It is asserted, with only random empirical support, that legal doctrines carefully built, which fit mortise and tenon to the structure of our law and the history of our people, will survive long and serve well. Those speedily built and ill fit must soon decay and, becoming unusable, will be abandoned.\(^1\) The quality of the work of the Supreme Court during the 1968 Term in the area of criminal procedure betokens yet another example of jerry-building. The pomp offered by instant commentators to mark the end of the Warren Court took no notice of this potential debris. The activist approach of the Warren Court toward criminal procedure had been quietly overtaken by events.

One objective has dominated the work of the Warren Court in the area of criminal procedure: to fashion a constitutional code that will effect basic constitutional values in both state and federal courts. In the two great cases of the criminal due process revolution, *Mapp v. Ohio\(^2\)* and *Miranda v. Arizona\(^3\)*, the Court emphasized the need for effective enforcement of constitutional rights. In *Mapp* the Court extended the Fourth Amendment's exclusionary rule to the

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\(^3\) 384 U.S. 436 (1966).
states for the reason it was applied in the federal courts. Without the exclusionary rule "the assurance against unreasonable... searches and seizures would be 'a form of words,' valueless and undeserving of mention in a perpetual charter of inestimable human liberties. ... [T]he purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'"\(^4\) In *Miranda*, the Court fashioned its fourfold warning procedure for in-custody interrogation as a safeguard against the inherently coercive nature of interrogation and to give suspects full opportunity to exercise the privilege against self-incrimination.\(^5\) Nor have the Court's decisions been directed solely at the police. The Court has also created a new guarantee of access to appellate and post-conviction remedies designed to force the trial courts to adhere more closely to the commands of the Constitution.\(^6\)

In the 1968 Term the Court continued to expand its control over the police and the trial courts. Increasingly the Court is designing its code of procedure on the premise that the officers of the criminal justice system—policeman, lawyer, and judge—cannot be trusted to respect the Constitution. This premise—which may concede the Court's own lack of power, since its authority must ultimately rest on the respect accorded to the Court as a constitutional institution—leads to procedures that make compliance in good faith, by responsible officers, increasingly demanding. At the same time the complexity and difficulty of the task of formulating a procedural code on a case-by-case basis is undermining the ability of the Court effectively to declare a coherent body of law capable of guiding the operation of the criminal process. The Court's distrust of the inferior agencies of criminal law has led it to invalidate codes of criminal procedure other than its own. But after powerful assertions of authority in *Mapp* and *Miranda*, the Court has itself been unable to articulate and enforce an operable and coherent code of criminal procedure. This has followed not so much from the public outcry against the Court's decisions as from inherent limitations of the


\(^5\) 384 U.S. at 457–58, 467.

\(^6\) The leading cases are Douglas v. California, 372 U.S. 353 (1963), holding that an indigent has a right to be represented by counsel on appeal on the same conditions that a non-indigent appellant might hire counsel, and Fay v. Noia, 372 U.S. 391 (1963), expanding the availability of federal habeas corpus.
judicial institution to perform the task. The Court has been unable
to innovate processes to carry out the responsibility it has assumed.
The result is an unsatisfactory division of responsibility between
the Supreme Court and the other courts of the land.

The casual reader of the opinions of the 1968 Term will not be
alerted to the Court's difficulties in the area of criminal procedure.
The opinions read bravely in a business-as-usual way. But careful
examination shows that the Court is in retreat from implementation
of its system of constitutional criminal procedure.

I. Control of the Police

When the Court extended the Fourth Amendment exclusionary rule to the states in *Mapp*, its rationale was the need to deter
police from making unconstitutional searches and seizures. The con-
ceptual structure of this deterrence mechanism is simple. If the
police fail to comply with the Constitution in making searches, the
courts “punish” them by refusing to admit the seized items into
evidence. In fact, the exclusionary rule has led to a more compli-
cated interaction between the Court, the Constitution, and the
police.

First, it is not clear what type of law enforcement officer will
be affected by this deterrence mechanism. The target of the deter-
rence rule appears to be the basically honest policeman who desires
to obtain legal convictions. The exclusionary rule provides a rem-
edy for his errors in judgment or zeal. But if one assumes that the
real problem is dishonest police who have no qualms about vio-
lating the Constitution in order to deal with crime, the deterrent
force of the rule is dissipated. Police can conduct illegal searches
for the purpose of harassment or to obtain information without
seeking prosecution. Searches can be made without the knowledge
of the suspect and the information obtained used to provide leads
to other evidence. Only procedures that force the police to divulge
the complete background of their evidence can make the exclusion-
ary rule effective in this situation. The Court, in dealing with the
procedures surrounding the administration of the Fourth Amend-
ment, has not yet confronted the issue whether it is fashioning a
device to deal with the good-faith policeman who errs or one to
keep dishonest policemen in line. Increasingly, however, the Court
seems to be assuming that it is dealing with the second problem, a
concept of the function of the exclusionary rule that carries within it the seeds of its own failure.

Second, the exclusionary rule has not only made the police more directly subject to the Constitution; it has also taken the Court into the business of police administration. In the process, demands of administrative reasonableness have begun to make significant inroads on formerly rigid constitutional prohibitions. The exclusionary rule has had an effect not only on the police but on the Court and the Constitution as well.

In *Spinelli v. United States*, the Court was concerned with the warrant procedure under the Fourth Amendment. The Court has long accorded the warrant procedure a central place in its scheme of administration of the Fourth Amendment. *Chimel v. California*—the bright spot in the Court's criminal procedure work this Term—overruled *United States v. Rabinowitz* and limited the scope of warrantless search incident to an arrest. In *Chimel*, the Court quoted at length from an earlier decision:

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. . . . And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.

The issue in *Spinelli* was whether the affidavit submitted to the commissioner issuing the warrant was sufficient to support a finding by the commissioner of probable cause. The Court reversed the court of appeals and held five to three, with Mr. Justice White writing a separate, enigmatic, concurring opinion, that the affidavit was insufficient. The affidavit, signed by an agent of the FBI, was detailed but worded in a stilted and technical way. In substance it alleged that the FBI had observed the defendant driving into St. Louis, Mis-

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11 393 U.S. at 423.
souri, on five different days, that on four of those days Spinelli had gone to a particular apartment building about 4:00 p.m., and one of those days he was seen entering a particular apartment. An informer, said to be known by the agent to be reliable but otherwise unidentified, had informed the FBI that Spinelli was carrying on bookmaking operations at telephone numbers WY 4-0029 and WY 4-0136. A check with the telephone company revealed that there were two phones in the apartment, listed in the name of Grace P. Hagen, with these same numbers.

The opinion of the Court, written by Mr. Justice Harlan, was cautious, focusing largely on the specific factual statements of the affidavit. The problem for the Court was to reconcile two lines of cases. One line stressed the problem of relying on unverified information from unidentified informants. How can a magistrate make an objective determination of probable cause if he knows nothing about the informer and how his information was obtained? No such information was contained in the Spinelli affidavit. Another line of cases acknowledged this problem but emphasized that information, insufficient in and of itself, could be adequate if officers found that it checked out with other information about the defendant. Did not the fact that Spinelli was making daily trips to an apartment, not his home, where phones with the very numbers provided by the informer were installed, verify the informant’s information?

The affidavit in Spinelli suffers from curious omissions. Where did Spinelli live? Did he have any employment or regular activity in St. Louis? Who is Grace P. Hagen? Was she the lessee of the apartment Spinelli visited each day? If there was an owner other than Spinelli, did he live there? Why didn’t the officers call the number and place a bet? In addition, the affidavit contained a statement that “William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers.” This statement bothered the Court. In another context, the Court observed that “it is especially important that the tip describe

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14 393 U.S. at 422.
the accused’s criminal activity in sufficient detail so that the magistrate may know he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual’s general reputation.”

"[T]he allegation that Spinelli was ‘known’ to the affiant and to other federal and local law enforcement officers as a gambler and an associate of gamblers,” said the Court, “is but a bald and unilluminating assertion of suspicion that is entitled to no weight in appraising the magistrate’s decision.”

Although the Court’s opinion is less than clear, the heart of the decision seems to be that the informer’s tip cannot be afforded any credibility unless details of the tip and the information in the affidavit about the informer and how he obtained his information entitle the tip to credibility without regard to whether the tip is corroborated by further investigation:

[T]he standards enunciated in Aguilar [holding that an affidavit setting forth undetailed conclusions based on “reliable information from a credible person” was insufficient] must inform the magistrate’s decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass Aguilar’s tests without independent corroboration?

The clarity of this holding is muddied by the fact that the Court distinguished but did not overrule cases which appear to hold the opposite. But why did the Court follow this line of reasoning?

The Court explained its position in terms of the need for the magistrate to make an independent factual determination. But this seems unpersuasive. Should not a fact-finder consider the evidence as a whole and doesn’t the identity of the informer’s telephone numbers and the actual telephone numbers add force to the tip? More important, the Court’s frequent language about the objective, detached magistrate has no correspondence to reality. In fact, warrants are for the most part issued routinely by magistrates in a mechanical fashion, and the first real exploration of the probable cause issue

16 Id. at 414.  
17 Id. at 415.

18 The perfunctory role of the magistrate in the issuance of a search warrant has been documented by the American Bar Foundation in three states: Kansas, Michigan, and Wisconsin. LaFave, Arrest: The Decision to Take a Suspect into Custody 30–36 (1965); Miller & Tiffany, Prosecutor Dominance of the Warrant Deci-
comes when the search is challenged at trial. In the context of a motion to suppress, the affidavit serves two important functions. First, it has pinned the government down at an early stage to specific allegations so that the facts cannot be altered to fit the results of the search. Second, it acts as a discovery device, giving the defense some information about the way in which the government built its case. But if "reliable information from a credible person" can be used to build the chain of inference on which a finding of probable cause is based, the defense is denied any such information. To illustrate by means of a hypothetical in the context of the Spinelli case. Suppose that the FBI, suspecting that Spinelli was a bookmaker, followed him and found that he was visiting a particular apartment each day. The FBI wondered what was going on there, so it put a tap on the phones in the apartment. From the tap the agents learned that Spinelli was carrying on a bookmaking operation. Unfortunately, however, the tap was illegal under § 605 of the Federal Communications Act, and a warrant based on such a tap would be illegal as a fruit of the tap. So, instead of stating that the information that Spinelli was accepting wagers and disseminating wagering information on the two telephones came from a tap, the agent swore that it came from "a confidential reliable informant." This of course need not even be untrue, since the "confidential reliable informant" may be the FBI agent who listened to the tap—confidential because further information about him would reveal the existence of the illegal tap.

The Court did not say that this was the rationale for its decision.


21 For a similar situation see United States v. Pearce, 275 F. 2d 318 (7th Cir. 1960), where "confidential information from a source which in the past has proven reliable" was received from the affiant's superior.
This is understandable, since the explicit statement of such a rationale would require the Court to spell out an unproved suspicion that agents of the FBI were intentionally dishonest. In a suggestive passage, however, the Court observed:

The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source received his information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable.

