The "Rehnquist Court" in Criminal Procedure

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The nomination of Justice William Rhnquist for the post of Chief Justice of the Supreme Court has caused considerable consternation in liberal circles. Whereas the product of the Burger Court has aptly been termed "the counterrevolution that wasn't"[1] it is feared that Chief Justice Rehnquist may have the will, the intellect and, most importantly the votes, to make serious inroads into the structure of federally enforced constitutional rights that was erected by the Warren Court.

For example, Anthony Lewis editorializing in the New York Times, strongly criticized the choice of Justice Rehnquist for Chief Justice. He termed Rehnquist an "Activist" who is willing "to override precedent, (and) to reshape constitutional traditions in radical ways...."[2] He foresees "drastic limitation of the Court's role as the protector of American liberties" and a country "in which our freedoms are less secure, official power less retrained...." He concludes that "the American people will not be happy with a Supreme Court reconstructed in President Reagan's image."[3]

Yet this same Anthony Lewis, in his foreward to The Burger Court: The Counter-Revolution That Wasn't, was sanguine about the current state of the law, expressing the view that the Warren Court doctrines "are more securely rooted now than they were in 1969." In the same book, Professor Kamisar, commenting on the state of criminal procedure law, similarly averred that "the intensity of the civil libertarian criticsm of the Burger Court in the police practices area 'relates less to what the Court has done than to what the critics fear(ed) it (would) do.'"[4]

This article will attempt to determine just what Justice Rehnquist's position is on the various issues that make up criminal procedure law[5] and to assess the chances that, to the extent that those views differ in substantially from current doctrine, they will become law in the future.

The Burger Court Decisions

Professors Israel, Salzburg and Kamisar have all ably and thoroughly analyzed the work of the Burger Court in criminal procedure.[6] I will not repeat these efforts, but rather provide the briefest possible sketch of developments in the last decade and a half.

In general, these decisions can be seen as a retreat from, rather than a rout of, the Warren Court decisions. In the search and seizure area, the exclusionary rule and the (often excepted) warrant requirement were retained. However, the establishment of probable cause by the police was made easier,[7] and a good faith exception to the warrant requirement was created.[8] Standing requirements were tightened[9] and Fourth Amendment claims were barred from collateral attack in federal counts.[10] Consent searches were made easier.[11] The scope of warrantless automobile searches,[12] and searches incident to arrest[13] (including automobile searches incident to arrest)[14] was greatly expanded.

While the Courts search decisions were essentially uniform in favoring the police,[15] it took a greater interest in the rights of defendants in cases involving seizure of the person. While in United States v. Watson[16] the Court did hold that warrantless arrests of felony suspects may be effected on probable cause, it required an arrest warrant to arrest a suspect in his home[17] and a search warrant to arrest him in the home of another.[18] In Dunaway v. New York,[19] the Court made it clear that detention of a suspect for custodial "questioning" by the police must be justified by probable cause, whether or not the police considered their act an "arrest." And, in Dunaway and Brown v. Illinois[20] the Court would not allow Miranda warnings alone to "purge the taint" of such an illegal arrest such that a confession made by the arrestee could be used. Rather, the confession must, on all the facts, be found to be an act of "free

will."[21] Thus a possible incentive to the police to perform illegal arrests in hopes of gaining an incriminating statement from the suspect was largely dispelled.

Further, the Court limited the application of Terry v. Ohio[22] by forbidding frisks of those present at a premises that was being searched pursuant to a search warrant, absent the individualized suspicion as to dangerousness required by Terry.[23] In Delaware v. Prouse[24] it similarly forbade random stops of automobiles for drivers' license and registration checks. Finally in Gerstein v. Pugh[25] it forbade "extended" detention of an arrestee unless he is brought before a judicial officer for a determination of probable cause.

In the interrogation area, the Court's decisions have been similarly balanced, not allowing Miranda v. Arizona[26] to be expanded, but showing some sensitivity to the rights of criminal suspects -- even rights that were never recognized until Miranda itself.

In the early 70's it appeared that the Court, as Professor Stone observed,[27] was paving the way to overrule Miranda. It allowed statements obtained from a suspect in violation of Miranda to be used to impeach him at trial,[28] and allowed requestioning by police even after the defendant had asserted his right to silence.[29] It permitted the prosecution to use evidence which was the "fruit" of an unwarned statement[30] and termed the Miranda warnings merely "prophylactic standards" designed to protect the constitutional right against self-incrimination rather than constitutional rights themselves.[31]

On the other hand, while concluding that a suspect had not been subject to interrogation in a police car when he told police where to find a murder weapon, the Court extended Miranda to any custody (not just stationhouse custody) and defined "interrogation," rather broadly, as including "any words or actions on that part of the police (other than those normally attendant to custody) that the police should know are reasonably likely to elicit an incriminating response."[32]

In Edwards v. Arizona[33] the Court distinguished between assertion of the right to silence by a suspect and right to

counsel, holding that after the latter assertion interrogation must (really) cease until counsel has been made available -- no second tries by police unless the defendant "initiates" further conversation.[34] Also, in Estelle v. Smith[35] the Court held that both the Fifth and Sixth Amendment rights of a defendant were violated when he was subjected to a psychiatric interview (which led to testimony against him at the "death phase" of his murder trial) without receiving Miranda warnings and without his counsel having been notified. Recently, in Beckemer v. McCarty,[36] the Court extended the Miranda requirement to all crimes, including misdemeanor traffic offenses. The other significant pro-defendant interrogation case, Brewer v. Williams,[37] didn't involve Miranda at all but, instead, resurrected the pre-Miranda decision in Massiah v. United States[38] in holding that once adversary proceedings had begun against a defendant the police could not "deliberately elicit" incriminating statements from him.[39]

Recent cases have not all gone for defendants. In New York v. Quarles[40] the Court established a "public safety" exception to the requirement that the police give Miranda warnings. In Oregon v. Elstad[41] they held that the "fruit of the poisonous tree doctrine" did not operate to exclude a second, warned, statement by a suspect that followed a prior unwarned one. Finally, in Moran v. Burbine[42] they held that a suspect's waiver of his Miranda rights was initiated neither by the failure of police to tell him that a counsel retained for him by a third party is attempting to reach him, nor by the police assuming counsel that he would not be interrogated when, in fact, he was.

