a black man 41 times during a street encounter suggest that the racial issues are still present. As famed writer and lawyer Scott Turow recently commented, "I find it hard to imagine the police shooting 41 times at a white man in a middle-class area standing peaceably in his doorway." Scott Turow, *You Think You Know Why the Diallo Cops Were Acquitted. Think Again.* WASH. POST, Mar. 5, 2000, at B1.

180. See DAVID HARRIS, AMERICAN CIVIL LIBERTIES UNION, DRIVING WHILE BLACK: RACIAL PROFILING ON OUR NATION'S HIGHWAYS (1999).

181. See Debbie Salamone, *Miami Cop Found Guilty but Only on Lesser Charge*, ORLANDO SENTINEL, Apr. 4, 1998, at A1.

182. See *id.*

183. See *id.*

184. See *id.* Some commentators have strongly suggested that "African-American men have become fair game for police harassment whenever they travel in public, be it by plane, car, bus, train, or foot. . . . '[C]onsent' and 'free-to-leave' doctrines prove unworkable given the racially abusive history between police and minorities." Erika L. Johnson, "A Menace to Society": The Use of Criminal Profiles and its Effects on Black Males, 38 HOW. L.J. 629, 663 (1995).

185. See Salamone, *supra* note 181, at A1.

186. Perhaps changing the burden of proof will help adjust for the potential, subconscious, racial bias in the decision making process of a suppression hearing. Even the most well regarded jurists have acknowledged that the judicial process is

the allegations of racism should give us pause before we so easily dismiss the possibility of a systemic problem of discriminatory conduct.¹⁸⁷

Studies have been conducted that examine race as a factor in police decision-making. One such study focused on the reasons for and the results of police encounters with citizens.¹⁸⁸ Highlights from the study indicate that Hispanics and African Americans are about seventy percent more likely to come in contact with police than whites.¹⁸⁹ Other studies have strongly suggested that police single out minority motorists.¹⁹⁰

often subject to the subconscious forces operating within the various actors in the legal system. Justice Benjamin Cardozo once wrote:

I have spoken of the forces of which judges avowedly avail to shape the form and content of their judgments. Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. . . . Deep below consciousness are other forces, the likes and the dislikes, the predictions and the prejudices, the complex of instincts and emotions and habits and convictions, which make the man, whether he be litigant or judge.

BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167 (1921).

187. Those who are not regularly subject to the effects of racism often dismiss the problem. Thus, the suggestion that we live in a colorblind society is an illusion. One writer has commented that

[i]n lieu of scientific research [dismissing discrimination,] we are offered speculation and conjecture, self-congratulatory theories from whites who have never been forced to confront the racial stereotypes routinely encountered by blacks, and who – judging themselves decent people, and judging most of their acquaintances decent as well – find it impossible to believe that serious discrimination still exists.

ELLIS COSE, *THE RAGE OF A PRIVILEGED CLASS* 3 (1993).

Direct police bias has been historically documented in this country. For example, one report noted:

Almost all police officers firmly believe that they do treat citizens alike, regardless of race or color. Nevertheless, policemen are human beings and like everyone else they have opinions and prejudices. "Police officers often fail to realize that their prejudices make impartiality impossible. Believing, as many do, that 'Negroes have criminal tendencies' leads to unconscious discrimination."—*Attorney General's representative, Richmond.*

A high ranking peace officer in California once stated in an official report that Mexicans had a "biological disregard for the value of life," that they had an "inborn desire to kill or at least let blood." Negroes, also, he said, had this same hereditary blood lust, while Filipinos were biologically disposed to crimes of violence, especially over women.

JOHN R. SNIBBE & HOMA M. SNIBBE, *THE URBAN POLICEMAN IN TRANSITION: A PSYCHOLOGICAL AND SOCIOLOGICAL REVIEW* 308 (1973).

188. See Lawrence A. Greenfield et al., *Police Use of Force Collection of National Data*, U.S. Department of Justice Bureau of Justice Statistics Paper No. NCJ-165040 (Nov. 1997), available at <<http://www.ojp.usdoj.gov/pub/bjs/ascii/puof.txt>> (last visited May 3, 1998).
189. See *id.*
190. See Sean Hecker, *Race and Pretextual Traffic Stops: An Expanded Role for Civilian Review Boards*, 28 COLUM. HUM. RTS. L. REV. 551, 558-65 (1997).

When race is used as a factor in traffic stops, the problems with police usually intensify because more invasive searches often follow. The practice of using race as a factor in making vehicle stops has led to the phrase “driving while Black.”¹⁹¹ This phrase describes the phenomenon of stopping Blacks without proper cause, performing what often becomes an invasive search,¹⁹² and then releasing them without charging them for violating any traffic laws.¹⁹³ In order to cope with the problem, African American drivers have developed “survival techniques” to avoid being pulled over by police.¹⁹⁴

Pro-law enforcement trends have emerged in the country;¹⁹⁵ however, these trends have been questioned. Studies have determined that police often use discretionary police stops to investigate crime for which they would otherwise lack reasonable, articulable suspicion.¹⁹⁶ The typical law enforcement approach is to stop a vehicle under the pretext of a traffic violation and then conduct a plain view search of the vehicle.¹⁹⁷ The empirical evidence in one study was taken from Florida and revealed that eighty-two percent of all vehicles searched after stops were those of Black or Hispanic drivers.¹⁹⁸ Similarly, a report released in 1999 by The American Civil Liberties Union, which suggests that local police often discriminate when they search for evidence by targeting minorities, has also raised concerns.¹⁹⁹ This report²⁰⁰ cites statistics that show that during a recent nine-month

191. *See id.* at 551.

192. *See id.*

193. *See id.* at 551-52.

194. *See id.* at 552. Examples of “survival techniques” include renting a bland vehicle instead of a flashy one, strictly obeying speed limits, and avoiding driving a vehicle with tinted windows. *See id.*

195. The need to control rising crime over the last two decades has resulted in greater deference to law enforcement.

196. *See Hecher, supra* note 90.

197. *See id.* at 558-59.

198. *See id.* at 560.