On the facts of Spinelli the need for disclosure is a more persuasive rationale for the decision than the need for an independent, objective determination of probable cause.

The rationale proffered for the Spinelli decision raises serious questions. If the Court believes that agents are willing to mislead the courts as to the source of their information, why shouldn’t those same agents be willing to go further and fabricate more details about the informer? Perhaps this is a line some wouldn’t cross, since the statement in the Spinelli affidavit might be rationalized as a “white lie” while an entirely fabricated story would be a bald lie. But it is hard to believe that a person who is willing to sign a misleading affidavit would be affected by such nice distinctions. If Spinelli forces such agents to fabricate at greater length, what is gained? Because the Court has held that the defense is not entitled to the name of the informant, it will be difficult to attack such stories. Perhaps in a few cases the fabrication will be inconsistent with other facts in the case, and the exposure of the inconsistency will throw doubt on the whole affidavit. But in the process, how many common-sense affidavits of honest policemen will fall afoul the technicalities of Spinelli?

The Court touched on the problem of enforcing the exclusionary rule more dramatically in Alderman v. United States, decided together with Ivanov v. United States and Butenko v. United States. In these cases the solicitor general conceded that the defendants' conversations had been monitored illegally. The defendants argued

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22 393 U.S. at 416.


that they were entitled to see the transcripts of the illegally monitored conversations to ascertain whether any of the Government's evidence against them was a fruit of the illegal surveillance. The Government argued that the transcripts should first be turned over to the trial judge for in camera inspection, and only if he found them "arguably relevant" should they be given to the defendants. The Court rejected the Government's procedure, emphasizing the importance of adversary procedure in a matter of such factual complexity. Mr. Justice White, writing for the Court, said:26

Adversary proceedings are a major aspect of our system of criminal justice. Their superiority as a means for attaining justice in a given case is nowhere more evidenced than in those cases, such as the ones at bar, where an issue must be decided on the basis of a large volume of factual materials, and after consideration of the many and subtle interrelationships which may exist among the facts reflected by these records...

Adversary proceedings will not magically eliminate all error, but they will substantially reduce its incidence by guarding against the possibility that the trial judge, through lack of time of unfamiliarity with the information contained in and suggested by the materials, will be unable to provide the scrutiny which the Fourth Amendment exclusionary rule demands.

The apparent clarity of the opinion, however, was obscured by a footnote in which the Court seemed to reject the solicitor general's concession that the surveillance had been illegal. "In all three cases," said the Court, "the District Court must develop the relevant facts and decide if the Government's electronic surveillance was unlawful."26 But the discussion in the opinion on the procedure to be followed was apparently directed to the situation where the illegality of the surveillance was clear. What procedure was to be followed on the equally important question of the legality of the surveillance?

The Court spoke briefly to this problem two weeks later in Giordano v. United States27 a per curiam opinion remanding a large number of cases in which allegations of illegal surveillance had been made by defendants for disposition in light of Alderman. Quoting Alderman, the Court said:28

26 Id. at 183–84.  
28 Id. at 312–13. (Emphasis added.)
"[T]he District Court must develop the relevant facts and decide if the Government's electronic surveillance was unlawful." Of course, a finding by the District Court that the surveillance was lawful would make disclosure and further proceedings unnecessary.

Mr. Justice Stewart, in a concurring opinion, offered an interpretation of Alderman without objection from the majority. "We did not in Alderman . . . and we do not today, specify the procedure that the District Courts are to follow in making this preliminary determination [of legality]. We have nowhere indicated that this determination cannot approximately be made in ex parte, in camera proceedings." And in his own footnote Mr. Justice Stewart practically urged the Government to argue that the surveillance in all the cases was legal. And lest anyone think that the virtues of adversary proceedings praised so highly in Alderman would require such a procedure on the issue of legality, he added:

One might suppose that all of this should be entirely clear to any careful reader of the Court's opinion in Alderman, Butenko, and Ivanov. Perhaps so, and perhaps, therefore, what I have said is quite unnecessary. But 10 years of experience here have taught me that the most carefully written opinions are not always carefully read—even by those most directly concerned.

The Court's failure to provide any guidelines for the procedure to be followed on the surveillance issue was a serious abdication of judicial responsibility. The issue was bound to be raised, at the Court's own invitation, in the proceedings below. Surely the Court should have given some indication of how to proceed.

29 Id. at 313–14.

30 Id. at 313–14 n. 1: "In oral argument of the Butenko and Ivanov cases, the Solicitor General, mystifyingly, sought to concede that the surveillances there were in fact unconstitutional, although he was repeatedly invited to argue that they were not. . . . In deciding those cases [including Alderman?], the Court declined to accept the Solicitor General's proffered concession."

31 Id. at 315.

32 The grant of certiorari in Ivanov and Butenko was limited to the procedural questions "on the assumption that there was electronic surveillance of petitioner or a codefendant which violated the Fourth Amendment." 392 U.S. at 924. By rejecting the concession of illegality, the Court itself breached the limits of its grant of certiorari. The limited grant can, therefore, hardly justify the Court's failure to address the problem.
Does the government have a duty to disclose illegal surveillance? Does it have to disclose the facts surrounding legal surveillance? Arguably illegal surveillance? Can the Department of Justice reach its own conclusions about legality? For instance, can the Department of Justice take the position in these proceedings as it long has for internal purposes that wiretapping is not in violation of § 605 so long as the department has not divulged the contents of the communication and that, therefore, there is no obligation to disclose? Can the department unilaterally decide on its own that the surveillance was within its "inherent power" and therefore legal, and therefore not necessary to disclose?

The Court is faced with a hard problem. At root, if the Department of Justice cannot be trusted to make a good-faith effort to comply with the law, there is little the Court can do about it unless the facts are uncovered by the defendants. But the contrast between the Court's quiet avoidance of the procedural problems in determining legality of surveillance and its proud trumpeting about the adversary process in *Alderman* smacks of hypocrisy. On the one hand, the Court orders all transcripts of any illegal taps, no matter what their degree of relevance to the case, spread across the public record. On the other, the Court refuses even to specify the procedures to be followed in making the determination of legality. Won't one effect of the *Alderman* case be to make the Department of Justice and other law enforcement agencies less likely to admit illegal surveillance in the future? Doesn't the *Alderman* procedure unduly embarrass and penalize the good-faith prosecutor who attempts to comply with the Court's rulings on electronic surveillance while protecting the prosecutor who refuses to make any disclosures about surveillance? The fashioning of appropriate procedures for the administration of the deterrent mechanism of the exclusionary rule in this secrecy-prone area is a difficult task. Abstract paeans to the adversary system are of little help.

Strangely enough, the Court has, in other opinions, been sensitive to the problems raised by use of the exclusionary rule as a deterrent. But the Court has revealed such awareness not in cases involving the appropriate procedures under the exclusionary rule but in cases extending the scope of the Fourth Amendment to new areas. There

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have been a number of these cases because the Court has consistently disregarded illogical, historic limitations on the scope of the Fourth Amendment and held that a search is a search is a search. The most notable example of a case recognizing the limits of usefulness of the exclusionary rule is *Terry v. Ohio,* holding a police "stop and frisk" constitutional when based on reasonable suspicion. Chief Justice Warren discussed the limits of the exclusionary rule in these terms:

"[T]he issue is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure. Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. . . .

The exclusionary rule has its limitations, however, as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some contexts the rule is ineffective as a deterrent. Street encounters between citizens and police officers are incredibly rich in diversity. . . . Doubtless some police "field interrogation" conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal.

Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. . . . [A] rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.

It is all a bit backward. The exclusionary rule was adopted to enforce the Fourth Amendment, which defined the legality of government conduct. But now we are told the issue is what the scope of the exclusionary rule should be, not "the abstract propriety of the police conduct."

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34 392 U.S. 1 (1968).
35 Id. at 12-15.
In *Terry*, the Court rejected the argument that a "stop and frisk" was not a "search and seizure" within the Amendment and also rejected the necessary consequence of such a holding, that probable cause was required to "stop and frisk." Instead the Court discussed at length the various "interests" involved and concluded that "stop and frisk" is legal if the officer has "reasonable suspicion."

The Court first used this type of analysis in *Camara v. Municipal Court*, and *See v. City of Seattle*. At first, these cases seem of relatively minor importance for the administration of the criminal justice system because they deal with the problem of searches by nonpolice officials for fire, housing, and health code violations. They may yet prove to be among the most important Fourth Amendment cases ever decided. In *Frank v. Maryland* the Court, in an opinion by Justice Frankfurter, held that such searches were not within the Fourth Amendment because historically such "civil" searches were outside the scope of the protection. In *Camara* and *See* the Court reversed *Frank* and held that a search is a search. Having done so, it proceeded to deal with the problem whether its holding would make systematic area enforcement searches illegal. In its discussion, the Court specifically equated the problem of probable cause for a search with the question whether a search is "reasonable":

In determining whether a particular inspection is reasonable—and thus in determining whether there is probable cause to issue a warrant for that inspection—the need for the inspection must be weighted in terms of [the] reasonable goals of code enforcement.

There is unanimous agreement among those most familiar with this field that the only effective way to seek universal compliance with the minimum standards required by municipal codes is through routine periodic inspections of all structures. It is here that the probable cause debate is focused, for the agency's decision to conduct an area inspection is unavoidably based on its appraisal of conditions in the area as a whole, not on its knowledge of conditions in each particular building. Appellee contends that, if the probable cause standard urged by appellant is adopted, the area inspection will be eliminated as a means of seeking compliance with code standards and the reasonable goals of code enforcement will be dealt a crushing blow.

... The ... argument is in effect an assertion that the

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37 387 U.S. 541 (1967).
area inspection is an unreasonable search. Unfortunately, there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails. But we think that a number of persuasive factors combine to support the reasonableness of area code-enforcement inspections. First, such programs have a long history of judicial and public acceptance. . . . Second, the public interest demands that all dangerous conditions be prevented or abated, yet it is doubtful that any other canvassing technique would achieve acceptable results. . . . Finally, because inspections are neither personal in nature nor aimed at the discovery of evidence of crime, they involve a relatively limited invasion of the urban citizen's privacy.

The balancing approach to the legality of Fourth Amendment searches has a certain ominous ring. It is always the reasonable demands of the public interest that are used to justify incursions on civil liberties. Suppose a child is kidnapped. Can the police search every home in town because the interest in saving the child's life is greater than the "relatively minor" inconvenience of having a policeman in your house? Because experts say the fastest way to find the child is to look everywhere? Because the search is aimed at finding the child, not aimed personally at the occupants of the homes?

The quoted language was greeted by commentators with relative calm. Both cases involved the problem of extending the Fourth

40 "If we are to make judicial exceptions to the Fourth Amendment for these reasons [of practical necessity], it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action, executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime." Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting).