In the third major area of pretrial rights, involving identification procedures, the Burger Court, in Kirby v. Illinois[43] effectively gutted the 1967 requirement of United States v. Wade[44] that counsel must be present at a lineup by limiting that holding to post indictment hearings. Since most lineups are for the purpose of finding out if the police have the right man, they are, of necessity, pre-indictment. In fact, neither Wade nor Kirby represents the most sensible approach to lineups which is to require them to be either photographed and

tape recorded or videotaped if they are to be used in Court. As anyone who has actually been to a lineup knows, there is nothing for defense counsel to do there except to see if the procedure is unfairly suggestive of his client as the criminal, and complain about it later to the court. This can be better achieved by recording the proceedings.

Justice Rehnquist's Views

In all of the cases discussed above, with two exceptions,[45] Justice Rehnquist either voted against the defendant, or, concurring in the result, expressed serious reservations about a pro-defendant opinion. No other Justice approached him in maintaining such a consistant stance in favor of the views advanced by law enforcement. Does this mean that if Chief Justice Rehnquist could attract a majority to his view point, criminal procedure law would return to its pre-Warren Court state? In my view, the answer is no.

In assessing Justice Rehnquist's views of criminal procedure it is important to recognize those aspects of the Warren Court innovations with which he does not disagree. To discuss criminal procedure rights without mentioning trial rights is, to expand on Professor Kamisar's phrase, like playing Hamlet without Hamlet.[46] In my view the most significant decisions by the Warren Court were Gideon v. Wainwright[47] that extended the Sixth Amendment right to counsel to state felony defendants and Douglas v. California[48] and Griffin v. Illinois[49] that accorded indigent defendants the rights to counsel and a free transcript on appeal. Without counsel to represent a defendant at trial and the opportunity to bring an effective appeal, other constitutional rights, such as that of proof beyond a reasonable doubt, as well as pretrial rights, could be ignored. Justice Rehnquist has never expressed any disagreement with these cases, nor with other key cases that ensure criminal defendants a fair trial in state and federal courts.[50] Indeed, he joined Justice Powell concurring in the result in Argersinger v. Hamlin[51] which extended the right to counsel to misdemeanor cases. Powell and Rehnquist agreed that an indigent should have appointed counsel at least whenever he is entitled to a jury trial. "If there is

no accompanying right to counsel, the right to trial by jury becomes meaningless."[52] They would have extended the right to counsel beyond jury trials to "whenever (it) is necessary to assure a fair trial"[53] but not necessarily to every case where the defendant might be imprisoned, as the majority held.[54]

In his dissenting opinion in Taylor v. Louisiana,[55] Justice Rehnquist further explicated his basic agreement with the application of fundamental trial rights to the states through the Fourteenth Amendment, quoting from Duncan v. Louisiana:[56]

> "The test for determining whether a right extended by the Fifth and Sixth Amendments with respect to federal criminal proceedings is also protected against state action by the Fourteenth Amendment has been phrased in a variety of ways in the opinions of this Court. The question has been asked whether a right is among those '"fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,"' Powell v. Alabama, 287 U.S. 45, 67 (1932); whether it is 'basic in our system of jurisprudence,' In re Oliver, 333 U.S. 257, 273 (1948); and whether it is 'a fundamental right, essential to a fair trial,' Gideon v. Wainwright, 372 U.S. 335, 343-344 (1963); Malloy v. Hogan, 378 U.S. 1, 6 (1964); Pointer v. Texas, 380 U.S. 400, 403 (1965).... Because we believe that trial by jury in criminal cases is fundamental to the American shceme of justice, we hold that the Fdourteenth Amendment guarantees a right of jury trial in all criminal cases...."[57]

Justice Rehnquist described this as "a sturdy test...."[58] The cases cited in the above passage from Duncan provded for right to counsel first in capital (Powell) and then all felon (Gideon) cases, extended the Fifth Amendment right against self imcrimination to the states (Malloy); extended the Sixth Amendment confrontation right to the states (Pointer) and forbade secret criminal proceeedings (Oliver).

Of course, the mere fact that Justice Rehnquist quoted this passage from Duncan in a dissent does not necessarily mean that, if he had the votes, he would not, for example, decide to overrule Malloy v. Hogan. However, Justice Rehnquist has not been shy about expressing his disagreement with key Warren Court decisions, even though he knew he lacked the votes to change

them.[39] Even if, when he came on the Court fourteen years ago, he might have been inclined to overrule a case such as Malloy, it would be truly extraordinary for him, after fourteen years of explicit acceptance of such cases, to then turn around and overrule them. Accordingly, I shall assume throughout this article that, when Justice Rehnquist expresses acceptance of a given doctrine, he means what he says.