199. *See HARRIS, supra* note 180.

200. Progressive attorneys and organizations like the ACLU have often advanced unpopular causes.

The role of progressive lawyers is not only to engage in crucial defensive practices – liberal practice vis-à-vis the courts – but also to preserve, recast and build on the traces and residues of past conflicts coded in laws. This latter activity is guided by a deep historical sensibility that not only deconstructs the contradictory character of past and present legal decisions, or demystifies the power relations operative in such decisions; it also concocts empowering and enabling narratives that cast light on how these decisions constitute the kind of society in which we live, and how people resist and try to transform it. Progressive lawyers can be politically engaged narrators who tell analytically illuminating stories about how the law has impeded or impelled struggles for justice and freedom. Like rap artists of the best sort, progressive lawyers can reach out to a demoralized citizenry, to energize them with insights about the historical origins and present causes of social misery in light of

period, nearly seventy-three percent of the drivers searched during routine traffic stops on I-95 north of Baltimore were Black.²⁰¹

Earlier this year, New Jersey Governor Christine Todd Whitman dismissed her Chief of Troopers after he defended racial profiling stating that “mostly minorities” trafficked in marijuana and cocaine.²⁰² At the time, New Jersey, like Maryland and a host of other states, was being sued for racial profiling abuses.²⁰³ The discrimination problem has also been noticed at the federal level. Currently, Representative John Conyers²⁰⁴ is sponsoring a bill that would require the Attorney General to collect data, including the race of the drivers stopped and other information about any searches performed by police, in pursuit of curbing discrimination.²⁰⁵

Critics of profiling have not been limited to the liberal organizations. Representative Henry Hyde²⁰⁶ has been on a mission to control the conduct of local police in the area of asset forfeiture, which is the process by which police seize private property from those merely suspected of committing crime. In his book on the subject, Representative Hyde said that “he was struck by the fact that so many minorities are being victimized by forfeiture abuses — stopped for matching drug courier profiles of the most stereotypical kind”²⁰⁷ — and described that practice as “devastatingly destructive.”²⁰⁸ We will not be able to develop accountability solutions that take racial considerations into account without nationally recognizing that police discrimination, be it conscious or subconscious,²⁰⁹ has a profound effect on the perception

visions, analyses and practices to change the world. Lawyers can perform this role more easily than others due to the prestige and authority of the law in American society. Progressive lawyers can seize this opportunity to highlight the internal contradictions and the blatant hypocrisy of much of the law in the name of the very ideals—fairness, protection, formal equality—heralded by the legal system.

CORNEL WEST, KEEPING FAITH: PHILOSOPHY AND RACE IN AMERICA 242 (1993).

201. See HARRIS, *supra* note 180.

202. New Jersey’s state police have recently come under fire for racial profiling. Police superintendent Colonel Carl Williams was fined by then Governor Whitman after being quoted as saying, “cocaine and marijuana traffickers were most likely to be members of minority groups.” Lisa Walter, Comment, *Eradicating Racial Stereotyping from Terry Stops: The Case for an Equal Protection Exclusionary Rule*, 71 U. COLO. L. REV. 255, 260 (2000).

203. See HARRIS, *supra* note 180.

204. Congressman John Conyers is a liberal representative from Michigan.

205. See *Traffic Stops Statistics Study Act of 2000*, H.R. 1443, 106th Cong. (2000).

206. Congressman Hyde is a well known conservative legislator who has been involved in limiting government abuse in seizing assets.

207. HENRY HYDE, *FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE?* 43 (1995).

208. *Id.* at 44.

209. See COSE, *supra* note 187.

of the fairness of law enforcement.²¹⁰ In order for communities to fashion effective legislative solutions, the majority community has to perceive that racial discrimination is a real and not imagined problem.²¹¹ To once again simply acknowledge that discrimination is a problem and fail to do anything to solve it would be pointless.²¹²

VI. ACCOUNTABILITY SOLUTIONS

The Warren Court's attempts to secure rights for the accused through well intentioned opinions often resulted in opinions that were difficult to justify under traditional scholarly analysis²¹³ and that were often crafted in a way that subjected them to attack.²¹⁴ Nevertheless, the shortcomings advanced by the critics regarding the Court's approach to constitutional decision-making should also recognize that the goal of government accountability in criminal prosecu-

210. The only way to reduce potential elements of racism is to make police more accountable to the rule of law across the board. One thoughtful observer has noted:

Often, the patterns of harassment were more than isolated incidents of sidewalk justice dispensed by rogue cops. In fact, they reflected a widespread pattern of police abuses rooted in departmental policies. In some cases, police departments created roving task forces that swooped down on high-crime neighborhoods and conducted indiscriminate street stops and searches.

David Cole, *Unequal Justice*, BALT. SUN, May 16, 1999, at C1.

211. See A. LEON HIGGINBOTHAM, JR., *SHADES OF FREEDOM: RACIAL POLITICS AND PRESUMPTIONS OF THE AMERICAN LEGAL PROCESS* (1996).

212. Some scholars have forcefully argued that the greatest potential for discrimination occurs when these racial factors emerge. "Accordingly, in a contest between whites and blacks, the Law presumptively protects whites. In a conflict between relative harms between whites and blacks, the Law punishes blacks more severely when they offend whites." Reginald Leamon Robinson, *Race, Myth and Narrative in the Social Construction of the Black Self*, 40 *HOW. L.J.* 1, 85 (1996).

213. See generally Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959) (advancing the proposition that the Warren Court did not rely on neutral principles in its constitutional adjudication). The so-called neutral principles concept rests on the notion that it will make constitution decision-making more predictable. The very demand for strict adherence to neutral principles has been criticized from its inception. See Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 *U. CHI. L. REV.* 661 (1960).

214. A primary motivation for the defendant-oriented decisions of the Warren Court was the concern that rules of law would create an unreasonable risk to the safety of police.

Officers on the street confronting potentially armed and dangerous suspects are required to make a "quick decision" as to how to protect themselves. To subject their measurement of what is needed to protect themselves to post hoc second guessing to scrutinize whether they engaged in the least intrusive means of effecting the goal of the intrusion places an unrealistic and dangerous burden on police.