41 LaFave, Administrative Searches and the Fourth Amendment: The Camara and See Cases, 1967 SUPREME COURT REVIEW 1, 20: "[T]he Court has taken the view that the evidentiary requirement of the Fourth Amendment is not a rigid standard, requiring precisely the same quantum of evidence in all cases, but instead is a flexible standard, permitting consideration of the public and individual interests as they are reflected in the facts of a particular case. This is an extremely important and meaningful concept, and one which may well prove most useful in reshaping some rather shaky Fourth Amendment doctrine." See also Kitch, Katz v. United States: The Limits of the Fourth Amendment, 1968 SUPREME COURT REVIEW 133, 142-43.
Amendment to new areas where as a matter of historic custom standards less rigorous than probable cause had prevailed. Surely these cases had nothing to say about the probable cause requirement of the Fourth Amendment in the context of police searches for the purpose of obtaining evidence to convict a person of a crime.

Last Term, in Davis v. Mississippi, the Court gave that sanguine reaction a sharp jolt. The script for Davis reads like that of many a classic civil rights case:  

The rape occurred on the evening of December 2, 1965, at the victim's home in Meridian, Mississippi. The victim could give no better description of her assailant than that he was a Negro youth. Finger and palm prints found on the sill and borders of the window through which the assailant apparently entered the victim's home constituted the only other lead available at the outset of the police investigation. Beginning on December 3, and for a period of about 10 days, the Meridian police, without warrants, took at least 24 Negro youths to police headquarters where they were questioned briefly, fingerprinted, and then released without charge. The police also interrogated 40 or 50 other Negro youths either at police headquarters, at school, or on the street. Petitioner, a 14-year-old youth who had occasionally worked for the victim as a yardboy, was brought in on December 3 and released after being fingerprinted and routinely questioned.

The defendant was also taken to the victim's hospital room but she did not positively identify him as her assailant. On December 12 the police took the defendant out of town to Jackson and incarcerated him overnight. The next day the defendant signed a statement and took a lie detector test, neither of which were used at the trial. He was returned to Meridian, fingerprinted again, and the new prints along with the prints of twenty-three other Negro youths were sent to the FBI for analysis. The FBI reported that the defendant's prints matched those on the window. This fingerprint evidence was used against the defendant at trial.

Before the Supreme Court, the state conceded that the second set of prints was illegally obtained because the arrest of the petitioner was without probable cause and illegal. But the state argued that the prints taken on December 3 were taken legally and that it didn't make any difference which set of prints had actually been sent to


43 Id. at 722.
The state argued that the December 3 prints were obtained legally because the detention occurred at the investigatory rather than the accusatory stage, and because detention for taking fingerprints is not an arrest subject to the Fourth Amendment. The Court, in an opinion by Mr. Justice Brennan, rejected both arguments on the ground that the Fourth Amendment applies to all searches for any evidence of crime at any stage of the proceeding. Mr. Justice Stewart in dissent offered a reinterpretation of the majority's opinion, as he had in Giordano, again without objection from the Court. The opinion didn't mean, said Mr. Justice Stewart, that Mississippi couldn't go out and get another set of prints from the defendant and prosecute him again. After all, "We deal... with 'evidence' that can be identically reproduced and lawfully used at any subsequent trial." In a footnote, he explained that the testimony of the victim who had identified the defendant at the trial would provide probable cause for a legal arrest. But since the victim apparently had not identified the defendant until after the investigation by the police her identification might possibly be a tainted fruit of the improperly obtained prints or statement. Mr. Justice Brennan failed to say anything that would undermine Mr. Justice Stewart's interpretation of the decision. Mr. Justice Stewart dissented because he could not "believe that the doctrine of Mapp ... requires so useless a gesture as the reversal of this conviction."

Mr. Justice Brennan seemed to go out of his way to confirm that the Court was indeed more concerned about "gestures" than about the substance of what the police had done:  

44 Brief for Respondent, pp. 7-8.  45 394 U.S. at 730.  46 Id. at 730 n.

47 The identification of the defendant by the victim, an eighty-seven-year-old woman, was ambiguous. Record A. 22. The cross-examination of the victim did not explore the way in which she had become sure of her identification. The police conducted their diligent investigation as if they had no reliable identification. The victim, in her hospital bed, was unable positively to identify the defendant as her assailant. Id., A. 51. The victim seemed to be made certain in her identification by her belief that the defendant had confessed. Id., A. 29. But no confession was introduced at trial. The Mississippi Supreme Court held that defense counsel had not preserved any objection to the mention of the confession. Davis v. Mississippi 204 So.2d 270 (Miss. 1967). But the admissibility of any such confession and the source of the identification are questions that can be raised in subsequent proceedings.

48 He acknowledged by implication in a footnote the possibility of a retrial. 394 U.S. 725-26 n. 4.

49 Id. at 730.  50 Id. at 727-28.
It is arguable . . . that, because of the unique nature of the fingerprinting process, such detentions [for the purpose of taking prints] might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense. See *Camara v. Municipal Court*. . . . Detention for fingerprinting may constitute a much less serious intrusion upon personal security than other types of police searches and detentions. Fingerprinting involves none of the probing into an individual's private life and thoughts which marks an interrogation or search. Nor can fingerprint detention be employed repeatedly to harass any individual, since the police need only one set of each person's prints. Furthermore, fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the "third degree." Finally, because there is no danger of destruction of fingerprints, the limited detention need not come unexpectedly or at an inconvenient time. For this same reason, the general requirement that the authorization of a judicial officer be obtained in advance of detention would seem not to admit of any exception in the fingerprinting context.

In other words the real objection to the procedure followed in *Davis* was that the police did not ask the courts to approve of it in advance. Mr. Justice Brennan seems to have forgotten that the Fourth Amendment was written to ban that most odious of all oppressive instruments, the general warrant.51 The general warrant did, after all, produce reliable evidence and the inconvenience to the householder was a passing one. But the experience of history has shown that it was subject to gross abuse.

The Court will some day repudiate this dictum. But in the mean-

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51 See the discussion in *Boyd v. United States*, 116 U.S. 616 621-33 (1886); *Landyński*, Search and Seizure and the Supreme Court 21-42 (1966); *Lasson*, The History and Development of the Fourth Amendment to the United States Constitution 13-78 (1937). The objections to a general warrant developed in England in response to efforts to enforce the criminal libel laws through indiscriminate seizures of a man's papers and in the colonies in response to the use of writs of assistance empowering revenue officers to make indiscriminate searches for smuggled goods. Resentment of the substantive laws being enforced was an important factor in the development of opposition to the practice. But the common theme was the general search on suspicion that indiscriminately affected the innocent as well as the guilty. The Court seems insensitive to the substantial difference between being subjected to an area housing code search, authorized in *Camara*, and being taken to the police station for compulsory fingerprinting in a murder investigation.
time it will be used as a justification by thousands of lower courts for procedures that are unconstitutional under the Fourth Amendment.

II. CONTROL OF THE COURTS

The thrust of the Warren Court's work in the area of police investigation has been to create barriers to the adjudication of guilt by inquisitorial methods at the investigatory stage, thereby shifting the focus of adjudication to the courts with their accusatorial procedures. The problem here is that of preserving free and open access to the courts for all defendants. The growing recognition of the overwhelming importance of the guilty plea for the administration of criminal justice and the existence in some jurisdictions of policies of differential sentencing designed to induce guilty pleas are at the frontiers of this problem.

In Boykin v. Alabama the Court reversed a death sentence for armed robbery imposed by a jury after a plea of guilty. The common-law record in the case showed the following:

This day in open court came the State of Alabama by its District Attorney and the defendant in his own proper person and with his attorney, Evan Austill, and the defendant in open court on this day being arraigned on the indictment of these cases charging him with the offense of Robbery and plead guilty.

Mr. Justice Douglas, writing for the Court, held: "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." He added:

A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. . . . Admissibility of a confession must be based on a "reliable determination on the voluntariness issue which satisfies the constitutional rights of the defendant." . . . The requirement that the prosecution spread on the record the prerequisites of a valid waiver is no constitutional innovation.

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54 Record, A. 4.
55 395 U.S. at 242.
56 Id. at 242–44.
The Court reversed the conviction and held that the defendant had the right to plead anew because the trial court had not complied with Rule 11. The court had not personally addressed the defendant to ascertain whether he understood the nature of the charge and the consequences of his plea. The Court observed that the record in McCarthy illustrated the problems that can arise when a trial judge fails clearly to establish on the record that the defendant understood the nature of the charge and the consequences of his plea. The fact that counsel had argued at the sentencing hearing that the tax evasion was inadvertent, said the Court, casts “considerable doubt on the Government’s assertion that petitioner pleaded guilty with full awareness of the nature of the charge.”

Although this argument is at the least oversimplified and probably specious, given the instructions on the presumption of intent from the act of nonpayment of taxes which the government would probably be able to get at trial, it does suggest that the Court viewed the central problem as one of incompetence of counsel. Counsel’s argument at the sentencing hearing suggested to the Court that counsel did not understand the elements of the offense. If one has confidence in counsel, he can be counted on to inform the defendant about the nature of the charge and ascertain whether the defendant is in fact likely to be convicted.

But can interrogation by the trial judge really operate to ensure that a plea is knowing, voluntary, and intelligent? The record in McCarthy itself suggests that interrogation by the trial judge cannot protect against involuntary pleas. McCarthy was charged with three different offenses in his indictment: income tax evasion in 1959, 1960, and 1961. When he entered his plea of guilty the Government “informed the court that if petitioner's plea of guilty to

62 Id. at 470.

63 Holland v. United States, 348 U.S. 121, 139 (1954): “A final element necessary for conviction is willfulness. The petitioners contend that willfulness ‘involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income.’ This is a fair statement of the rule. Here, however, there was evidence of a consistent pattern of underreporting large amounts of income, and of the failure on petitioners’ part to include all of their income in their books and records. Since on proper submission, the jury could have found that these acts supported an inference of willfulness, their verdict must stand.” Cf. United States v. Mitchell, 271 F. Supp. 858, 863 (N.D. Ill. 1967): “Though consistent substantial understatement of income is highly persuasive evidence of intent to defraud, I do not believe that such understatement in and of itself is proof enough.”
count 2 [1960] were accepted, the Government would dismiss counts 1 and 3.° This certainly looks like a plea bargain. Can it be argued that this bargain made McCarthy's plea involuntary—the result not of a free decision but of government-created inducements to plead? But when the judge asked McCarthy if any promises had been made to induce a plea of guilty he answered no. This is no surprise. Any promise to induce a plea of guilty is going to be made on condition that the defendant correctly answer such questions. It is not without significance that the prosecutor in McCarthy specifically requested the judge to ask the defendant whether the plea had been induced by any threats or promises. He wanted to make a record that would bar any subsequent attack on the plea based on the existence of the plea bargain.