In addition to acceptance of the fundamental precepts discussed above, Justice Rehnquist has agreed that a state cannot compel a defendant to stand trial in prison clothes[40] and that a defendant cannot be prevented from consulting with his counsel during a recess in the trial.[41] Similarly, he authored the unanimous opinion in Burch v. Louisiana[42] holding that the conviction of a defendant for a non-petty offense by a non-unanimous six member jury violates the defendant's right to trial by jury and joined New Jersey v. Portash[43] (despite a dissent by Justice Blackmun and the Chief Justice) which held that testimony given before a grand jury under a grant of immunity could not be used to impeach the defendant at trial. Also, he joined a unanimous opinion in Burks v. United States[44] holding that double jeopardy barred retrial of a defendant whose conviction had been reversed by an appellate court based on insufficiency of evidence. He even joined Justice Brennan's opinion in Goldberg v. United States taking a rather expansive view of the defendant's right to receive the prosecutor's notes of a witness interview under the Jencks Act despite the fact that four other Justices expressed reservations about the scope of the opinion.[45]

More recently, Justice Rehnquist further demonstrated his adherence to the notion that the federal Constitution (and the federal courts) should guarantee fundamental trial rights when he joined a unanimous Court in Crane v. Kentucky,[46] reversing the Kentucky Supreme Court's holding. In Crane, the Court held that a defendant at trial must be allowed to introduce evidence as to the circumstances under which a confession was given in an effort to show that the confession was unworthy of belief.

None of the above is designed to show that Justice Rehnquist is the "defendant's pal" when it comes to trial rights. Indeed,

many decisions could be mustered to make the opposite case. Rather, the point is that he is not a "knee jerk conservative," ready to vote against the defendant no matter what the circumstances and unconcerned about the possibility of a defendant not being allowed to make an adequate defense. Instead, the cases just discussed show that he, like all of the other Justices, is prepared to weigh the interests of the state in convicting the guilty against the interests of the defendant and to try to reach a conclusion that comports with his understanding of the Constitution.[67]

As Justice Rehnquist stated in his majority opinion in Illinois v. Gates:[68]

> "Fidelity" to the commands of the Constitution suggests balanced judgement rather than exhortation. The highest "fidelity" is achieved neither by the judge who instinctively goes furthest in upholding even the most bizarre claim of individual constitutional rights, any more than it is achieved by a judge who instinctively goes furthest in accepting the most restrictive claims of governmental authorities. The task of this Court, as of other courts, is to "hold the balance true" and we think we have done that in this case.

As to the Fifth Amendment, while Justice Rehnquist has rather consistently voted to cut back the scope of Miranda v. Arizona[69] and has also urged that Massiah v. United States[70] be overruled[71] nevertheless it seems clear that he has now accepted the Miranda decision as well as certain of the key subsequent decisions that gave it added significance. If this is true, then he joins Chief Justice Burger in this view. As Burger stated in his concurring opinion in Rhode Island v. Innis:[72]

> The meaning of Miranda has become reasonably clear and law enforcement practices have adjusted to its strictures. I would neither overrule Miranda, disparage it, nor extend it at this late date.[73]

At least it would seem to be true, that Justice Rehnquist, along with the rest of the Burger Court, accepts the "basic premise" of Miranda "that the defendant's right against self-incrimination applies to police custodial interrogation"[74] and not just at trial.

In 1974, Justice Rehnquist wrote the Court's opinion in Michigan v. Tucker[75] which, in deeming the Miranda warnings

merely "prophylactic rules" rather than a constitutional right of the defendant, seemed, as Professor Stone has observed "certainly to have laid the groundwork to overrule Miranda."[74] Moreover, he joined the dissent in Doyle v. Ohio[77] when the majority held that a defendant's post-warning silence could not be used against him. He agreed with the majority in Oregon v. Haas[78] that a defendant could be impeached with statements made after he had asked for a lawyer and been wrongly questioned further and joined a majority in Michigan v. Mosely[79] holding that a defendant who had asserted his right to silence could be questioned later as to another offense.

However, whatever his initial reservations about Miranda, in recent years he seems to have accepted the opinion. In Wainwright v. Greenfield,[80] concurring in the result, Justice Rehnquest "agree(d) ... that our opinion in Doyle v. Ohio, shields from comment by a prosecutor a defendant's silence after receiving Miranda warnings, even though the comment be addressed to the defendant's claim of insanity."[81] In Edwards v. Arizona[82] he joined Justice Powell concurring in the result but agreeing with the majority that Edward's interrogation "clearly was questioning under circumstances incompatible with a voluntary waiver of the fundamental right to counsel."[83] Finally, in Berkemer v. McCarty,[84] he joined, without reservation, a Court opinion that applied Miranda to any custodial interrogation "regardless of the nature or severity of the offense for which (the defendant) is suspected or for which he was arrested (but that "roadside questioning" of a motorist pursuant to a traffic stop does not constitute "custodial interrogation.")[85]

The concessions in the above cases may be viewed as merely tactical -- drafting or joining a relatively narrow opinion without really conceding that, should the opportunity arise, Justice Rehnquist would vote to overrule Miranda. Still, as noted, after more than a decade of acceeding to Miranda, however grudgingly it would be difficult for Justice Rehnquist to then write an opinion overruling it. Moreover, it is quite clear that if he did so, he would not be able to attract a majority of votes.