Thomas K. Clancy, *Protective Searches, Pat-Downs, or Frisks?: The Scope of the Permissible Intrusion to Ascertain if a Detained Person is Armed*, 82 *MARQ. L. REV.* 491, 517 (1999).

tions is the primary focus of a large portion of the Bill of Rights.²¹⁵ They should also take into account the fact that our country has a history of largely ignoring the rights of the poor, oppressed, and those in the minority, even after express language was written in the Constitution to protect them.²¹⁶

The only way to reconcile such a dilemma is to identify the principles that support accountability and adherence to the textual constitutional rights,²¹⁷ then reinforce judicial doctrines, legislation, and policies that encourage clear compliance with those fundamental constitutional commands.²¹⁸ Thus, penalizing police by excluding illegally seized evidence may be warranted if violations of clear search or interrogation requirements are established. Unfortunately, the Supreme Court's more recent jurisprudence pays little attention to the accountability principles inherent in the Warren Court's jurisprudence.²¹⁹ The consequence of deconstructing those opinions while ignoring the accountability principles they embrace is a perception that the Supreme Court is abandoning its constitutional role as the structural guardian of the criminal adjudication process.²²⁰

215. The Fourth, Fifth, and Sixth Amendments of the Bill of Rights are primarily concerned with matters of criminal procedure.

216. See *Wong Sun v. United States*, 371 U.S. 471 (1962).

217. See U.S. CONST. amend. IV.

218. If the central task of the administration of criminal law is to balance the conflicting principles of order and of legality, the dilemma is epitomized in the question of police discretion. Whether one sees legality as being undermined for the sake of order, or vice versa, the issue reduces to whether there ought to be a loosening or a tightening of restraints on the decisional latitude of police. The issue has recently been given increasing attention by legal scholars concerned primarily with how much discretion police ought to have and how this discretion may be controlled. All conclude that criminal law enforcement can be substantially improved by introducing arrangements to heighten the visibility of police discretion to permit its control by higher authority.

JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL* 71 (2d ed. 1975).

219. Critiques suggesting that the Warren Court jurisprudence solely embraces a policy-oriented approach to criminal justice issues are somewhat misguided.

However, courts that at one time make wise policies may at another time make foolish ones; judges who are initially benevolent may in time become despotic. The fundamental safeguard in the American political process against such misfortunes lies in the fragmentation of the policymaking and policy-executing processes. The courts cannot impose their will single handedly upon the nation. They succeeded in imposing the Warren decisions because those policies represented the conscience and latent policy preferences of a large segment of the population. Opponents could not successfully mobilize the agencies of representative government against those policies.

HERBERT JACOB, *JUSTICE IN AMERICA: COURTS, LAWYERS, AND THE JUDICIAL PROCESS* 256-57 (4th ed. 1984).

220. In *Miranda*, the Warren Court attempted to build a protective structure around the important constitutional rights for the accused in order to give those provisions meaning. See generally Yale Kamisar, *Confessions, Search and Seizure and*

In the short run, little can be done about the turn the Court has taken away from the Warren Court's embrace of accountability principles. Too much time has passed and too many cases have been decided that have chipped away at the fabric of the Warren Court's primary opinions that applied the criminal procedure concepts of the Bill of Rights to the states.²²¹ Even a sudden change in the Court's makeup would be unlikely to result in accountability principles that would affect a broad range of cases in the way that *Miranda*²²² controlled police behavior. The Supreme Court simply does not reach enough controversies to restore the accountability principles that have been lost or overshadowed by the sometimes methodical process by which the unfavorable, "liberal" results of many Warren Court decisions have been eroded.²²³

Perhaps the Warren Court overplayed its hand in expanding Due Process concepts without carefully crafting its opinions in a narrow manner that would have made them more resistant to long term attack.²²⁴ In that regard, its decisions may be as much to blame for the lack of stability in constitutional adjudication as the more conservative forces that did not like what they believed to be a result oriented approach.²²⁵ That intellectual battle, however, is no excuse for leaving the citizens of this country with little guidance on what rules the police and prosecution must follow as they bring suspected offenders to justice.²²⁶ The confusion in the law creates an incentive for officers

the Rehnquist Court, 34 TULSA L.J. 465, 471 (1999)(stating that "a prophylactic rule is not a dirty word" and that such rules are sometimes "necessary and proper").

221. For an early examination of the incorporation principle, see Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).
222. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 554-55 (Kermit L. Hall et al. eds., 1992).
223. See generally Paul G. Cassell, *All Benefits, No Costs: The Grand Illusion of Miranda's Defenders*, 90 NW. U. L. REV. 1084 (1996)(weighing the costs and benefits of the *Miranda* decision).
224. See Joseph D. Grano, *Miranda v. Arizona and the Legal Mind: Formalism's Triumph Over Substance and Reason*, 24 AM. CRIM. L. REV. 243 (1987).
225. See *id.*
226. The problem with leaving prosecutors and police without guidance becomes clear when one considers the consequences of a twenty-four year-old officer exercising great discretion without adequate training.

Some police forces use legal technicalities to selectively stop and search cars. The Tunicum, Pennsylvania police department from 1989 to 1992 routinely stopped blacks and Hispanics driving through or near the town on the pretext of a motor vehicle code provision that prohibits cars from having rabbit's feet, dice, or air freshners hanging on the rearview mirror. . . .

JAMES BOVARD, *LOST RIGHTS: THE DESTRUCTION OF AMERICAN LIBERTY* 230 (1994).

to push the limits since the Supreme Court is clearly becoming less likely to sanction them²²⁷ through the suppression of evidence.

