Toward an Integrated Vision of Criminal Procedural Rights: A Counter to Judicial and Academic Nihilism

Alfredo Garcia
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I. INTRODUCTION

The debate over the proper scope and interpretation of criminal procedural rights has reached a sterile impasse. To a great degree, the dialectic stems from the fundamental source of American criminal procedure, the Bill of Rights. At bottom, the safeguards relating to the criminal process embodied in the Bill of Rights are value-laden, open-textured, and subject to divergent philosophical perspectives. Indeed, one may find support for this viewpoint from writers of different ideological stripes. For example, Judge Richard Posner, an avowed "pragmatist," has acknowledged that the shifting degrees of protection for criminal defendants' rights have no connection to "logic."1 Similarly, but more explicitly, Professor Susan Bandes argues that constitutional interpretation and discourse is impossible "without reference to values."2

One may test this theory by pointing to the stridency with which scholars and jurists have assailed the propensity of both the Burger and Rehnquist Courts to curtail criminal defendants' rights. Thus, two of the last three remaining members of the Warren Court, Justices Thurgood Marshall and William Brennan, decried the conservative philosophical

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bent of the Rehnquist and Burger Courts before they left the bench. In his "valedictory" dissent in \textit{Payne v. Tennessee},\footnote{111 S. Ct. 2597, 2619-25 (1991) (Marshall, J., dissenting).} Justice Marshall accused his brethren of relying on power, not reason, as the basis for their decisions. In less dramatic fashion, Justice Brennan denounced the Court for its exercise of a "doctrinally destructive nihilism," which lacked a coherent framework and amounted to a "conceptual free-for-all."\footnote{New Jersey v. T.L.O., 469 U.S. 325, 357-70 (1985) (Brennan, J., dissenting). Justice Brennan took issue with the majority's interpretation of the scope of the Fourth Amendment's proscription against unreasonable searches and seizures in a school setting. In discarding the probable cause standard, the majority held that neither the warrant nor the probable cause provisions of the Fourth Amendment applied to school officials who conducted searches and seizures to maintain school discipline. Rather, the majority replaced the probable cause standard with a reasonableness criterion. The majority's rationale was based on a balancing test that weighed the privacy of the student against the need of school authorities to maintain order and discipline. \textit{Id.} at 340-43.}

Echoing the attack by Justices Brennan and Marshall, scholars have pointed to the doctrinal deficiency of the Court's criminal procedure jurisprudence. For example, Professor Bruce Green confirmed Justice Marshall's critique by examining five decisions issued in the 1990 Term that dealt with the Fourth Amendment. He found that the Court employed interpretive principle, policy, and precedent in an inconsistent fashion to yield a restrictive construction of the Fourth Amendment in every case.\footnote{Bruce A. Green, "Power, Not Reason": Justice Marshall's Valedictory and the Fourth Amendment in the Supreme Court's 1990 Term, \textit{70} N.C. L. Rev. 373 (1992).} Coinciding with Professor Green's conclusion is Professor Tom Stacy's analysis of the Burger and Rehnquist Courts' conception of the role of accurate adjudication in the criminal process. Stacy discovered a lack of "internal" consistency and coherence in the Court's treatment of the dichotomy between what he labels "truth-furthering" versus "truth-impairing" rights.\footnote{Tom Stacy, \textit{The Search for the Truth in Constitutional Criminal Procedure}, \textit{91} \textit{Colum. L. Rev.} 1369, 1370-71 (1991).}

Although academicians have identified and taken issue with the Court's apparent doctrinal vacuum, they have contributed to the void by taking a shortsighted view of the values and purposes underlying the Bill of Rights. Rather than analyzing the criminal provisions of the Bill of Rights as an organic whole serving mutually complementary values, scholars have treated them as disjointed entities. The tendency of criminal specialists is to examine and analyze separate facets of the Bill of Rights, such as the Fourth, Fifth, Sixth, and Eighth Amendments, as distinct commodities rather than as a unified structure. Thus, "academic determinism" has facilitated the division of the Bill of Rights and
thereby reinforced the doctrinal drift of the Court's criminal procedure jurisprudence.\(^7\)

In my work on the Sixth Amendment, I have joined the chorus of judicial and academic carping at the lack of doctrinal consistency and the result-driven nature of the Burger and Rehnquist Courts' interpretation of the criminal provisions of the Bill of Rights.\(^8\) To a large extent, therefore, I have contributed to a debate that, perhaps, is rapidly becoming stale. As an antidote to this staleness, I wish to elevate the level of the dialogue by offering an interpretive synthesis grounded upon the essential values underlying the four amendments in the Bill of Rights that provide the foundation for the criminal adversarial process. My aim is to steer the debate to a more fruitful plane by proposing an overarching theory that serves as a counter to judicial and academic nihilism.