In the Fourth Amendment area, Justice Rehnquist has been much more consistent in voting against defendants. This is because of his belief that

> the so-called "exclusionary rule" created by this Court imposes a burden out of all proportion to the Fourth Amendment values which it seeks to protect.[86]

This belief is shared by Chief Justice Burger,[87] as it was by Justices Harlan, Frankfurter and Whittaker who dissented in Mapp v. Ohio,[88] and many others.[89]

Given Justice Rehnquist's view that it is irrational to "let the criminal go free because the constable blundered" it is not surprising that he is generally inhospitable to claims of criminal defendants that their convictions should be reversed because of the trial courts failure to suppress evidence that has allegedly been illegally seized. Rehnquist believes that, whatever the appropriate remedy, it includes neither the suppression of evidence at trial nor the reversal of convictions for failure to suppress.[90] Having failed to convince his colleagues that illegally seized evidence should not be excluded, he tends to argue in each case that the evidence in question was not illegally seized. Sometimes he is successful in the endeavor as in United States v. Robinson[91] where the Court, per Justice Rehnquist, held that a search incident to any custodial arrest (even for a traffic offense) was appropriate as long as the arrest was based on probable cause, even though there was no additional justification for the search.[92] Other times he fails, as in Delaware v. Prouse[93] where an 8-1 majority, over Rehnquist's dissent prohibited random stops of automobiles by police for drivers license and registration checks. Similarly, in Dunaway v. New York,[94] a 6-2 majority held that picking up a suspect "for questioning" was an arrest, regardless of what the police called it, and consequently was illegal if not based on probable cause. Justice Rehnquist, joined by the Chief Justice in dissent agreed that such detainment could be an arrest and that probable cause was lacking but argued that, in this case, the defendant accompanied the police voluntarily.[95]

Another tactic employed in the Fourth Amendment area by Justice Rehnquist and the more conservative Justices is to argue

that, whether or not a search was illegal, the defendant is foreclosed from raising the issue. The most significant opinion by Justice Rehnquist in this regard is Rakas v. Illinois[96] in which the Court took a rather narrow view of a defendant's standing to raise Fourth Amendment claims in holding that a passenger of a car may not raise the issue of the illegality of the search of that car. Similarly, in Stone v. Powell[97] the Court per Powell J., held that Fourth Amendment claims could not be entertained on federal habeas corpus. In United States v. Havens,[98] a 5-4 majority per Justice White, allowed the government to use illegally seized evidence to impeach the defendant's testimony, even as to matters first raised by the prosecutor on cross-examination. However, in Franks v. Delaware[99] a 7-2 majority struck down a state rule that forbade a defendant from challenging the veracity of the police in a search warrant affadavit.

A slightly different, but related tactic is, having failed in case A to persuade a majority that a given police search was appropriate under the Fourth Amendment, to argue in case B that case A is not retroactive. This Justice Rehnquist did successfully in United States v. Peltier[100] in which the Court held that Almeida Sanchez v. United States[101] was not retroactive.[102]

There are, however, limits to the police behavior that Justice Rehnquist will countenance under the Fourth Amendment. In Lo Ji Sales, Inc. v. New York,[103] Justice Rehnquist joined a unanimous Court in striking down an open ended search warrant and the participation of the judge who issued the warrant in the search. In Brown v. Texas[104] he again joined a unanimous Court in striking down a state statute that required people to identify themselves to the police. In Mincey v. Arizona he explicitly agreed with the majority that there should be no murder scene exception to the Fourth Amendment warrant requirement.[105] In the recent case of New York v. PJ Video[106] he recognized, in writing

the majority opinion, that "police may not rely on the 'exigency exception to the Fourth Amendment's warrant requirement in conducting a seizure of allegedly obscene materials, under circumstances where such a seizure would effectively constitute a prior restraint."[107] In Hayes v. Florida,[108] he joined a unanimous Court in reversing the Florida courts and holding that in the absence of probable cause or consent, it was an unconstitutional seizure for police to take a suspect to the station for fingerprinting and the fingerprints must be suppressed.[109] Finally, and most significantly, in Gerstein v. Pugh[110] he joined a unanimous Court decision that required, under the Fourth Amendment, a judicial determination of probable cause as a prerequisite to extended restraint on a suspect's liberty following an arrest.

Justice Rehnquist clearly recognizes that too much power in the hands of the police can be dangerous. In general, however, his Fourth Amendment jurisprudence has been informed by the view that the Warren Court went too far in the other direction, according to the criminal defendant too many rights and allowing the crime problem to threaten the civil liberty of the people. In a speech at the University of Kansas[111] he observed that

> No thinking person would suggest that we are precisely where we want to be in the process of balancing claims for privacy against other governmental interest or that every new claim of privacy should be rejected simply because it might marginally impair the efficiency of law enforcement. In Hitler's Germany and Stalin's Russia, there was very efficient law enforcement, there was very little privacy, and the winds of freedom did not blow.[112]

However, he also noted that

> If the claim to privacy may be idealized in terms of individual human dignity, the claim of fair and efficient administration of the law may be idealized in terms of the sine qua non of a self-governing society. To the extent that a society is unable to enforce the laws it has enacted, it is not a self-governing society. Nor is it a society in which civil liberties and privacy are secure.[113]

The "constitutionality of a particular search" in Justice Rehnquist's opinion, "is a question of reasonableness and depends on 'a balance between the public interest and the individual's

right to personal security free from aribtrary interference by law officers."[114] Given Justice Rehnquist's view of the exclusionary rule and his view that the Warren Court had gone overboard in guaranteeing the rights of criminal defendants[115] it is not surprising that he has consistently endeavored to cut back on those rights. However, as illustrated above, he has his limits.

Rehnquist as Chief Justice

Heretofore the discussion has centered on Rehnquist's past views as an Associate Justice. However there is reason to believe that he may moderate some of the views expressed in those cases in an effort to lead the Court as the Chief Justice. In the first place, he considers the "law dealing with the constitutional rights of criminal defendants ... more evenhanded now than it was when I came on the Court.[116] Obviously, then the sense of mission that he had when he joined the Court, to "call[] a halt to a number of the sweeping rulings of the Warren Court"[117] in the criminal procedure area has now been fulfilled. He now recognizes that "there probably are things to be said on both sides of issues that perhaps I didn't think were"[118] when he came on the Court in 1972.