The only alternative may be to resort to locally heightened and sanctioned police review. This will require citizens to carefully consider policies and approaches that may be used to monitor the actions of local police. The reliance on judicial controls has proven to be a mistake because such reliance is inefficient.²²⁸ That is not to say that sound jurisprudence that protects the rights of the accused is still not required, it simply cannot be relied on as the primary tool for enforcing police accountability.²²⁹

Recently, the problem of police abuse during the questioning and searching of suspects has received considerable attention.²³⁰ Such misconduct has led to various procedures, such as the implementation of civilian review boards to investigate and make recommendations as to what to do about the problem.²³¹ However, one civil liberties organization that recently investigated police conduct in New York City concluded that “[f]rom its inception New York’s all-civilian review board has been implemented in a manner that virtually ensured it would not provide the oversight called for in the City Charter . . . [because the agency] has been significantly understaffed and under funded.”²³² One of the problems was the inability of the review board to fully investigate police misconduct complaints.²³³ Such a failure to provide

227. See Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 32 (1995)(criticizing post-Warren Courts for balancing away too much of the Fourth Amendment’s protection).

228. When courts fail to enforce rights, the absence of legislative action results in a void.

229. The nature of legal appeals makes the police response to the slow results virtually meaningless.

230. The news media has published many instances of allegations of police abuse. See Katheryn K. Russell, “Driving While Black:” *Corollary Phenomena and Collateral Consequences*, 40 B.C. L. REV. 717 (1999)(collecting many popular press accounts of racial discrimination and abuse by police in encounters with minorities).

231. Some recent efforts to implement civilian review boards have been successful.

Insofar as community-based policing mitigates the unreliability of police intuition in community criminal law-deployment, it may foster state-community exchange and dialogue . . . Not only do civilian review boards serve a symbolic function of demonstrating state interest in racial equity and tolerance, the assistance or the prosecution in instituting community policing promises community through group connection and mercy.

Anthony V. Alfieri, *Prosecuting Violence/Reconstructing Community*, 52 STAN. L. REV. 809, 827-28 (2000). See Benjamin B. Tucker, *How Do We Reduce Crime and Preserve Human Decency? The Role of Leadership in Policing for a Democratic Society*, 28 FORDHAM URB. L.J. 601, 615 (2000)(noting police community tensions as the basis for poor police community relations).

232. NYCLU, *supra* note 75.

233. The report stated the following:

[T]he CCRB has failed to conduct complete investigations into the overwhelming majority of police misconduct complaints received. In its five

rapid enforcement of sanctions against errant police officers will lead to disrespect for the accountability procedures.²³⁴

One insightful recommendation to improve police accountability is to establish a separate legal unit to prosecute citizen review board complaints.²³⁵ The system of internal police review is said to be suspect if it "does not give civilian complaints a fair hearing."²³⁶

As one judicial expert has observed: If an investigating body cannot conduct its own prosecutions, the entire process will suffer from a lack of accountability. . . . If the [CCRB's] attorneys knew while they were investigating a complaint that they would ultimately have to present evidence at a disciplinary hearing, their investigations would probably be more thorough, and their judgments on what was provable would be more reliable. In short, there would be far more accountability.²³⁷

An independent review process may also have the advantage of leading to more meaningful disciplinary action for police officers who are the subject of substantiated complaints. "The overwhelming majority of substantiated police misconduct complaints referred to the police department result in no disciplinary action. . . . In the unlikely event a police officer is disciplined, the punishment is typically light — loss of a few vacation days."²³⁸

I believe that aggressive action is needed at the state²³⁹ level to not only ensure that police will be held accountable for their actions,

years of operation the CCRB has received approximately 25,800 complaints. Of the 24,300 complaints disposed of by the CCRB, only about 36 percent have been fully investigated. Of the 8,700 complaints that have received a full investigation, 60 percent have resulted in a record insufficient to support a finding. In other words, only about one in seven complaint investigations have resulted in a finding based on the merits.

Id. The fact that police complaints are not promptly processed likely contributes to the problem of law enforcement accountability.

234. "A weak civilian review agency emboldens police officers with a propensity to abuse their power, and gives false assurance to civilians who file a complaint of police misconduct with the expectation justice will be done." *Id.*

235. *See id.*

236. *Id.* Elected public officials have expressed the idea that good police/community relations begin with the attitude of police toward minority citizens. The former Mayor of Detroit, Coleman Young, expressed that view in his autobiography. He wrote, "For nearly twenty years, I had emphasized a firm but respectful style of law enforcement. I had campaigned on that issue and fought over it with the veteran cops. The police department's attitude adjustment had been the first priority of my first term" COLEMAN YOUNG & LONNIE WHEELER, *HARDSTUFF: THE AUTOBIOGRAPHY OF COLEMAN YOUNG* 321 (1994).

237. *NYCLU, supra* note 75.

238. *Id.*

239. One course of action would be to enact state statutes that place limitations on police discretion and provide for financial compensation when police make mistakes. "[G]rowing numbers of law enforcement agencies have been morally and sometimes criminally deformed by their dependence on drug war financing. In Paducah, Kentucky, the lawless operations of one agency . . . came to light when the discovery of almost \$66,000 secreted in its headquarters provoked an official

but also to restore predictability to at least the basic confusion the Court created during its philosophical battle²⁴⁰ over its supervisory role in the criminal justice system. As I have already discussed, the burden of proof can be used as a tool to enforce accountability,²⁴¹ and has in fact been a basic tool in maintaining responsibility in legal doctrines.²⁴² In the weighing and balancing of justice, the allocation of evidentiary burdens is the principle means by which judicial structures are given meaningful guidance. Ultimately, the burden of proof determines who must push the pile, move the load, or tip the legal scale.²⁴³ Placing the burden of proof on the prosecution will permit judges to reject searches made by police when they are skeptical of an officer's basis for the search but are not prepared to declare him a liar.²⁴⁴

Changes to the burden of proof also offer the advantage of providing a "structural adjustment"²⁴⁵ to the system. That is, once the fundamental changes in the allocation of responsibility take place, subjective factors, like the subconscious motives of police when they conduct a search, will have a more limited effect on the outcome.²⁴⁶ Police departments will find it advantageous to develop procedures,²⁴⁷ forms,²⁴⁸ and training²⁴⁹ to support the searches they conduct on citi-

inquiry and a major scandal." Eric Blumenson & Eva Nilsen, *The Drug War's Hidden Economic Agenda*, THE NATION, Mar. 9, 1998, at 15.