Can interrogation by the judge operate to make a plea knowing and intelligent? Experience indicates that the interrogation by the trial judge will usually be conducted in abstract terms of deceptive simplicity. The defendant, having already consulted his counsel, is unlikely to insist on a full explanation of simple sounding but highly technical concepts. To illustrate from the facts of McCarthy. Suppose the trial judge had personally told McCarthy that the charge required proof of a “willful failure” to pay taxes and asked whether McCarthy understood that. Wouldn't McCarthy have probably answered yes because the concept of willfulness is one which a layman is likely to feel he understands, even though it has confused lawyers for centuries? Or take a defendant charged with murder. Is the judge going to explain the problems of the required mens rea, the degrees of the crime, and the scope of all available defenses? Perhaps the procedure of Rule 11 provides some protection against incompetent counsel who has given his client grossly erroneous advice about the crime charged or the range of penalties, but it cannot insure that a plea is knowing, voluntary, and intelligent.

In this light, the Court's insistence in McCarthy and Boykin that such a procedure bars further attack on the plea is troubling. "Our holding," wrote Chief Justice Warren in McCarthy, "will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate."° "When a judge," wrote Mr. Justice Douglas in Boykin,

° 394 U.S. at 461.
°° Id. at 472.
In *Carnley v. Cochran* . . . we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: "Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.

We think that the same standard must be applied to determine whether a guilty plea is voluntarily made. For, as we have said, a plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality. . . .

. . . We cannot presume a waiver . . . from a silent record.

What is at stake for an accused facing death or imprisonment demands utmost solicitude of what courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and of its consequence. When the judge discharges that function, he leaves a record adequate for any review that may be later sought . . ., and forestalls the spin-off of collateral proceedings that seek to probe murky memories.

The reasoning seems to be that a plea of guilty is a waiver of all constitutional rights. Therefore the procedure for a valid waiver of these rights must be at least as rigorous as that required for waiver of any constitutional right. Presuming waiver of the right to counsel from a silent record is impermissible; therefore, presuming waiver of any constitutional right from a silent record is impermissible. But the "silent record" the Court was discussing in *Carnley v. Cochran)* was the record in a post-conviction proceeding. The silent record in *Boykin* was the record on the plea itself. If the state has a burden to "spread on the record the prerequisites of a valid waiver," should it not have the opportunity to do so in a post-conviction proceeding when the question is raised?

Procedures and standards for the waiver of constitutional rights raise important and difficult issues. The Court has seldom discussed them except in terms of the overly general concepts: voluntary, knowing, and intelligent. 58 It is unfortunate that the Court once again passed up an opportunity to discuss these issues. The scope of


a constitutional right is not fully defined until the conditions under
which it can be waived have been delineated. When the Court
thinks seriously about the problem, it will discover that standards
and procedures for the waiver of a constitutional right must be de-
lined in relation to the nature and function of that right. The
did the Court in fact mean by the requirement "that the prosecution
spread on the record the prerequisites of a valid waiver"? Must the
judge hear evidence on the matter? Does the state have the burden
of an evidentiary presentation relating to all the facts surrounding
the plea of guilty? Must the defendant take the stand and be inter-
rrogated at length about his understanding of his rights? It is clear
from the footnotes to the opinion that the Court had none of these
things in mind. Instead, the Court meant that the record must
show that the trial judge had followed a procedure like that required

Rule 11 provides: "The court . . . shall not accept such plea [of
 guilty] . . . without first addressing the defendant personally and
determining that the plea is made voluntarily with understanding
of the nature of the charge and the consequences of the plea." The
significance of Rule 11 was dramatized last Term in McCarthy v.
United States. McCarthy was convicted of willful income tax
evasion on a plea of guilty. His counsel entered the plea, assuring
the court that his client understood the consequences of a plea. The
trial judge personally inquired only whether or not the plea was
the product of any threats or promises. At the subsequent sentenc-
ing hearing defendant's counsel unsuccessfully argued that a sus-
pended sentence should be imposed because the defendant's failure
to pay taxes had been accidental and unintentional.

The rule that a defendant may be tried again after reversal of his conviction
has long been justified on the ground that by appealing the defendant has waived
his right to be protected against double jeopardy. But such a "waiver" is hardly
voluntary, knowing, and intelligent. In discussing the rule last Term in North Caro-
lina v. Pearce, 395 U.S. 711, 720-21 (1969), the Court was more precise: "Although
the rationale for this 'well-established part of our constitutional jurisprudence' has
been variously verbalized, it rests ultimately upon the premise that the original con-
viction has, at the defendant's behest, been wholly nullified and the slate wiped
clean. . . . A new trial may result in an acquittal. But if it does result in a convic-
tion, we cannot say that the constitutional guarantee against double jeopardy of
its own weight restricts the imposition of an otherwise lawful single punishment
for the offense in question."

“discharges that function [of canvassing the matter with the accused], he leaves a record adequate for any review that may be later sought . . . and forestalls the spin-off of collateral proceedings that seek to probe murky memories.”

In other words, once the defendant has answered all the proper questions, it will be almost impossible for him successfully to contend that he was coerced, or that he really didn’t understand the nature of the charge and the consequences of his plea, even if he had been coerced and he had not understood.

That these very real problems in the administration of guilty pleas are not impossible of solution is illustrated by the procedure actually followed by the Alabama courts on Boykin’s guilty plea. For under Alabama procedure, unlike that of most other states, when a man pleads guilty to a capital offense that is not the end of the matter.

In Boykin’s case the Court proceeded to have an abbreviated jury trial with testimony from the witnesses, submission of the issue of guilt and innocence to the jury, and determination by the jury of the sentence to be imposed. This procedure, to be sure, does not offer the same safeguards as a trial, because the cross-examination and argument by the defense counsel are pro forma only. It does, however, provide two important protections. First of all, it forces the state to put in actual eyewitness testimony of the crime. This provides a basis independent of the plea for concluding that the defendant has in fact committed the crimes charged. Second, because the jury imposes the ultimate penalty, it protects against any form of bargaining over the penalty. This is a particularly serious problem in capital cases because a promise from a trial judge or a prosecutor that the death penalty will not be imposed if a defendant pleads guilty creates substantial coercive pressures so to plead. But if the penalty is imposed by a jury, impaneled after the plea and informed as to the full range of penalties that can be legally imposed, then neither the judge nor the prosecutor has effective control over the disposition. Therefore, a defendant will plead guilty only when he feels there is no advantage to a trial, not because he knows that he can save his life by so pleading.

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66 395 U.S. at 244.

67 Ala. Code, tit. 30, § 70 (1958): “[I]f the defendant enters a plea of guilty . . . such plea of guilty . . . shall be entered of record . . . the trial of the cause shall be had and the question of the degree of guilt must be ascertained and the punishment fixed by a jury.”
The Supreme Court, however, treated these additional procedural protections as irrelevant. Ironically, there is reason to suppose that had Boykin not formally pleaded guilty his conviction would have been sustained. Examination of the record shows that the state put in eyewitness testimony to each of the five armed robberies charged in the indictment. Defense counsel did not object to the introduction of hearsay evidence and confined his cross-examination to the two witnesses who testified that the defendant had fired his gun. The purpose of the cross-examination was to establish that the gun was not discharged in order to injure anyone and that the one injury actually inflicted was not serious.68

In many cases there are good tactical reasons for the defendant neither to plead guilty nor to make a defense. For instance a defendant who has lost a motion to suppress critical evidence will not be able to raise this question in the appellate courts if he pleads guilty. But if he has no other defense there is every reason to simplify the presentation of the case so that the defendant can in substance be in the position of a defendant who has pleaded guilty and thrown himself on the mercy of the court. Such bench trials are not very different from the hearing actually held in Boykin. But in these cases the defendant waives numerous substantial constitutional rights without the benefit of any interrogation by the judge. Are such convictions now invalid under Boykin?

In contrast to the generalities of Boykin, the Court was able last Term to fashion specific procedural protection against differential sentencing designed to penalize resort to the appellate courts. In Benton v. Maryland69 the Court overruled Palko v. Connecticut70 thus extending the federal double-jeopardy rule to the states. Then in North Carolina v. Pearce71 the Court confronted the question whether the double-jeopardy provision or the Equal Protection Clause bars a trial judge from imposing a heavier sentence after a retrial following appellate reversal. The Court held that they did not. But it proceeded to rule that the Due Process Clause requires that there be a valid reason for any increased sentence. Mr. Justice Stewart wrote:72

It can hardly be doubted that it would be a flagrant violation of the Fourteenth Amendment for a state trial court

68 Record, A. 15–16, 20–21.  
70 302 U.S. 319 (1937).  
72 Id. at 723–24.
to follow an announced practice of imposing a heavier sentence upon every reconvicted defendant for the explicit purpose of punishing the defendant for his having succeeded in getting his original conviction set aside. Where, as in each of the cases before us, the original conviction has been set aside because of a constitutional error, the imposition of such a punishment, "penalizing those who choose to exercise" constitutional rights, "would be patently unconstitutional." United States v. Jackson. . . . And the very threat inherent in the existence of such a punitive policy would, with respect to those still in prison, serve to "chill the exercise of basic constitutional rights." Id. See also Griffin v. California . . .; cf. Johnson v. Avery. . . . But even if the first conviction has been set aside for a nonconstitutional error, the imposition of a penalty upon the defendant for having successfully pursued a statutory right of appeal or collateral remedy would be no less a violation of due process of law. "A new sentence, with enhanced punishment, based upon such a reason, would be a flagrant violation of the rights of the defendant." . . . "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, those avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts. . . ."

If there is no constitutional right to appeal, what right is being "chilled" by the increased sentence? The precedents which the Court cites for its conclusions deal with different problems. United States v. Jackson73 held unconstitutional a statutory scheme that imposed the risk of the death penalty only on those who insisted on jury trial. But the Court has repeatedly held that there is a due process right to a jury trial. Griffin v. California74 dealt with comments by the prosecutor on the failure of the defendant to testify. The reference to Johnson v. Avery75 is most curious. In that case, decided last Term, the Court held that jail-house lawyers must be permitted to pursue their trade because otherwise their fellow inmates would be effectively deprived of the federal right to habeas corpus.

Perhaps the Court is groping toward a general concept that every federal constitutional right carries with it the right to an effective remedy for the vindication of that right. But even that would not explain the Court's actions because presumably trial courts are designed to be an effective forum for the vindication of constitutional

rights. The Court seems to go farther and say that there is a right to have a right not recognized by a trial court vindicated by an appellate court. And a right not recognized by an appellate court vindicated in a post-conviction proceeding. And, for state defendants, a right not recognized in a post-conviction proceeding vindicated on federal habeas corpus. In short, maybe there is a constitutional right to appeal, not once but ad infinitum.