He views one's "major contribution" on the Court as "putting something together yourself or joining something someone else puts together that commands a Court opinion."[119] In a speech entitled "Chief Justices I Never Knew"[120] he described the role of the Chief Justice:

> Although his vote carries no more weight than that of his colleagues, the chief justice undoubtedly influences the Court and its decisions. When a new chief accedes to the bench, newspaper editorials often suggest that by either his "executive" or his "administrative" ability he will somehow "bring the Court together" and eliminate the squabbling and bickering thought to be reflected in decisions of important issues by a sharply divided Court. The power to calm such naturally troubled waters is usually beyond the capacity of any mortal chief justice. He presides over a conference not of eight subordinates, whom he may direct or instruct, but of eight associates who, like him, have tenure during good behavior, and who are as independent as hogs on ice. He may at most persuade or cajole them.

To the extent that Justice Rehnquist's positions have been

extreme compared to the other Justices, it is reasonable to expect that he will moderate them. It is one thing to be a maverick[121] as an Associate Justice; quite another to be one as Chief. This is not to say, as Justice Rehnquist discussed in the paragraph above that he will cause the Court to suddenly become harmonious and produce unanimous decisions. It does mean that, rather like Anna and the king of Siam, in the process of "cajoling" the people he may cajole himself as well.

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1. Book Title. The Burger Court: The Counterrevolution that wasn't. (V. Blasi, ed.) (1983).

2. New York Times, June 23, 1986, p. 17.

3. Id. Similarly, Professor Tribe stated that he "would be extremely surprised if over the next several years the effect (of the Rehnquist and Scalia appointments) is not to push the Court to the right considerably." Time Magazine, June 30, 1986, p. 25. The New York Times also averred that "the ideological balance is likely to shift perceptibly to the right if the Senate confirms President Reagan's selections (for the Supreme Court.) June 16, 1986, p. 1.

4. The Burger Court, supra n.1 at 90 (quoting Israel, Criminal Procedure, the Burger Court and the Legacy of the Warren Court, 75 Mich. L.R. 1319, 1408 (1977). See also, Salzburg, The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts, 69 Geo. L.J. 151, 153 (1980):

> The Burger Court has reaffirmed, explicitly or implicitly, nearly all of (the Warren Court criminal procedure) decisions

> .... (T)he difference between the Warren and the Burger decisions tend to be more at the margin than at the heart of the constitutional principles for which the Warren Court is remembered.

5. There are a number of sources to which one may turn for such information. Of greatest value are published speeches/law review articles and sole dissents since these will represent the pure views of their author, undiluted by any need to accommodate the opinions of others and unfiltered by the mind of a reporter of those views. Nearly as useful is the New York Times Magazine interview with the Justice which, while subject to distortion by the reporter, provides insights into personal philosophy which cannot be found in opinions and speeches. Of slightly diminished importance, but still useful are dissenting and concurring opinions authored by Justice Rehnquist that are joined by others. In these, one cannot be totally confident that any given assertion, or reservation, is in truth the pure view of the author or an accommodation to one of the joiners. Obviously this reservation is even more true of majority opinions where the author is more anxious to attract others to join his actual opinion (as opposed to just voting the same way) than is the author of a dissent. Of least use, but not totally valueless, particularly where a consistent pattern has developed over the years, are mere votes to join the majority opinions of others. As I have previously pointed out, the "tyrancy of the majority opinion" is such that it cannot confidently be read as expressing any more than a general preference of the joining justices, rather than their specific views. Bradley, The Uncertainty Principle in the Supreme Court, 1986 Duke L.J., 1, 28 (1986). Nevertheless, it would be difficult for a Justice who has consistently accepted Miranda, for example, by joining a series of opinions that endorsed that decision, to suddenly turn around and decry it. It would be even more difficult for him to attract any supporters to that denunciation. When a Justice joins a concurring or dissenting opinion, it is more likely to express his views since writing a separate dissent is a less significant departure than writing separately from a majority opinion. Since

Justice Rehnquist has not hesitated to write separate dissents, see, e.g., National Law

6. Supra n.4.

7. Illinois v. Gates, 462 U.S. 213 (1983).

8. United States v. Leon, ___ U.S. ___; 104 S.Ct. 3405 (1984).

9. Rakas v. Illinois,439 U.S. 128 (1979). Only a person with a "legitimate expectation of privacy" in a particular premise has standing to raise a Fourth Amendment claim.

10. Stone v. Powell, 429 U.S. 465 (1976).

11. Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Journal, June 30, 1986 ("Rehnquist Lone Dissenter in 47 Cases), when he joins a dissent or concurrance in a result, I have tended to ascribe to him acceptance of the author's views, barring better evidence to the contrary.

12. In United States v. Ross, 456 U.S. 798 (1982)

13. United States v. Robinson. 414 U.S. 218 (1973).

14. In New York v. Belton, 453 U.S. 454 (1981).

15. One exception was Franks v. Delaware, 438 U.S. 154 (1978) in which the Court rejected the state's rule that under no circumstances may the defendant challenge the truthfulness of factual statements made in a police affidavit supporting a search warrant.

16. 423 U.S. 411 (1976).

17. Payton v. New York. 445 U.S. 573 (1980).

18. Steagald v. United States, 451 U.S. 204 (1981).

19. Dunaway v. New York, 442 U.S. 200 (1979).

20. 422 U.S. 590 (1975).