240. See PRESIDENT'S TASK FORCE ON VICTIMS OF CRIME, *supra* note 66.

241. Concerns regarding the burden of proof touch all phases of a criminal case. Its allocation on issues other than the ultimate verdict may be critical. As one insightful observer has noted, a defendant generally will not benefit from going forward first, at any phase of a criminal trial, because police will "conform their testimony." See ANTHONY AMSTERDAM, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES § 252 (5th ed. 1988).

242. The Supreme Court has held that in establishing the voluntariness of a confession, the prosecution need not satisfy the burden beyond a reasonable doubt. See *Lego v. Twomey*, 404 U.S. 477, 486-87 (1972).

243. See Stephen A. Saltzburg, *Standards of Proof and Preliminary Questions of Fact*, 27 STAN. L. REV. 271 (1975) (arguing that burden of proof standards help to protect against the Justices' practice of giving weight to unreliable confessions).

244. In a contest of integrity, the defendant usually loses. See DONALD A. DRIPPS, POLICE, PLUS PERJURY EQUALS POLYGRAPH, 86 J. CRIM. L. & CRIMINOLOGY 693, 696 (1996) (pointing out that a judge has difficulty spotting perjury since he must "decide cases one at a time, so the police almost always win the swearing contest" between the officer and the defendant).

245. Structures for police review should be adopted.

246. Knowing that the higher standard exists, police will be more careful.

247. Giving police the first opportunity to correct the problems will likely have the greatest long-term effect.

248. Forms establish a recorded written record, which establishes accountability. Some states have already begun the process of collecting information. "Without admitting wrongdoing, several police departments across the country have agreed to start collecting racial data on who is stopped and why." Florangela Davila, *ACLU Ads to Spotlight 'Racial Profiling' Issue*, SEATTLE TIMES, Apr. 20, 2000, at B5.

zens. This will lead to more properly justified searches, and thus to greater confidence in police integrity.²⁵⁰

The Supreme Court's consent decisions have permitted the police to exercise too much inadequately controlled discretion²⁵¹ during street level confrontations with suspected offenders.²⁵² No case is likely to come along that would permit the Court to clarify the utter absence of standards and constitutional guidance its cases have created.²⁵³ Thus, state and perhaps federal legislation should be developed to supply the necessary guidance.²⁵⁴ I propose laws that would require the prosecution to show by clear and convincing evidence that a confession or consent to a warrantless search was properly obtained before the fruits of the search or the confession could be introduced into evidence.²⁵⁵ This standard would discourage the fabrication of a factual basis for searches that were pretextual from their inception.²⁵⁶ Indeed, much of the rationale for this principle can be identified in the

249. The training of police is the key to ensuring that they understand what is expected of them. Many police agree that more training is needed: "[t]hey described training as inadequate, particularly in the use of force." Editorial, *Misperceptions Feed Zero-Tolerance Scare*, BALT. SUN, Apr. 9, 2000, at 2C.

250. Police integrity has been compromised by citizen conflict in recent years.

251. Without adequate structural guidance, police are simply overwhelmed with the basics of doing their job, which affects the efficiency with which they exercise their discretion.

Neglect has permeated every aspect of the police function and left law enforcement unable to provide its essential services effectively. Jurisdiction, organization, definition of service, personnel and performance are all inadequate to present needs. The fragmentation of police jurisdictions alone makes excellence impossible and effectiveness limited. The nation has a crazy-quilt pattern of 40,000 police jurisdictions

RAMSEY CLARK, *CRIME IN AMERICA: OBSERVATION ON ITS NATURE, CAUSES, PREVENTION AND CONTROL* 132 (1970).

252. One attorney advised that citizens have no good reason to comply with police in a street level encounter.

The best policy is to refuse the search request. Even if you think you have nothing to hide, the best policy is to still say no. Why? Allowing the police to search you, especially while traveling, only opens you up to any number of problems: if a yes is given, then you have no defense if any contraband is discovered. This is advisable because you may not even be aware of what exactly constitutes contraband.

Walter L. Gordon III, *Button Your Lip!*, CODE, Jan. 2000, at 48.

253. Since changing constitutional law requires litigants in actual cases to present their cases in court, making policy changes through court action is not as responsive as direct legislative action. Courts simply cannot remedy even their own erroneous judgments very easily.

254. See HYDE, *supra* note 207, at 55-56.

255. See *id.* at 59.

256. It has long been recognized that police officers often exercise a great deal of discretion at the street level that is unseen by their supervisors. See Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice*, 69 YALE L.J. 543, 552-53 (1960). Thus, there is a potential for police to substitute pretextual reasons for the truth.

*United States v. Leon*²⁵⁷ and *Illinois v. Gates*²⁵⁸ good faith exception doctrine, which gives heightened protection to searches that were supported by warrants because of the accountability exercised by an officer who seeks a magistrate's guidance before intruding on an individual's privacy.²⁵⁹

Some states have rejected the good faith exception.²⁶⁰ Nevertheless, the idea of giving the police flexibility only when they have respected the accountability principle is a sound structural concept because it would encourage officers to rely on the accountability principle in order to obtain the benefit of the more forgiving search and seizure standard.²⁶¹ Thus, the good faith exception would put police on fair notice that going too far would lead to the exclusion and suppression of illegally obtained evidence if they decide to ignore available accountability principles and opt for a risk laden approach that is not reviewable.²⁶² As a result, society should expect police to blame themselves for making decisions that result in a sanction.²⁶³ Ironically, this principle operates in much the same way as the prophylactic approach taken by the Supreme Court in *Miranda* to clarify the boundaries of proper police conduct.²⁶⁴

Another solution involves the aggressive implementation of a community based, police accountability strategy that would place more police review in the hands of local citizens.²⁶⁵ Sometimes known as "community policing,"²⁶⁶ this strategy would reinforce the notion that the police work for the community, not the other way around. Placing more local control in the hands of citizens is also consistent with the emerging trend toward federalism as a philosophical approach to law enforcement issues.²⁶⁷ Nevertheless, whatever merit there may be in

257. 468 U.S. 897 (1984).