In analyzing a policy of more severe penalties on retrial, the Court is insensitive to the problem of channeling appellate resources to the review of cases where there is a real possibility of righting injustice. For appellants who pay their own expenses there is a financial sanction to deter the pursuit of meaningless appeals. But for indigent appellants, the Court has declared unconstitutional any channeling devices which operate unequally on the poor. Continuing that tradition, the Court last Term held improper a rule of the Ninth Circuit that, in substance, required indigent petitioners in federal post-conviction proceedings who allegedly had been deprived of their right of appeal to disclose, without the assistance of a lawyer, the errors they would have raised and to demonstrate that denial of the appeal had caused prejudice. And in *Williams v. Oklahoma City* the Court extended *Griffin v. Illinois* to petty offenses, holding that a free transcript must be provided to an indigent appealing a drunken driving conviction. But a more severe sentence after retrial is a resource channeling device that affects rich and poor alike. Someone who stands reconvicted after an appellate reversal is someone who was legally guilty. Should he not have been discouraged from pursuing his appeal simply to force the state to try him again?

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77 In *Case v. Nebraska*, 379 U.S. 958 (1964), the Court granted certiorari to determine "whether the Fourteenth Amendment requires that the States afford state prisoners some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." 381 U.S. 336, 337 (1965). When Nebraska passed a post-conviction act, the case was remanded. Ibid.


79 The leading case is *Griffin v. Illinois*, 351 U.S. 12 (1956), holding that all indigents must be furnished a free stenographic transcript—or its equivalent—so that they may prepare their appeals.


82 Note 79 supra.
The reasoning of the Court in *Pearce* requires a similar procedure to protect against differential sentences designed to chill assertion of the constitutional right to trial. Whether or not there is a constitutional right to appellate review, the right to a trial is the most fundamental due process right. But such a procedure is much easier to fashion in the context of appellate review. The first sentence is established in the record, whereas the sentence the judge would have imposed on a plea of guilty is not on the record and is known only to the participants in a bargaining conference. The only way bargaining and differential sentencing can ever be supervised is by devising procedures to make plea discussions a matter of record, fully disclosed. Unfortunately, the Rule 11 procedure imposed by the Court in *Boykin* has the effect of driving plea bargaining underground, since any promises must always be denied for purposes of the record.

The Court’s intensive concern with barriers to appellate and post-conviction remedies, and a willingness to shape in detail the access channeling mechanisms, contrasts sharply with its treatment of the access problem in the trial courts in terms of general, vacuous abstractions. This is a curious inversion of what would seem to be the sensible priority. Shouldn’t full and effective access at the trial level come first, and shouldn’t the Court be more willing to tolerate limitations on access at the secondary and really less important appellate level? This inversion probably reflects the natural orientation of a court without trial experience but a court with day in and day out experience with appellate procedures. The Court’s preference for appellate as opposed to trial remedies was sharply illustrated last Term by the contrast between *Kaufman v. United States* and *Alderman v. United States*. In *Kaufman* the Court held that a federal defendant could raise the issue of an unlawful search and seizure in a post-conviction proceeding even though the issue had not been raised at trial or on appeal. The Government argued that the deterrent function of the exclusionary rule “is adequately served by the opportunities afforded a federal defendant to enforce the exclusionary rule before or at trial, so that the relatively minimal additional deterrence afforded by a post-conviction remedy would not seem to justify, except in special circumstances, the collateral release of guilty persons who did not raise the search

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and seizure issue at trial or on direct appeal.”

This argument, first advanced by Professor Anthony Amsterdam was rejected by the Court. “The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief.” But in Alderman v. United States, the Court, contrary to the expectations of many commentators, reaffirmed the standing rule requiring that a motion to suppress be made by a person whose rights were violated by the search. The argument against the standing rule is that it decreases the deterrent force of the exclusionary rule. The Court answered:

The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. . . . [W]e are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

If the objective is effective vindication of constitutional rights, however, wouldn’t it make more sense to make the exclusionary rule broadly available at the trial level but limit its availability at subsequent procedural levels, more distant from the law enforcement process? What is gained by allowing a defendant who has not raised the search and seizure issue at trial to raise it in a subsequent proceeding? The only possible explanation is that the Court is concerned about the effectiveness of defense counsel and the trial courts to vindicate constitutional rights. Therefore, it is led to devise more effective appellate and post-conviction remedies to act as a

85 394 U.S. at 224–25.
87 394 U.S. at 226.
88 See Comment, Standing to Object to an Unreasonable Search and Seizure, 34 U. Cin. L. Rev. 342 (1967), and authorities cited in the dissenting opinion of Mr. Justice Fortas, 394 U.S. at 206 n. 8.
89 394 U.S. at 174–75.
check on the trial courts. As Mr. Justice Harlan, dissenting last Term in *Desist v. United States*,\(^\text{80}\) expressed it: "[T]he threat of habeas serves as a necessary additional incentive for trial and appellate courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards." But it is a hopeless task. For the post-trial proceedings are administered by those same judges and those same lawyers and there is no reason to expect that they will do any better the second time around. Indeed, post-conviction proceedings, lacking clear procedural rules\(^\text{81}\) or rules of evidence, seem a particularly inadequate forum to correct the defects of trial procedures.

**III. The Court's Control of the Law**

The most important innovation of the Warren Court in the area of the conventions governing its own work has been the prospective application of new constitutional decisions. Although prospective overruling undermines the symbolic status of the Constitution as permanent, fundamental law, it has been attractive for the Warren Court because it makes the process of constitutional change less difficult, sparing the Court the public outcry that would surely follow a general jail delivery.

From its announcement in *Linkletter v. Walker*\(^\text{92}\) the doctrine has given the Court difficulty. First of all, which new rules should be announced prospectively and which apply to all cases, past and present? Surely most constitutional rules are of such fundamental importance that all defendants should be entitled to their protection. The Court has attempted, following a suggestion by Professor Paul

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\(^{80}\) 394 U.S. 244, 262-63 (1969).

\(^{81}\) In *Harris v. Nelson*, 394 U.S. 286 (1969), the Court held that the discovery provisions of the Federal Rules of Civil Procedure were inapplicable to habeas corpus, but the Court went on to observe: "Where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is confined illegally and therefore is entitled to relief, it is the duty of the court to provide the necessary facilities and procedures [unspecified] for an adequate inquiry." *Id.* at 300. In a footnote, the Court left open the question of the applicability of other civil rules to habeas corpus. *Id.* at 294-95 n. 5. In still another footnote, the Court indicated that special rules should be drafted for habeas corpus. *Id.* at 301 n. 7.

\(^{92}\) 381 U.S. 618 (1965).
Mishkin, to distinguish between rules relating to the reliability of the guilt-determining process and rules designed to advance other objectives, such as the exclusionary rule designed to enforce the Fourth Amendment. The distinction is, however, a difficult one to apply.

Second, what events constitute a cut-off for the assertion of a prospective rule? In Linkletter v. Walker, the Court held that Mapp applied only to cases that had not become final as of the date of Mapp. But if the purpose of the exclusionary rule is deterrence, then why should the rule apply to any search that occurred before the date the rule was announced? Responding to this question, the Court has moved the relevant date, first to the date of trial in Johnson v. New Jersey and then to the date of the regulated conduct itself in Stovall v. Denno. The Court has continued to apply the rule in the case in which it is announced, however, ostensibly to keep the new rule from being dictum but probably to preserve an incentive for counsel to argue for new constitutional rules.

Last Term the prospective overruling doctrine began to run amuck. In Desist v. United States, the Court held that the rule of Katz v. United States extending the Fourth Amendment to non-trespassory surveillance, would apply only to surveillance conducted after the date of Katz. And in Halliday v. United States the Court held that the interpretation of Rule 11 in McCarthy should be applied only to pleas entered after the date of the decision. Prior to last Term, the prospective overruling doctrine had been confined to cases of major constitutional significance announc-


95 Johnson v. New Jersey, 384 U.S. 719 (1966), held that the rules of Escobedo v. Illinois, 378 U.S. 478 (1964) and Miranda v. Arizona, 384 U.S. 436 (1966), relating to police interrogation procedures, applied only in trials after the date of the decisions. Last Term the Court held that the rules do not apply to retrials after the date of the decisions, if the first trial predated the decision. Jenkins v. Delaware, 395 U.S. 213 (1969).

96 388 U.S. 293 (1967). It held that the identification procedure of United States v. Wade, 388 U.S. 218 (1967), and Gilbert v. California, 388 U.S. 263 (1967), applied only to confrontations for identification conducted after the date of the decisions.


ing the extension of additional provisions of the Bill of Rights to the states. Last Term the doctrine was quietly extended to cases both constitutional and nonconstitutional whose "new" rule simply represents an extension of established principles in the traditional, case-law manner. Unless this development is quickly checked, it will have a lasting impact on the process of case-by-case development of the law and the ability of the Court effectively to declare the content of that law.

In *Desist* the defendant argued that the extension of the Fourth Amendment to nontrespassory searches should not be applied prospectively because the extension had been clearly foreshadowed by *Silverman v. United States.* The Court held that the rule should be applied prospectively. "Because the deterrent purpose of *Katz* overwhelmingly supports nonretroactivity, we would reach that result even if relatively few convictions would be set aside by its retroactive application." The Court is once again determining the scope of the Fourth Amendment by considerations based on the existence of the exclusionary rule. The defendant argued that even if *Katz* were held to be prospective, it should, like *Mapp* apply to all cases pending on direct review at the time of the decision because both cases involved the Fourth Amendment. The Court rejected that argument. "Both the deterrent purpose of the exclusionary rule and the reliance of law enforcement officers focus upon the time of the search, not any subsequent point in the prosecution, as the relevant date."

The most serious problem raised by the decision is the scope of the doctrine. Almost every case decided by the Supreme Court involves in some sense the announcement of a "new" rule, and most rules in the criminal procedure area are designed to shape the conduct of the police or the courts. It is possible to dismiss *Desist* as an atypical case, reflecting the special pressures on the Court last Term in the electronic surveillance area. It is said that electronic surveillance has been most frequently used in national security cases. The Court may not want to be responsible for reversing the convictions of foreign spies on the basis of procedural protections not available to our spies in other countries. Both *Desist* and the discussion of standing in *Alderman* show a desire on the part of the Court

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*10* 394 U.S. at 251-52.