21. Id. at . Factors to be considered are "the temporal proximity of the arrest and the confession, the presence of intervening circumstances and, particularly, the purpose and flagracy of the official misconduct are all relevant."

22. 392 U.S. 1 (1968).

23. Ybarra v. Illinois. 444 U.S. 85 (1979).

24. 440 U.S. 648 (1979).

25. 420 U.S. 203 (1975).

26. 384 U.S. 436 (1966).

27. Stone, The Miranda Doctrine in the Burger Court, 1977 S.Ct. Rev. 99, 123.

28. Harris v. New York, 401 U.S. 222 (1971). And in Oregon v. Hass, 420 U.S. 714 (1975) it even allowed the defendant to be impeached with statements given after he was warned and asserted his right to silence, thus providing police with an incentive to ignore the assertion of the Miranda rights.

29. Michigan v. Mosely, 423 U.S. 96 (1975).

30. Michigan v. Tucker, 417 U.S. 433 (1975).

31. This, despite express language in Miranda to the contrary. Miranda held that the warnings are required by the Fifth Amendment "unless we are shown other procedures which are at least as effective in apprising accused persons of their rights." 384 U.S. at 467. See also id. at 476 ("The requirement of warning and waiver of rights is a fundamental with respect to the Fifth Amendment privilege...." See generally, Stone, supra n.27 at 118-19.

32. Rhode Island v. Innis, 446 U.S. 291, 300-01 (1980).

33. 451 U.S. 477 (1981).

34. 451 U.S. at . In Oregon v. Bradshaw, 462 U.S. 1039 (1983) the Court held that a suspect had "initial(ed) dialogue with the authorities" by asking "what's going to happen to me now?" See also, Smith v. Illinois, 105 S. Ct. 490 (1984) holding that after an Edwards request, the defendant's responses to further reading, or discussion of, the Miranda warnings, "may not be used to cast retrospective doubt on the clarity of the initial request itself."

35. 451 U.S. 454 (1981).

36. 104 S.Ct. 3138 (1984).

37. 430 U.S. 387 (1977).

38. 377 U.S. 201 (1964).

39. In Brewer the police appealed to the defendant's religious feelings in urging him to lead them to the body of his victim so that she could have a "Christian burial." See also United States v. Henry, 447 U.S. 264 (1980) extending Brewer to "deliberate elicitation" of statements, not by police but by a fellow prisoner who was a police plant. But see, Kuhlman v. Wilson. 54 L.W. 4809 (1986) holding that a fellow prisoner who merely hears and reports defendant's statements does not violate Massiah.

40. 104 S.Ct. 2626 (1984).

41. 105 S.Ct. 1285 (1985).

42. 54 L.W. 4265 (1986).

43. 406 U.S. 682 (1972).

44. 388 U.S. 218 (1967). See also Ash v. United States, 413 U.S. 300 (1973) holding that right to counsel does not apply to photographic identifications whether conducted before or after the filing of formal charges. See Kamisar, supra n.1 at pp. 68-72 for a detailed criticism of the pretrial identification cases.

45. Berkemer v. McCarty, supra n.36, Gerstein v. Pugh, supra n.25.

46. "Isn't a discussion of the Warren Court's criminal procedure decisions without mentioning Miranda like staging Hamlet without the ghost." Kamisar, supra, n.1 at 66. Kamisar recognizes, id. at 62, that the Burger Court has accepted these seminal decisions of the Warren Court.

47. 322 U.S. 335 (1963).

48. 372 U.S. 353 (1963).

49. 351 U.S. 12 (1956).

50. Such as Griffin v. California, 380 U.S. 609 (1965) forbidding the prosecutor to comment adversely on the defendant s failure to testify and Bruton v. United States, 391 U.S. 123 (1968) upholding the defendant's right to confront adverse witnesses, including co-defendants. See, Tennessee v. Street, 53 L.W. 4528 (1985) in which Justice Rehnquist joined a unanimous opinion reaffirming Bruton but carving out a limited exception to it.

In Carter v. Kentucky, 450 U.S. 288, 309 (1981) Justice Rehnquist did grumble about "the mysterious process of transmogrification by which (the Fifth) Amendment was held to be 'incorporated' and made applicable to the States by the Fourteenth Amendment ...." but his dissent accedes to that development. He disagrees, rather, with the Court's reading Griffin v. California to allow a defendant to insist on a 'no inferences from silence" instruction from the trial judge.

51. 407 U.S. 25, 44 (1972). As Professor Israel has pointed out, the practical impact of the Argersinger decision has been greater than Gideon. Not only are many more cases presented at the misdemeanor level, but there also were many more states that had not been appointing counsel in misdemeanor cases involving jail sentences prior to Argersinger than there were states that had not been appointing counsel in felony cases before Gideon. Israel, supra n.4 at 1337-38.

52. Id. at 46 (op. of Powell, J.).

53. Id. at 47.

54. In Scott v. Illinois, 440 U.S. 367 (1979) the Court, per Justice Rehnquist, limited Argersinger to cases where imprisonment is "actually imposed."

55. 419 U.S. 522, 538 (1975).

56. 391 U.S. 145, 148-49 (1968).

57. 419 U.S. at 540-41. (Emphasis Justice Rehnquist's).

58. Id. at 541. He then argued that the Court's holding that a male defendant was entitled to be tried by a jury from the venire of which women were, in effect, excluded was not "necessary to guard against oppressive or arbitrary law enforcement or to prevent miscarriages of justice and to assure fair trials. Id. at 541.