258. 462 U.S. 213 (1983).

259. *See id.* at 236-37.

260. *See generally* Ronald K. L. Collins & David M. Skover, *The Future of Liberal Legal Scholarship*, 87 MICH. L. REV. 189, 217 (1988)(reporting 450 cases in which a state recognized rights that were not available under the federal constitution).

261. The constitutional doctrine should require more structural justification for warrantless searches.

262. When search cases are virtually impossible to review, police will have little structural fear of abusing their discretion.

263. Police work for the citizens, not the other way around.

264. *See* Kamisar, *supra* note 220.

265. Citizen review provides vital community input that enables the police to resolve problems within the department before they get out of hand.

266. *See generally* JEROME SKOLNICK & DAVID BAYLEY, *THE NEW BLUE LINE: POLICE INNOVATION IN SIX AMERICAN CITIES* (1986)(providing an overview of community policing).

267. However, turning to local governments for total control of the quality of law enforcement is unwise because "[w]hile combating crime under our system of federalism is primarily a state and local responsibility, there are violations of law that the federal government is uniquely able to counter." GRIFFIN B. BELL, *TAKING*

the supervision of police at the federal level,²⁶⁸ dishonest and excessive police conduct most directly affects the citizens of the community.²⁶⁹ This strategy shows particular promise in areas with large minority populations. Perhaps making law enforcement officials live in the communities they serve would be a valuable first step in such efforts.²⁷⁰

Finally, passing local laws that protect and enhance traditional search and seizure rights is essential to the future of police accountability.²⁷¹ Each citizen has a stake in the protection of personal liberty. Even though crime control is important, most people who have been unfairly targeted by police or wrongfully or mistakenly detained understand the value of personal liberty.²⁷² Despite the value of personal liberty, people rarely succeed in lawsuits against police for search and seizure violations²⁷³ because the legal rules in place make obtaining judgments against individual police officers virtually impossible.²⁷⁴ Thus, lawsuits are a poor vehicle for enforcing civil liberties.²⁷⁵ That is not to say that proper lawsuits against police and their supervising departments and cities should not be continued.²⁷⁶ Such legal actions, however, fall far short of the type of day-to-day accountability that local legislatures can effectively tailor by fashioning statutes that require record keeping,²⁷⁷ police training on

CARE OF THE LAW 156 (1982)(describing policies in place while serving as Attorney General under President Carter).

268. See *Civil Asset Forfeiture Reform Act*, H.R. 1965, 105th Cong. (1997).

269. As Professor Tracey Maclin has insightfully noted:

One need not accept that perjury is a pervasive problem in every police department to recognize that perjury (or the potential for perjury) may play a central role in how pretextual traffic stops are carried out. When narcotics officers and their supervisors admit to stopping as many cars as possible under the guise of traffic stops to investigate drug trafficking, the possibilities and temptation to lie about a motorist driving skills are manifest.

Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 381 (1998).

270. One of my third year students suggested that the best way to ensure that police have contact with the community and respect its citizens would be to require police officers to live in the very community they would regularly patrol.

271. Some federal laws have offered a potential remedy for federal officials' illegal searches.

272. See ALDERMAN & KENNEDY, *supra* note 25.

273. See, e.g., NYCLU, *supra* note 75.

274. Civil immunity insulates individual officers from lawsuits. See Derek W. Meineche, Note, *Assessment of Conduct During High-Speed Chases in State Tort Liability Cases: The Effects of Piser v. City of Ann Arbor and Rogers v. City of Detroit*, 46 WAYNE L. REV. 325 (2000) (discussing generally the problems of obtaining civil judgments against police officers).

275. Various immunity statutes make lawsuits difficult to sustain.

276. Appropriate lawsuits should still be pursued.

277. Record keeping of search and seizure is a vital accountability tool. One innovative bill recently proposed in Maryland could require the following:

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- (D) Each time a law enforcement officer makes a traffic stop, that officer shall report the following information to the law enforcement agency that employs the officer using the form developed under subsection (B)(1) of this section:
- (1) The date, location, and the time of the stop;
 - (2) The approximate duration of the stop;
 - (3) The traffic violation or violations alleged to have been committed that led to the stop;
 - (4) Whether a search was conducted as a result of the stop;
 - (5) If a search was conducted, the reason for the search, whether the search was consensual or nonconsensual, whether the person was searched, and whether the person's property was searched;
 - (6) Whether any contraband or other property was seized in the course of the search;
 - (7) Whether a warning, safety equipment repair order, or citation was issued as a result of the stop;
 - (8) If a warning, safety equipment repair order, or citation was issued, the basis for issuing the warning, safety equipment repair order, or citation;
 - (9) Whether an arrest was made as a result of either the stop or the search;
 - (10) If an arrest was made, the crime charged;
 - (11) The state in which the stopped vehicle is registered;
 - (12) The gender of the driver;
 - (13) The date of birth of the driver;
 - (14) The state and, if available on the driver's license, the county of residence of the driver; and
 - (15) The race or ethnicity of the driver as:
 - (I) Asian;
 - (II) Black;
 - (III) Hispanic;
 - (IV) White; or
 - (V) Other
- (E) (1) A Law enforcement agency shall:
- (I) Compile the data described in subsection (D) of this section for the calendar year as a report in the format required under subsection (B)(3) of this section; and
 - (II) Submit the report to the Maryland Justice Analysis Center no later than March 1 of the following calendar year.
- (2) A law enforcement agency that is exempt under subsection (C)(2) of this section shall submit to the Maryland Justice Analysis Center copies of reports it submits to the United States Department of Justice in lieu of the report required under paragraph (1) of this subsection.
- (F) (1) The Maryland Justice Analysis Center shall analyze the annual reports of law enforcement agencies submitted under subsection (E) of this section based on a methodology developed in consultation with the Police Training Commission.
- (2) The Maryland Justice Analysis Center shall submit a report of the findings to the governor, the general assembly as provided in § 2-1246 of the state government article, and each law enforcement agency before September 1 of each year.
- (G) (1) A law enforcement agency shall adopt a policy against race-based traffic stops that is to be used as a management tool to promote nondiscriminatory law enforcement and in the training and counseling of its officers.