*100 Id.* at 253.
to bring the constitutional doctrine within the scope of Title III of the Crime Control Act\(^\text{102}\) both in time and coverage,\(^\text{103}\) thereby shifting from the Court to Congress the responsibility for prohibitions against electronic surveillance. But \textit{Halliday v. United States}\(^\text{104}\) makes it clear that \textit{Desist} was more than a pragmatic reaction to an intense political problem. In holding that the rule of \textit{McCarthy} should be applied prospectively, the Court said:\(^\text{105}\)

\begin{quote}
[A] defendant whose plea has been accepted without full compliance with Rule 11 may still resort to appropriate post-conviction remedies to attack his plea's voluntariness. Thus, if his plea was accepted prior to our decision in \textit{McCarthy}, he is not without a remedy to correct constitutional defects in his conviction. ... In \textit{McCarthy} we noted that the practice we were requiring had been previously followed by only one Circuit; that over 85% of all convictions in the federal courts are obtained pursuant to guilty pleas; and that prior to Rule 11's recent amendment, not all district judges personally questioned defendants before accepting their guilty pleas. Thus ... we decline to apply \textit{McCarthy} retroactively.
\end{quote}

Mr. Justice Harlan, concurring, argued that since \textit{McCarthy} turned on the meaning of Rule 11 it should be applied from July 1, 1966, the date when Rule 11 was amended by the addition of the phrase "address personally." Mr. Justice Black, in dissent, argued that Rule 11 had always required the judge to determine that the plea was made voluntarily with understanding and that therefore \textit{McCarthy} should be applied to all pleas entered since Rule 11 became effective.\(^\text{106}\) Both of these positions are oversimplified. The real issue in \textit{McCarthy} was not the meaning of Rule 11 but the sanction that should be used to enforce Rule 11. The Court held that where a plea has been entered without compliance with Rule 11, a defendant should be permitted to withdraw his plea in order to insure compliance with the requirements of Rule 11. Rule 11 does not say

\begin{footnotes}
\footnote{102}{18 U.S.C. §§ 2510 \textit{et seq.}}
\footnote{103}{In \textit{Alderman} the Court observed: "Of course, Congress or state legislatures may extend the exclusionary rule and provide that illegally seized evidence is inadmissible against anyone for any purpose. ... Congress has not done so." 394 U.S. at 175 and n. 9.}
\footnote{104}{394 U.S. 831 (1969).}
\footnote{105}{394 U.S. at 833.}
\footnote{106}{The plea in \textit{Halliday} was entered in 1954. Rule 11 became effective on March 21, 1946.}
\end{footnotes}
what consequences will follow from a failure to comply, although it is a reasonable implication that pleas in violation of the rule are not binding.

The meaning of Halliday became somewhat more confused when a month later the Court announced its opinion in Boykin. Boykin held that Rule 11 procedures were constitutionally required. Furthermore, it held not that this new constitutional requirement was to be enforced by permitting defendants to plead again, but that a plea so obtained was invalid.\textsuperscript{107} After Boykin, Rule 11 procedures can no longer be viewed as designed to prevent unconstitutional pleas. Their absence makes a plea unconstitutional.

Mr. Justice Harlan in dissent in Boykin argued that the case was an application of the McCarthy rule to the states and that since the McCarthy rule had been held to be prospective in Halliday, it should not be extended to Boykin. This argument has two serious defects. First, it is not clear why a rule of criminal procedure cannot be applied at different times to the federal government and the states. Thus in Linkletter the Court did not apply Mapp prospectively as of the date of the 1914 \textit{Weeks}\textsuperscript{108} case, which adopted the exclusionary rule in federal cases. Second, certiorari had already been granted in Boykin\textsuperscript{109} at the time of the McCarthy opinion, and unless the Court wished to move to an even more overtly random process of selecting the defendants who will benefit from retroactive application of a new rule, it should extend the rule to all defendants in cases before the Court for direct review at the time the rule is announced. For instance, in Miranda the Court did not limit retroactive application of the Miranda rules to Miranda but extended them to all the companion cases. Halliday on the other hand came to the Court on collateral attack and certiorari was not granted until after the McCarthy opinion.\textsuperscript{110}

\textsuperscript{107} In McCarthy, the Court held that the defendant should have the opportunity to plead anew and remanded the case. In Boykin, the Court held the conviction itself unconstitutional and reversed. Thus, after McCarthy the burden was on the defendant to reopen the proceeding while after Boykin the burden was on the state to reprosecute the defendant.

\textsuperscript{108} Weeks v. United States, 232 U.S. 383 (1914).

\textsuperscript{109} 393 U.S. 820 (1968).

\textsuperscript{110} Certiorari was granted and the opinion issued on the same day, May 5, 1969, after McCarthy. This enabled the Court to indicate immediately the nonretroactive
Although Boykin casts doubt on Halliday because it elevates the Rule 11 procedure from a rule of court to a constitutional mandate, it seems clear that Halliday will control the retroactivity of Boykin for the same reasons that the Court chose nonretroactive application of the Katz rule in Desist. The Boykin rule is a prophylactic rule designed to improve the procedures for entering guilty pleas. It can only affect these procedures in the future. But what other "new" rules adopted by the Court this Term will be held to be prospective? Of the cases discussed above, Spinelli v. United States, Davis v. Mississippi, and North Carolina v. Pearce would all appear to be prospective under the standards of Desist and Halliday. In addition, Orozco v. Texas\textsuperscript{111} extending the application of Miranda to interrogation in the suspect's home, and Chimel v. California\textsuperscript{112} narrowing the scope of a search incident to an arrest, should be prospective.

The fact that the "rule" of an opinion is declared to be prospective has an impact on the way in which that opinion can be read and interpreted. In the normal case a Court's opinion speaks in the context of a line of cases and the language of the Court can be interpreted in light of that tradition. But when the Court declares an opinion to be prospective it clearly states that the rule of this opinion is different from the rule of prior cases and that those cases are not to be controlling in the application of the new rule. In Desist, Mr. Justice Stewart described the rule of his own Katz opinion as follows:\textsuperscript{113}

\begin{quote}
[W]e held that the reach of the Fourth Amendment "cannot turn upon the presence or absence of a physical intrusion into any given enclosure." \ldots\textperiodcentered Noting that the "Fourth Amendment protects people, not places," \ldots\textperiodcentered we overruled cases holding that a search and seizure of speech requires some trespass or actual penetration of a particular enclosure. We concluded that since every electronic eavesdropping upon
\end{quote}

impact of McCarthy. The use of pending cases on the miscellaneous docket for this purpose seems an unnecessary formality which leads the Court to decide the case without any opportunity given to the petitioner for the appointment of counsel or the argument of the case. It might be better if the Court would simply indicate in each of its opinions whether or not the opinion applies retroactively.

\textsuperscript{111} 394 U.S. 324 (1969).

\textsuperscript{112} 395 U.S. 752 (1969).

\textsuperscript{113} 394 U.S. at 246.
private conversations is a search or seizure, it can comply with constitutional standards only when authorized by a neutral magistrate upon a showing of probable cause and under precise limitations and appropriate safeguards.

There are at least three different rules that can be drawn from Mr. Justice Stewart's opinion in *Katz*.\(^{114}\)

1. Henceforth, the Fourth Amendment will apply to all surveillance of conversations conducted by a means that relies on the transmission of sound or electronic impulses through a solid in direct contact with a protected area.

   *Comment:* This rule would apply to bugs attached to walls or other objects in direct contact with the protected area. It would not apply to parabolic microphones pointed through open windows. It would apply to wiretaps. This rule removes technical distinctions based on property rights from the law of the Fourth Amendment.

2. Henceforth, the Fourth Amendment will apply to surveillance of all conversations conducted by means of electronic devices where the person who is the object of the surveillance has a reasonable expectation of privacy.

   *Comment:* This rule is the same as that of Title III of the Crime Control Act\(^ {115}\) and is designed to serve the purpose of the Fourth Amendment: the protection of privacy. It represents a sharp break with the cases because it extends to conversations conducted in areas such as parks and restaurants that have normally not been protected. It is inconsistent with the opinion in *Katz* because a limitation on the scope of the Fourth Amendment based on the means of surveillance, a distinction inconsistent with the wording of the Fourth Amendment, was not discussed by the Court in *Katz* and has never been defended in any opinion of the Court.\(^ {116}\)

3. Henceforth, the Fourth Amendment will apply to surveillance of all conversations conducted by any means including the human ear where the participants in the conversation have a reasonable expectation of privacy.

   *Comment:* This is the same rule as 2 but the distinction between electronic and other forms of surveillance is eliminated. Most important, it extends the application of the

\(^{114}\) My own reading is to be found in Kitch, note 41 *supra*.


Fourth Amendment to any use of informers. It is supported but not required by recent decisions of the Court in the informer area.117

There is even a fourth rule, apparently rejected by Mr. Justice Stewart in Desist, that can be drawn from Katz.

4. Henceforth, the Fourth Amendment will apply to all surveillance, visual or aural, where the effect of the surveillance is to offend the society’s notions of privacy.

Comment: This rule responds to the inherent inconsistency of distinguishing between things that can be seen and things that can be heard.

Mr. Justice Stewart seems extremely proud of his phrase: “The Fourth Amendment protects people and not places.” But it is difficult to deduce a rule from it.

If Katz is interpreted in light of the case-by-case development that precedes it, it announces rule 1 but foreshadows the future development of rule 3.118 In Desist, however, the Court, by emphasizing the “newness” of the Katz rule and its application exclusively to electronic surveillance, seems to have reinterpreted Katz to stand for rule 2.

The Court’s problem of effectively establishing its new rules is compounded by the spongy quality of its opinions. The opinions typically tend to speak in public relations jargon with little discussion of how those generalities would be applied to different facts. Precedents are cited not as examples of applications of those generalities but as examples of earlier expressions by the Court of the same generalities. As long as one could assume that the “rule” being applied in the case at hand was the same or at least related to rules earlier announced, then the precedents of the Court could be examined in order to determine the implications of the new “rule.” A good-faith judge, using the body of the Court’s decisions as a reference point, could then hope to do a reasonably craftsmanlike job of interpreting and applying the law. But when that body of decisions has explicitly been declared “different,” how is this job to be done?

Part of the problem for the Court is that the convention of a judicial opinion does not lend itself to a clear statement of the “new

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118 As I argued extensively in Kitch, note 41 supra.
rules." The new rule and the reasons for that rule (or in other terms, its legislative history) are stated together and the problem for the interpreter is to separate them. One solution, of course, would be for the Court to abandon the present convention and explicitly have three sections: in one, the new rule would be announced; in another the reasons for the rule would be discussed; in the third the application of the rule to the particular facts of the case would be made. The Court's style has in fact been moving in this direction; it is particularly noticeable in the opinions of Chief Justice Warren in *Miranda v. Arizona*¹¹⁹ and *Terry v. Ohio*.¹²⁰ But do such general, legislative pronouncements bind the Court for the future? The convention of *stare decisis* is built around the concept that the Court is bound only by the holding of a case, that is, by the narrow application of the rule to the particular facts. Do the general rules announced in these opinions really reflect the enthusiasm of the opinion writer rather than a future commitment of the Court as an institution? To make such general pronouncements binding the Court will have to strengthen the convention of *stare decisis*. The whole thrust of its work, however, points in the opposite direction. The Court might solve this problem by making more frequent use of its power to amend the Federal Rules of Criminal Procedure. But the Rules, at least in theory, are not binding on the states, and the amendment procedure is subject to explicit congressional check.¹²¹

The frequent use of prospective overruling of prior doctrine dramatizes the equal protection problem inherent in any change of law. Whenever a new rule is announced by a court it is denied to those who have no present means of obtaining judicial relief. This problem is substantially mitigated where the change takes place in a gradual manner over a long period of time. But where a new rule is announced to apply only for the future because it reflects policy considerations of a constitutional magnitude, why should it be denied to defendants affected by conduct one week earlier in time? The Court's answer is that since retroactive application of the rule cannot affect past conduct there is no constitutional purpose to be served by it. This provides a reasonable basis for the classification.