59. Most notably with Mapp v. Ohio, 367 U.S. 643 (1961) in his dissent from denial of a stay of the mandate of the Supreme Court of California in California v. Minjares, 443 U.S. 916 (1977) (Discussed infra, T.A.N.___). See also United States v. Henry, 447 U.S. 266, (1980)(dissenting opinion of Justice Rehnquist) urging that Massiah v. United States, 377 U.S. 201 (1964) be reexamined.

60. Estelle v. Williams, 425 U.S. 501 (1976). However, the majority further held that this claim was negated by failure of counsel to object. Justice Brennan and Marshall disagreed with this latter point.

61. Geders v. United States, 425 U.S. 80 (1976). See also, Strickland v. Wash., 52 L.W. 4565 (1984) in which Justice Rehnquist agreed that the issue of ineffective assistance of counsel should be available to defendants on federal habeas corpus.

62. 441 U.S. 130 (1979). To be sure, Burch merely stopped the progression of earlier cases in which the jury trial rights of defendants had been constructed, Williams v. Florida, 399 U.S. 78 (1970)(6 person jury O.K.) Apoduca v. Oregon, 406 U.S. 406 U.S. 404 (1972)(Non-unanimous guilty verdicts O.K.).

63. 440 U.S. 450 (1979). Justice Blackmun's dissent was based on jurisdictional grounds.

64. 437 U.S. 1 (1978). See also, Hudson v. Louisiana, 450 U.S. 40 (1981)(unanimous opinion. But see, Tibbs v. Florida, 457 U.S. 31 (1982) in which Justice Rehnquist joined a 5-4 opinion which weakened Burks by holding that reversal of the defendant's conviction based on the weight, rather than the sufficiency, of the evidence does not bar retrial, a distinction that I find unconvincing.

65. 425 U.S. 94 (1976). Justice Stevens, joined by Justice Stewart concurred in the opinion but made it clear that certain of the prosecutor's notes were exempt from disclosure. 425 U.S. at 112-116.

Justice Powell, joined by the Chief Justice concurred in the result but disagreed with the majority as to what prosecutorial notes were appropriate for disclosure. 425 U.S. at 116-129.

66. 54 L.W. 4598 (1986).

67. Thus, I disagree with the assessment of Professor Shapiro, rendered in 1976 that, at least in the area of trial rights, Justice Rehnquist's guiding philosophy is that "conflicts between an individual and the government should, whenever possible, be resolved against the individual. Shapiro, Mr. Justice Rehnquist: Preliminary View, 90 Harv. L.R. 293, 294 (1976).

68. 462 U.S. 213, (1983).

69. 384 U.S. 436 (1966).

70. 377 U.S. 201 (1964).

71. In his dissenting opinion in United States v. Henry, 447 U.S. 264, ___ (1980). See also, Salzburg, supra n.___ at 206-08 criticizing Massiah's "doctrinal emptiness."

72. 446 U.S. 291 (1980).

73. Id. at ___.

74. Is. supra n.___ at

75. 417 U.S. 433.

76. Stone, "The Miranda Doctrine in the Burger Court," 1977 Sup. Ct. Rev. 99, 123.

77. 426 U.S. 610 (1976).

78. 420 U.S. 714 (1975).

79. 423 U.S. 96 (1975).

80. 54 L.W. 4077 (1986).

81. However, he disagreed that the defendant's request for counsel could not be so used. "While silence may be "insolubly ambiguous," as Doyle held, "a request for a lawyer may be highly relevant where the plea is based on insanity." 54 L.W. at 4080 (dissenting opinion of Rehnquist, J. joined by Burger, C.J.).

82. 451 U.S. 477 (1981).

83. Id. at 490. However, Powell and Rehnquist did not agree that a defendant could only be further interrogated if he "initiated further conversation." Rather the question should have been "whether there was a free and knowing waiver of counsel before interrogation commenced." Id. at 491.

84. 104 S.Ct. 3138 (1984).

85. Id. at ___.

86. Robbins v. California, 453 U.S. 420, 437 (1981)(dissenting opinion). For a fuller exposition of Justice Rehnquist's opposition to the exclusionary rule see, California v. Minjares, 443 U.S. 916 (1979)(Dissenting from denial of stay)(Joined by Chief Justice Burger.)

87. See, Burger, Who Will Watch the Watchman. 14 Am. Univ. L.R. 1, 10 (1964).

88. 367 U.S 643, (1961).

89. See, e.g., Willey, The Exclusionary Rule: Why Suppress Valid Evidence, 62 Judicature 214 (1979) and sources cited therein. For the opposite position see, e.g., Kamisar, Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment? 62 Judicature 66 (1979) and sources cited therein.

90. See generally, Minjares, supra, n.75 at 927.

91. 414 U.S. 218 (1973).

92. Other significant opinions written by Justice Rehnquist which take a relatively narrow view of what constitutes a Fourth Amendment violation are Illinois v. Gates, 462 U.S. 213 (1983) in which the definition of probable cause is broadened, and Adams v. Williams, 407 U.S. 143 (1972) in which a "frisk" was allowed despite the fact that the policeman who performed it had seen no illegal activity (he had been "tipped" by "a person known" to him).

93. 440 U.S. 648 (1979). Justice Rehnquist accepted the Court's holding to the extent that it forbade police from stopping vehicles without cause for criminal investigatory purposes but felt that random stops for license and registration checks were appropriate. Id. at 665.

94. 442 U.S. 200 (1979) (Powell, J., took no part in the decision.)

95. Id. at 221. Justice Rehnquist further argued that, even if there was a Fourth Amendment seizure here, the Constitution did not require suppression of the defendant's statements, given after receipt of Miranda warnings. Id. at 225-27.

96. 439 U.S. 128 (1978).

97. 428 U.S. 465 (1976).