citizen intervention,²⁷⁸ and standardized procedures for citizen

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- (2) The policy shall prohibit the practice of using an individual's race or ethnicity as the sole justification to initiate a traffic stop. However, the policy shall make clear that it may not be construed to alter the authority of a law enforcement officer to make an arrest, conduct a search or seizure, or otherwise fulfill the officer's law enforcement obligations.
 - (3) The policy shall provide for the law enforcement agency to periodically review data collected by its officers under subsection (D) of this section and to review the annual report of the Maryland Justice Analysis Center for purposes of paragraph (1) of this subsection.
 - (H) (1) If a law enforcement agency fails to comply with the reporting provisions of this section, the Maryland Justice Analysis Center shall report the noncompliance to the Police Training Commission.
 - (2) The Police Training Commission shall contact the law enforcement agency and request that the agency comply with the required reporting provisions.
 - (3) If the law enforcement agency fails to comply with the required reporting provisions within 30 days after being contacted by the Police Training Commission, the Maryland Justice Analysis Center and the Police Training Commission jointly shall report the noncompliance to the governor and the Legislative Policy Committee of the general assembly.

H.R. 225, 2000 Leg., Reg. Sess. (Md. 2000).

278. Sensitivity training should be a vital part of police preparation. Some scholars have criticized sensitivity training as being an unproven technique. Nevertheless, better training for men on the force is always recommended. There can be little doubt that the training now received is sometimes perfunctory. But even assuming lengthy pre-service training, "human relations" is inevitably the part of the curriculum that has the least direct effect on the policemen. The procedures to follow during an arrest or in the application of first aid, and even the proper use of weapons, can be taught by lecture and demonstration, but the management of personal relations in tense situations is not so easily taught.

The officers I interviewed universally testified that training-room discussions of minority groups and police-community relations have little impact, and that the impressions they do produce quickly evaporate when the officer goes on the street and first encounters hostile or suspicious behavior. The officer may remember what he is *not* supposed to do ("don't address blacks with a racially insulting name such as 'boy'"), but he has precious little guidance as to what he *should* do when confronted by a serious verbal challenge to his authority.

If conventional training methods are of little value in this area, is it possible to develop unconventional, more intensive techniques that will effect a more profound change in the attitude of the officer? Some departments have experimented with "sensitivity training" designed to produce heightened self-awareness and even significant personality changes. Such methods are based on group discussions, which are stimulated but not directed by a training leader, in which the participants criticize one another and reexamine themselves in prolonged and often emotional sessions. Sometimes only police officers participate in such sessions; in other experiments, police and community residents participate together. One of the chief purposes of sensitivity training is to change the participants' orientation toward authority and the exercise of authority so that they will engage in cooperative problem solving, rather than struggle to win superiority or maintain personal autonomy. Unfortunately, the effects of such training (actu-

questioning.²⁷⁹

With respect to police record keeping, I advance a serious cautionary note. Any police procedure for recording arrest information that might detect racial discrimination or other forms of illegal conduct should be balanced to protect the fair evaluation of street level police officers.²⁸⁰ Accordingly, I would confine access to such records to those involved in internal review processes designed to improve police performance.²⁸¹ Such records might ultimately alert police supervisors to a racist or crime prone officer. However, no police discipline should automatically attend the basic record keeping and review process.²⁸² Furthermore, such records should not be generally discoverable by defense lawyers²⁸³ or plaintiffs' lawyers.²⁸⁴ Although these advocates would still be granted traditional constitutional²⁸⁵ access as well as access under the procedural discovery rules,²⁸⁶ my proposal is not designed to give wide access to this law enforcement data. It is primarily a tool for self-enforcement, not for generating time wasting litigation.²⁸⁷

To prevent unnecessary access to this information, I propose a procedure in which a special judge or master²⁸⁸ would be appointed to supervise the disclosure of police arrest records so that material regarding the officer's work performance would not be the subject of random challenge in every criminal case.²⁸⁹ Where the information generates a legitimate issue of racial discrimination or illegality, how-

ally, reeducation) methods on organizational behavior generally have not been carefully studied; in particular, the effects on police organization and behavior have scarcely been studied at all. See JAMES Q. WILSON, THINKING ABOUT CRIME 106 (1983).

279. Some writers have suggested that all police interrogations should be videotaped. See Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 Nw. U. L. REV. 387, 499 (1996)(citing research that endorses the use of videotape confessions).
280. Officers should be offered some protection so there is no chilling effect as they do their job.
281. Many state constitutions have provisions that require their bill of rights to be interpreted in a manner consistent with the United States Constitution. See, e.g., FLA. CONST. art. I, § 12.
282. Police supervisors should get the first opportunity to analyze the data and to improve police performance.
283. Due Process may require that the material be available to defense attorneys in order to preserve the Sixth Amendment right to present a defense.
284. Civil law suits may sometimes follow illegal search cases.
285. See *Brady v. Maryland*, 373 U.S. 83 (1963).
286. See FED. R. CRIM. P. 16(d)(discussing protective orders).
287. One chief complaint of litigation discovery is that it often wastes valuable court time and resources.
288. Special masters have been used successfully in many procedural contexts to resolve issues confined to specific points of law.
289. The use of an impartial judge to evaluate discovery disputes would be an efficient way to quickly determine what access to police records would be appropriate.

ever, access to some of the collected arrest records should be permitted.²⁹⁰ Local legislatures could easily adopt similar procedures that could be used in civil litigation as well.²⁹¹

The protection of the arrest records would be designed to reinforce the idea that police supervisors are the first and best line of accountability for wayward police performance.²⁹² Moreover, a police department would want to be the first to know that it has a "bad apple"²⁹³ in its midst. Balance is the key; record-keeping procedures should be fair and effective for all concerned.²⁹⁴

VII. CONCLUSION

Blaming the Supreme Court exclusively for the lack of clarity in controls over police conduct during searches and seizures would be unfair.²⁹⁵ Years of waiting on Court decisions to adjust law enforcement priorities have contributed to layer after layer of uncertainty. The rhetoric over the war on drugs²⁹⁶ and philosophical squabbling over conservative²⁹⁷ or liberal²⁹⁸ approaches to Court rulings like *Mi-*

290. See *supra* note 287.

291. Any rule that would limit access to police arrest records in the criminal context should also be applied to civil discovery.