¹²⁰ 392 U.S. 1 (1968).
The Court, then, is like a legislature, declaring new guidelines for conduct for the future.

But there are two problems of equal protection that arise in the judicial system but do not arise in a legislative system. First is the de minimis but aesthetically offensive problem that the Court applies the new rule retroactively to the defendant in the case in which the new rule is announced. Why should he get the benefit of the rule? How is he chosen? It is sometimes said that if the rule is not applied in the case in which it is announced it will be dictum. That may be so, but the Court could deal with that problem by acknowledging the binding quality of a rule so announced and actually following it in future cases. The more serious problem is the lack of incentive for counsel to argue for new rules if they would not be extended to their clients. It is doubtful, however, that extension of the rule to the one case in which it is announced is really sufficient to preserve a flow of cases presenting “new” questions for resolution to the Court. The decision to present a new constitutional issue is often made not before the Supreme Court but at trial, where the factual underpinnings for a constitutional issue must be laid. When a defense counsel faced with a trial strategy choice knows that an anticipated rule can help his client only if the case is the lucky one that actually goes to the Supreme Court, he must prefer strategies that do not rely on such rules.

An even larger problem of equal protection is the problem of geographic discrimination. For instance, on November 2, 1965, the Ninth Circuit had already applied the interpretation of Rule 11 adopted by the Court in McCarthy.122 Foreshadowing Halliday, the Ninth Circuit applied its decision prospectively to all pleas entered after the date of the decision.123 Since that date, defendants in the Ninth Circuit have had the benefit of Rule 11. In other circuits, defendants did not have advantage of the rule until the date of McCarthy, April 2, 1969. Why should they be denied the rule because they were convicted in a different circuit? In some circuits, they are denied the rule because the court of appeals decided the question erroneously, contrary to McCarthy.124 But weren’t those

122 Heiden v. United States, 353 F.2d 53 (9th Cir. 1965).

123 Castro v. United States, 396 F.2d 345 (9th Cir. 1968).

124 Kennedy v. United States, 397 F.2d 16 (6th Cir. 1968); United States v. Del
courts wrong? Or were they right because McCarthy retroactively validated their rule for pleas before April 2, 1969? In other circuits defendants are denied the rule because no one has made the argument for a McCarthy rule.\textsuperscript{125} Suppose a circuit should decide that, had it been presented with the question at any time after the Ninth Circuit decision adopting the McCarthy rule, it would have followed the Ninth Circuit.\textsuperscript{126} Should defendants in that circuit then get the benefit of the November 2, 1965, date? The problems are compounded if one brings the state and district courts into the picture, greatly increasing the number of jurisdictions.

The most important consequence of the rise of the nonretroactivity doctrine is its deeply conservative impact on the lower courts. It was formerly thought that when a lower court was faced with an unresolved question of constitutional law, it should ask: How would the Supreme Court decide the question if it were deciding it now? But that can no longer be the appropriate question, because if the Supreme Court were deciding the question today it would also decide that the rule should not be applied to the case before the lower court. Rather, the lower court must now ask, what is the “old” rule that will be applicable in these cases until the Supreme Court has clearly announced the “new” rule? For instance, last winter the Seventh Circuit in \textit{United States v. White},\textsuperscript{127} followed the hints of the Court in \textit{Katz} and other cases and held that \textit{Katz} stood for rule 2, as described above, extending the Fourth Amendment to a “wired for sound” informer. The case was decided prior to \textit{Desist} and applied to conduct prior to \textit{Katz}. The Supreme Court Piano, 386 F.2d 436 (3d Cir. 1967); Halliday v. United States, 380 F.2d 270 (1st Cir. 1967); Stephens v. United States, 376 F.2d 23 (10th Cir. 1967); Lane v. United States, 373 F.2d 570 (5th Cir. 1967); Brokaw v. United States, 368 F.2d 508 (4th Cir. 1966).

\textsuperscript{126} Apparently this is true in the District of Columbia, Second, and Seventh Circuits.

\textsuperscript{127} The Eighth Circuit rejected a collateral attack based on the pre-1966 Rule 11 on the ground that Rule 11 had been complied with. Bartlett v. United States, 354 F.2d 745 (8th Cir. 1966). Did this imply that if the rule were not complied with, the plea was subject to collateral attack? And in Halliday v. United States, 380 F.2d 270 (1st Cir. 1967), and United States v. Del Piano, 386 F.2d 436 (3d Cir. 1967), both dealing with pre-1966 Rule 11, the courts made passing references to amended Rule 11 suggesting that the result under the amended rule might be different. 386 F.2d at 437 n. 2; 380 F.2d at 272. Should the McCarthy rule apply in these circuits as of the effective date of amended Rule 11, July 1, 1966?

\textsuperscript{127} 405 F.2d 838 (7th Cir. 1969).
has granted certiorari in the case. Should the Court hold that the
decision is in error because *Katz* applies only prospectively? Should
it hold that the application of the Fourth Amendment to informers
is a new rule that should apply in the case in which it is announced?
Should it hold that the Seventh Circuit's interpretation of the
Fourth Amendment is correct, or that that question is not before
the Court because the case involves only the application of old
"trespass" Fourth Amendment law? Or should it hold that the case
is rightly decided under Seventh Circuit law because it was decided
by the Seventh Circuit before notice was given in *Desist* that *Katz*
was only prospective?

The rise of retroactivity, freeing the lower courts from an obli-
gation to carry out the implications of contemporary Supreme
Court law, was paralleled by the sudden re-emergence of the harm-
less error doctrine last Term—in the very class of cases where the
retroactivity doctrine does not apply. Shortly after the Court's due
process revolution was announced in *Mapp*, the Court proceeded
to limit this threat to its control mechanism. If prosecutors contin-
ued to win cases on appeal even though unconstitutionally seized
evidence had been admitted at trial because there was enough other
evidence in the record to sustain the conviction, they would not be
sufficiently inconvenienced to put pressure on the police to comply
with the Fourth Amendment. In *Faby v. Connecticut*, a search
and seizure case, Chief Justice Warren wrote:

> [In deciding whether the error was harmless] we are not
> concerned . . . with whether there was sufficient evidence on
> which the petitioner could have been convicted without the
> evidence complained of. The question is whether there is a
> reasonable possibility that the evidence complained of might
> have contributed to the conviction.

The Court strengthened the limitations on the harmless error do-
ctrine in *Chapman v. California*, a case involving the no-comment
rule of *Griffin v. California*, held prospective in *Tehan v. Shott*.
"We, therefore," wrote Mr. Justice Black, "do no more than adhere

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130 Id. at 86-87.
131 386 U.S. 18 (1967).
132 380 U.S. 609 (1965), holding that a prosecutor may not comment to the jury
on the fact that a defendant has exercised his right not to testify.
to the meaning of our Fahy case when we hold, as we now do, that before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

The first case in which the Court applied the harmless error doctrine last Term was Foster v. California.\textsuperscript{135} Foster was a pre-Wade identification case. In Stovall v. Denno\textsuperscript{136} the Court held that the rule of United States v. Wade,\textsuperscript{137} requiring an attorney for the suspect to be present at a lineup, was prospective. The Court acknowledged in Stovall, however, that identification procedures judged by the "totality of the circumstances" may be "so unnecessarily suggestive and conducive to irreparable mistaken identification" as to be a denial of due process of law.\textsuperscript{138} In Foster, the Court applied this rule and found that the identification procedures denied due process. Foster was convicted on the basis of identification by the victim and the testimony of his accomplice. The Court held that the identification procedures used with the victim, who had been unable to identify the defendant until after a lineup and a one-to-one confrontation, violated due process. But the Court then remanded the case to the state courts to determine whether the error was harmless. It is difficult to see how identification by the victim in a criminal case could be harmless error. But Mr. Justice Black, the author of the Chapman opinion, enthusiastically supported the remand even in dissent. "[T]he question whether an error in a particular case is harmless is an issue peculiarly for the lower not the highest appellate courts. . . . This Court was not established to try such minor issues of fact for the first time."\textsuperscript{139} In light of Chapman this is nonsense. The only obvious reason for the remand seems to be to avoid the need to overrule Chapman even though mitigating the effects of the pre-Wade rule announced in Stovall.

The Court also apparently applied a kind of harmless error doctrine in Boulden v. Holman,\textsuperscript{140} a case involving the rule of Witherspoon v. Illinois.\textsuperscript{141} Witherspoon held that a jury, chosen under a rule that gave the state the right to challenge veniremen for cause

\textsuperscript{134} 386 U.S. at 24.
\textsuperscript{135} 394 U.S. 440 (1969).
\textsuperscript{136} 388 U.S. 293 (1967).
\textsuperscript{137} 388 U.S. 218 (1967).
\textsuperscript{138} 388 U.S. at 302.
\textsuperscript{139} 394 U.S. at 452.
\textsuperscript{140} 394 U.S. 478 (1969).
\textsuperscript{141} 391 U.S. 510 (1968).
for having an opinion against the death penalty, could not constitutionally impose the death penalty because the jury was biased on that issue. Such a rule is applied retroactively because its rationale is based on the integrity of the penalty determining process. Alabama statutes give the state a challenge for cause as to veniremen who have "a fixed opinion against capital or penitentiary punishment." Such challenges were exercised at Boulden's trial. Mr. Justice Stewart, writing for the Court in Boulden, held:

It appears, therefore, that the sentence of death imposed upon the petitioner cannot constitutionally stand under Witherspoon v. Illinois. We do not, however, finally decide that question here, for several reasons. First, the Witherspoon issue was not raised in the District Court, in the Court of Appeals, nor in the petition for certiorari filed in this Court. [The Court of Appeals decision had been rendered prior to Witherspoon.] A further hearing directed to the issue might conceivably modify in some fashion the conclusion so strongly suggested by the record now before us. Further it is not clear whether the petitioner has exhausted his state remedies with respect to this issue. Finally, in the event it turns out, as now appears, that relief from this death sentence must be ordered, a local federal court will be better equipped than are we to frame an appropriate decree with due regard to available Alabama procedures.

The last reason for the remand is clearly specious, since the district court could just as easily frame the decree after the Court determined the Witherspoon issue. The first reason is Kafkaesque. Why should the defendant, after having arrived at the highest court in the land, be forced to go back to the bottom of the judicial system in order to argue an issue on which the highest court says he is right but which he didn't know about at the time he initially sought relief? The second reason is inexplicable, since neither the Boulden nor Witherspoon opinions give any hint of what other evidence might be relevant. Is the Court inviting the district court, as the Illinois Supreme Court did in People v. Speck, another pre-Witherspoon trial, to find by some mysterious process that the particular questions asked and challenges exercised in Boulden did not have any effect on the jury?