98. 446 U.S. 620 (1980). Walder v. United States, 347 U.S. 62 (1954) had previously held that a defendant's direct testimony could be impeached with illegally seized evidence.

99. 438 U.S. 154 (1978). Justice Rehnquist, joined by the Chief Justice, dissented, arguing that "if the function of the warrant requirement is to obtain the determination of a neutral magistrate as to whether sufficient grounds have been urged to support the issuance of a warrant, that function is fulfilled at the time the magistrate concludes that the requirement has been met." Id. at ___. While it is not the purpose of this article to criticize Justice Rehnquist's positions, but rather to

summarize them, I cannot resist dissenting from this view. A magistrate who has been lied to by the police is simply not "neutral" in any meaningful sense. To not allow the defendant to challenge the veracity of the warrant affidavit would be to seriously weaken the warrant requirement.

100. 422 U.S. 531 (1975).

101. 413 U.S. 266 (1973). Sanchez held that warrantless roving patrol searches for illegal aliens were unconstitutional in the absence of a warrant.

102. Finally, even if the Fourth Amendment violation and defendant's capacity to raise it are conceded, the Court may find the error harmless. However, while Justice Rehnquist has written harmless error opinions in cases involving error at trial, Del. v. Van Arsdall, 54 L.W. 4347 (1986) and in the grand jury, U.S. v. Mechanik, 54 L.W. 4167 (1980) to date the only case to find a Fourth Amendment violation harmless, Chambers v. Maroney, 399 U.S. 42 (1970) did so without discussion and before Justice Rehnquist joined the Court.

103. 442 U.S. 319 (1979).

104. 443 U.S. 47 (1979).

105. 437 U.S. 385, 405 (1978). Justice Rehnquist dissented from the majority opinion on the separate issue of the admissibility of certain statements made by the defendant.

106. 54 L.W. 4396 (1986).

107. Id. at 4397. Also, in Haring v. Prosise, 51 L.W. 4736 (1983) Justice Rehnquist, consistently with his view that there should be other remedies than evidentiary exclusion for Fourth Amendment violations, joined a unanimous Court in allowing a defendant who plead guilty to pursue a search and seizure, 42 U.S.C. § 1983 action against the police based on an alleged illegal search and seizure.

108. 105 S.Ct. 1643 (1985).

109. However, Justice Brennan and Marshall concurred only in the result because the majority further offered the dictum that on-site fingerprinting of the suspect would have been OK. 105 S.Ct. at ___.

110. 420 U.S. 103 (1975). However, four Justices refused to join that portion of the Court's opinion that held that the question of probable cause to hold the defendant can be determined without an adversary hearing. 420 U.S. at ___ (opinion of Stewart, J.)

111. Rehnquist, "Is an Expanded Right of Privacy Consistent With Fair and Effective Law Enforcement," 23 Kans. L.R. 1 (1974).

112. Id. at 21. In that same speech, Justice Rehnquist noted his agreement with Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974) in which the court ordered the expungement of the arrest record of a suspect who had been wrongly arrested and never charged from the FBI's criminal (but not identification) files. Id. at 6-8.

113. Id. at 22.

114. Mincey v. Arizona, 437 U.S. 385, 406 (1978) (Opinion of Rehnquist, J.) quoting United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

115. In an interview with the New York Times Magazine he expressed the view that:

> (A)t the time I came on the Court the boat was kind of keeling over in one direction.... I felt that my job was to ... to kind of lean the other way.
>
> New York Times Magazine, March 3, 1985.

116. New York Times Magazine, supra at 34.

117. Id. at 35.

118. Id. at 31.

119. Id. at 101.

120. 3 Hastings Con. Law. Q. 637 (1976). Justice Rehnquist also described how he believed the Chief should run the conference:

> By virtue of his own preparation and economy of statement, Charles Evans Hughes presided magisterially and yet without offending the brethren. Stone, on the other hand, though an extraordinarily able lawyer and excellent writer of opinions, had less sensitivity for the different kinds of responsibilities associated with presiding over the conference. If the chief justice

> conceives his role to be akin to that of the presiding officer at a political convention, who can always grab the microphone away from the opposition when necessary, he will create resentment without actually advancing the cause that he champions. Justice Cardozo has written that "the sovereign virtue for the judge is clearness," and most members of the profession would agree with him. The chief justice has a notable advantage over his brethren: he states the case first, and analyzes the law governing it first. If he cannot, with this advantage, maximize the impact of his views, subsequent interruptions of colleagues or digressions on his part or by others will not succeed either. Theodore Roosevelt described the presidency as a "bully pulpit." The chief justice, as president of the conference, occupies no such position.

Id. at 647.

121. Anthony Lewis described Justice Rehnquist as "a loner," "out at the edge of the Court." New York Times, supra n.2. It is true that particularly in his early years he authored a number of sole dissents, see, National Law Journal, June 30, 1986, pp. 48-49. "Rehnquist Lone Dissenter in 47 Cases." Still, 47 sole dissents out of about 2100 decisions in which Justice Rehnquist has participated in 14 years is not exactly an overwhelming statistic. More significant, in my view, is how often a Justice dissents overall. In the last two years for which statistics are available (October Terms 1983 and 1984, Justice Rehnquist has dissented an average (mean) of 31.5 times out of about 150 opinions. This is close to the Court's average of 31.8 and substantially less than the average of Justice Brennan (58.5),

Marshall (55.5) and Stevens (52). "The Supreme Court, 1983 Term," 98 Harvard L.R. 307 (1984); "The Supreme Court, 1984 Term," 99 Harvard L.R. 322 (1985). This is hardly the record of a "loner out at the edge of the Court."