292. Proper police supervision should involve warning officers who have a record of complaints and who demonstrate a propensity for improper citizen contact. See BURRIS & WHITNEY, *supra* note 33, at 218.

293. Some commentators have written about an unwritten code of silence among police that makes discovering some forms of improper conduct difficult. See generally Gabriel J. Chin & Scott C. Wells, *The "Blue Wall of Silence" As Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998)(discussing the problem of police perjury).

294. Police are generally thought to be underpaid considering the risks inherent in their job.

295. The absence of meaningful attention to search and seizure laws at the state level has equally left citizens subject to potentially harmful police discretion.

296. Commentators have noted the following:

The Nixon Administration officially declared the "War on Drugs" twenty-five years ago. It has continued, at escalating levels, ever since. Today we annually spend \$15 billion in federal funds and \$33 billion in state and local funds to finance this war . . . however, the Drug War has been an extraordinary failure. Drugs are more available—at higher purity and lower prices—than they were at the start of the decade.

Eric Blumenson & Eva Nilsen, *Policing Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 36-37 (1998)(footnotes omitted); see also Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987)(noting that police budgets have become heavily linked to drug enforcement).

297. Professor Ronald Dworkin insightfully describes the categorization in this way:

Popular imagination sorts justices into camps according to the answers they are thought to give to questions like these. It deems some justices "liberal" and others "conservative" and on the whole seems to prefer the latter. The ground of this distinction, however, is famously elusive, and one familiar reading has contributed to the lamentable character of the

*randa*²⁹⁹ and concepts like the exclusionary rule³⁰⁰ have diverted our focus from the true issue, which is how we should monitor the day-to-day conduct of police who possess enormous power and exercise extraordinary discretion over the lives of citizens.³⁰¹

public debate. People say that conservative justices obey the Constitution while liberal ones try to reform it according to their personal convictions. We know the fallacy in that description. It ignores the interpretive character of law. Justices who are called liberal and those who are called conservative agree about which words make up the Constitution as a matter of preinterpretive text. They disagree about what the Constitution is as a matter of postinterpretive law, about what standards it deploys for testing official acts. Each kind of justice tries to enforce the Constitution as law, according to his interpretative judgment of what it is, and each kind thinks the other is subverting the true Constitution. So it is useless as well as unfair to classify justices according to the degree of their fidelity to their oath.

RONALD DWORKIN, *LAW'S EMPIRE* 357-58 (1986).

298. The labeling of the different approaches to criminal justice issues as "liberal" or "conservative" will continue unavoidably because the media and politicians have grown familiar with these general expressions of ideology. However, those of us who believe that Chief Justice Warren's opinions, and the decisions of the Courts he led, on criminal justice issues were at least a step in the right direction point to the values his opinions were attempting to advance.

Warren's mission . . . was to suppress behavior that he found obnoxious or repressive from his perspective of deep commitment to the freedoms inherent in American citizenship. The Constitution was one source of Warren's perspective, but there were others: his instincts about what was fair and just, his humanitarian premises, his outrage at brutal or immoral acts.

G. EDWARD WHITE, *THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES* 365 (1976).

299. Any notion that *Miranda* was not consistent with constitutional values should be rejected as too narrow a limitation on constitutional power. "All *Miranda* did was to conform conduct to the mandates of the Bill of Rights. The most important function of the court was to give the language of the constitution meaning in the context of contemporary events, and that it did in *Miranda*." *Id.*; see *supra* note 82 and accompanying text.

300. As Professor Lawrence Tribe reminds us:

As Sophocles said, nobody has a more sacred obligation to obey the law than those who make and enforce it.

This so-called exclusionary rule has often been criticized for valuing the rights of criminals above those of law-abiding citizens. But those who wrote the Constitution's limitations on how suspects may be pursued obviously knew that taking those limits seriously — that is, obeying them rather than flouting them — would necessarily prevent some guilty people from being apprehended and convicted. The exclusionary rule simply makes that result more dramatic and visible than might some other rules — rules that successfully prevent illegal searches from occurring in the first place. But whatever its price, the exclusionary rule plainly protects the liberties of all of us.

LAURENCE H. TRIBE, *GOD SAVE THIS HONORABLE COURT* 8 (1985).

301. See Gregory Howard Williams, *Police Discretion: The Institutional Dilemma — Who Is in Charge?*, 68 *IOWA L. REV.* 431, 437 (1983) ("There is little assurance that policy established by the Supreme Court will be implemented by patrol officers.")

With grave concerns about police abuse, particularly in the area of racial discrimination, a legislative consensus to increase the burden of proof³⁰² necessary to establish the validity of consent searches³⁰³ and to make police more accountable to their communities by improving police record keeping, training, and sensitivity will serve the law enforcement interests of all citizens.³⁰⁴ Developing approaches that affect the structural accountability of the search and seizure process is the only way we can eliminate the uncertainty about the search and seizure rules that govern our free society.

302. Consistent with the principles of *Johnson v. Zerbst*, 304 U.S. 458 (1938), “an intentional relinquishment or abandonment of a known right or privilege” should be jealously protected. *Id.* at 464. Requiring that the validity of consent searches that were performed in the absence of a signed consent form be proved by clear and convincing evidence advances those values.

303. The decision to waive the constitutional right not to consent to a search should be “voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.” *Moran v. Burbine*, 475 U.S. 412, 421 (1986).

304. “The preservation of freedom requires a positive and continuing commitment. Specifically the maintenance of the United States as a free society confronts the American people with an immediate responsibility in two areas in particular: civil rights and civil liberties.” ARTHUR M. SCHLESINGER, JR., *THE VITAL CENTER: THE POLITICS OF FREEDOM* 189 (1949).