143 394 U.S. at 484.
144 41 Ill. 2d 177 (1968). See also People v. Mallett, 244 N.E. 2d 129 (Ill. 1969).
The Court faced the issue of the present scope of the *Chapman* rule directly in *Harrington v. California*. Harrington had been tried with three co-defendants. Each of the other co-defendants confessed and their confessions were introduced into evidence at the trial in violation of the rule of *Bruton v. United States*, holding that such a procedure violated the Sixth Amendment right to confrontation even when the jury was instructed that each confession was admissible only against the defendant who made it. The petitioner argued that the conviction should be reversed whether or not the error was harmless. The Sixth Amendment right to confrontation, he argued, is a right "of the first magnitude" whose violation requires automatic reversal. The rules involved in *Fahy* and *Chapman*, on the other hand, were "secondary" rules designed to implement major constitutional rights. Thus, the exclusionary rule in *Fahy* was designed to prevent unreasonable searches and seizures. And the no-comment rule in *Chapman* was designed to prohibit prosecution tactics which capitalize on the defendant's exercise of his right not to testify. But in *Harrington*, the constitutional requirements of the Sixth Amendment had themselves been violated. Indeed, the Court had spoken of the *Bruton* rule in this way when, in *Roberts v. Russell*, it held the rule retroactive. "The retroactivity of the holding in *Bruton* is . . . required; the error 'went to the basis of fair hearing and trial because the procedural apparatus never assured the [petitioner] a fair determination' of his guilt or innocence." How can a denial of a right essential to a fair hearing and trial be held harmless? For instance, could a denial of the right to appointed counsel be held harmless error because the evidence against the defendant was overwhelming and the presence of counsel couldn't have made any difference? Under *Gideon v. Wainwright*, rejecting the actual prejudice standard of the earlier cases, clearly not.

The entire Court, however, treated the question as if there were a single unitary standard of "constitutional harmless error," the standard of the *Fahy* and *Chapman* cases. Mr. Justice Douglas, writing for the Court, found that the error was harmless because apart from the confessions "the case against Harrington was so

147 392 U.S. 293 (1968).
148 Id. at 294.
overwhelming that we conclude that this violation of Bruton was harmless beyond a reasonable doubt.\footnote{151} Mr. Justice Brennan, dissenting with the Chief Justice and Mr. Justice Marshall, argued:\footnote{152}

The Court today by shifting the inquiry from whether the constitutional error contributed to the conviction to whether the untainted evidence provided "overwhelming" support for the conviction puts aside the firm resolve of Chapman. . . . As a result, the deterrent effect of [our constitutional rules] . . . on the actions of both police and prosecutors, not to speak of trial courts, will be significantly undermined.

The record reveals that Harrington might well present an example of harmless error even under the test of Chapman and Fahy as interpreted by the dissenters. But the test requires a more complex and speculative analysis than Mr. Justice Douglas cared to indulge. The four defendants had attempted to rob a small grocery and liquor store in southern Los Angeles with a blinding incompetence that would be comic if a clerk had not been shot dead by one of them in the course of the attempt. With brash self-confidence, when arrested each admitted participation in the events to the police but attempted to avoid responsibility for the murder itself. None had anticipated, however, the operation of the felony-murder rule and all four were convicted of murder. The case against Harrington, even apart from the confessions, was overwhelming. He admitted that he had gone to the scene with the other three but denied planning or participating in the robbery.\footnote{153} His story was that he was just an honest dupe along for a ride who walked into the store to buy cigarettes as the shot rang out. The testimony of two of the store personnel and a customer placed Harrington inside the store throughout the robbery and shooting.\footnote{154} Harrington's only possible line of defense was to argue that although he was there, he had not been a co-conspirator to the robbery and therefore was not vicariously liable for the shooting under the felony-murder rule. On this issue the three confessions were cumulatively quite important in establishing that the four had indeed planned the robbery before they entered the store.

It seems highly unlikely that Harrington would have done any better with his defense had he had a separate trial. There was some

\footnote{151} 395 U.S. at 254. \footnote{152} Id. at 255. \footnote{153} Record, A. 363-64. \footnote{154} Id. at A. 56-138.
confusion about his identification in the store because the witnesses had originally reported the robbers as four colored men. Harrington was white. Particularly damning for Harrington would be the testimony of a resident of the neighborhood that she had seen four men, three colored and one white, changing from two cars to a single car several blocks from the grocery store shortly before the robbery. But it is difficult to tell what would happen in such a trial from the record in the case because counsel's knowledge that the three confessions would be admitted may have made it pointless for him to pursue lines of inquiry and argument that would otherwise have been available.

Mr. Justice Douglas' analysis is particularly deficient in its treatment of the confession of one of the co-defendants, Rhone. Rhone's confession was the most damaging to Harrington because it placed him by name in the store with a gun at the time of the murder. But after the state's case was in, Rhone took the stand in his own defense to testify that he was not a party to the robbery attempt. Harrington's lawyer then cross-examined him. Neither Rhone's testimony nor the cross-examination were helpful to Harrington. Mr. Justice Douglas assumed that the introduction of Rhone's confession did not violate the Bruton rule. He apparently took the position that the cross-examination satisfied the confrontation requirement of the Sixth Amendment. But the admission of the confession was error. How was the error cured by the subsequent examination? Suppose Rhone felt forced to take the stand because the admission of his confession left him with no other workable defense strategy. In Bruton the Court had observed that the violation of the right of confrontation was particularly serious in cases where the co-defendant whose confession was admitted did not testify. But that observation did not justify holding the Bruton rule inapplicable where the co-defendant did testify. Is it now constitutional for a prosecutor to introduce a confession in violation of Bruton in the hope that the confession will "flush out" the confessor and force him to testify?

155 Id. at A. 88-90, A. 120-21, A. 138.

156 Id. at A. 140-45.

157 "The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." 391 U.S. at 136.
Although the record in *Harrington* might support a finding of harmless error even under the “contributed to” standard of the dissenters, the style of Mr. Justice Douglas' opinion suggests that the Court is turning back toward an “untainted overwhelming evidence” approach rather than a “what might have happened if there had been no error” approach. Particularly troubling is the Court's apparent assumption that the standard of harmlessness for all constitutional errors is the same. Surely some constitutional requirements are such that their violation requires automatic reversal. Is the *Bruton* rule, so fundamental that it must be applied retroactively, one of them?

The explanation for this approach to harmless error may be that the Court wishes to preserve *Chapman* as a precedent in order to enforce its criminal procedure rules in the future while at the same time using the harmless error rule to avoid the retroactive effect of rules that are not limited to prospective application. It is probably not without significance that in *Harrington* the State of California, joined by Arizona, Arkansas, Colorado, Connecticut, Delaware, Illinois, Kentucky, Minnesota, Montana, New Mexico, New York, North Carolina, South Carolina, South Dakota, Utah, Virginia, and Washington as amici curiae, urged the Court to overrule *Roberts* and apply *Bruton* prospectively.

IV. Conclusion

The Warren Court in the last Term of its existence was retreating from implementation of the system of control over criminal procedure it had so forcefully built. In characteristic fashion, it did not retreat by limiting the procedural system it had created while more strongly integrating its essential features into the body of our constitutional law. Rather, it retreated by creating a new set of doctrines which substantially undermine the ability of the Court to declare and enforce the law. It is ironic that a Court that has built a complex system of rules based in part on the implicit assumption that the officials of the criminal justice system cannot be trusted should at the same time create doctrines that increase their discretionary power.

The rapid development of the doctrines of retroactivity and harmless error does not seem to be the result of a desire to bend to the shifting winds of public opinion. Mr. Justice Black has become
remarkably more conservative. There does seem to be some desire on the part of the three critical swing voters, Mr. Justice Brennan, Mr. Justice Stewart, and Mr. Justice White, to moderate the impact of the Court’s decisions. But the more important factor seems to be an institutional one. The system of rules the Court has created in the area of criminal procedure has become extremely complex. The Court has been able to simplify it somewhat, at the expense of meaningful control over the lower courts, by the convenient fiction that waiver and harmless error are unitary doctrines. Because of the complexity, the Justices are having trouble agreeing on a majority opinion. If the cases are disposed of without a majority opinion, then the Court announces no law at all.

This fate actually overtook the Court last Term in Spinelli, where Mr. Justice White finally concurred with the majority in order to prevent a four-to-four deadlock. “I join the opinion of the Court and the judgment of reversal, especially since a vote to affirm would produce an equally divided Court.” Spinelli must be one of the few cases in the history of the Court decided the way it was because otherwise it would have been decided differently. But a case decided on such a basis declares no law at all. The institution of an opinion makes it difficult for the Court to declare a system of procedural rules because each opinion must in a sense “re-enact” the applicable rules. But if no majority of the Court favors the application or result of the rule in the case at hand, the existing rules can be preserved only by creating some exception in order to form a majority opinion. Since almost all members of the Court now seem to feel that it is important to uphold the decisions of the past ten years lest the authority of the Court be weakened, this strategy can lead to an almost unanimous opinion. The original dissenters from the rule sign an opinion-upholding the rule in exchange for a new rule that undermines its impact. For instance, it is hard to believe that the language of Mr. Justice Brennan in Davis authorizing a general fingerprinting warrant was not essential in order to frame an opinion of the Court. Yet the opinion, as finally written, was supported by seven Justices. Similarly in Boulden, it is hard to believe that there were five members of the Court who supported disposition of the case without a remand. Yet the opinion as written on the Wither- spoon issue was supported by all members of the Court.

168 393 U.S. at 429.
The alarming aspect of this development is its inherent danger to the preservation of civil liberties. A relatively minor aspect is a doctrine like the general fingerprinting warrant of the Davis case, announced as a Court, cut off from history and stare decisis, gropes for good policy in a changing political climate. More important is the fact that the Court, having taken on itself the primary burden for the protection of the integrity of the American criminal justice system, has substantially undermined the ability of the state courts to do the job. The state courts reacted to the criminal due process revolution at first with anger and then with sullen resentment. They have now discovered the new nullification doctrines, and many are applying them with a vengeance. But they are trapped in a reactive system of law; their decisions must be framed in relation to the Supreme Court's decisions. In this climate there is a tendency to choose sides, to support or to reject the Supreme Court, rather than to attempt to articulate and enforce a system of justice responsive to the state courts' norms of procedural fairness. This problem is in part the result of petty pique, and perhaps it could be avoided if judges were better men. But it is hard for a state court that does not share the Supreme Court's norms to avoid using the new doctrines to undermine the Court's procedural law. This leaves the jurisdiction with no real system of procedural law at all. The Supreme Court's rules are not abandoned, only sapped.

If these developments during the final Term of the Warren Court are not checked, they will substantially undermine the ability of the courts to protect the integrity of the American system of criminal justice. The challenge to the "new" Court is to prevent that from happening.