The first step in the process is to identify the common values that are fostered by the criminal provisions of the Bill of Rights from both a historical and a modern standpoint. The second phase is to determine how these values have been interpreted and assessed by both the Court and scholars in specific contexts. The last stage is to critique the improvident fashion with which the Court and scholars have interpreted criminal procedural rights and to offer an alternative view.

II. COMMON VALUES AND THE CRIMINAL AMENDMENTS

An analysis of the origins and development of the criminal provisions contained in the Bill of Rights reveals several discrete, yet common and mutually complementary, norms. These values inhere in all four amendments relating to the criminal process. Although the amendments differ in the extent to which any specific norm predominates, all of them share the same standards. The values pervading the criminal provisions of the Bill of Rights are both substantive and procedural; they protect the inviolability of individual autonomy, while safeguarding against government abuse of power and ensuring the fair play norms that support the adversary system of adjudication.

In the context of assessing the reach of the Fifth Amendment, the Court has characterized these values as the "societal interests in privacy, fairness, and restraint of governmental power."\(^9\) Structurally, the interest

\(^7\) In an incisive article, Howard W. Gutman recognized this phenomenon and explained its development. See Howard W. Gutman, Academic Determinism: The Division of the Bill of Rights, 54 S. CAL. L. REV. 295 (1981).


in privacy may be characterized as a substantive right that promotes human and moral autonomy. Inextricably linked to this substantive value are the two procedural, but analogous, "interests" in freedom from governmental overreaching and adherence to fair play. Although the Court has identified these norms in the process of analyzing the fundamental policies underlying the Fifth Amendment's self-incrimination clause, it has failed to apply them consistently and organically while determining the scope of the Fourth, Fifth, Sixth, and Eighth Amendments. This shortcoming has led both the Burger and Rehnquist Courts to a seemingly "nihilistic" path, which has become the subject of critical commentary.

Criticism of the Court's doctrinal abyss has been ineffective because it has failed to take a more holistic approach based on the common values fostered by the Bill of Rights. Two attempts have been made to view the Bill of Rights as an organic document, rather than as a series of discrete objects. In a path-breaking work, Howard Gutman pointed to the misplaced division of the Bill of Rights as he argued that the division stemmed largely from "academic determinism." Indeed, before Gutman's incisive essay, the only substantive work treating the Bill of Rights as an organic document was Edward Dumbauld's *The Bill of Rights and What it Means Today*, published in 1957. In a recent piece, Professor Aktil R. Amar has provided a sweeping reinterpretation of the Bill of Rights from a structural perspective.

Elaborating upon the thematic edifice furnished by Gutman and Amar, I will illustrate how the dismembering of the criminal provisions of the Bill of Rights has yielded a sterile jurisprudence and a jaundiced academic view of the criminal process. The failure of the Court and academia to offer a more complete approach stems from their lack of emphasis on the commonality of values underlying the criminal amendments and their failure to identify and apply those values. Having identified those fundamental norms, the task at hand is to elucidate their

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14. *See supra* notes 9-10 and accompanying text.
historical and doctrinal significance and to see how their lack of application, or misapplication, has borne meager results.

A. Historical Foundations and the Bill of Rights

Americans derived their concept of freedom and liberty from a distinguished English historical and legal foundation. Liberty was a reciprocal term that connoted both protection from the excesses of one's fellow men, as well as protection from the power of government. In effect, liberty was a plural term that "consisted in limitations upon the power of the sovereign and in a sharing, enjoyed by freemen, in the exercise of those powers." Transplanted to the shores of the New World, the colonists jealously preserved their freedoms by enacting charters that safeguarded personal rights. Thus, the Massachusetts Bay Colony promulgated the first comprehensive statement of personal rights in 1641. The Massachusetts Body of Liberties included protections against cruel and unusual punishments, provided for the right of habeas corpus, allowed the accused the right to counsel as long as the defendant did not pay for his lawyer's services, and guaranteed a jury trial.

Colonial grievances that launched the severance from England were in large part prompted by violation of what colonists viewed as the quintessential democratic institution of the jury trial. The Stamp Act of 1765 subverted the jury trial through resort to vice-admiralty courts, which determined violations without juries. As the movement toward independence gained momentum, a declaration of rights became a focus of dissatisfaction, culminating in the Continental Congress's approval of a "Declaration of Rights" in 1774. That document emphasized the right to "the common law of England, and more especially, to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."

The most exhaustive revolutionary catalogue of rights was the Virginia Declaration of Rights, drafted by George Mason on the eve of the Declaration of Independence. This document foreshadowed both the Constitution and the Federal Bill of Rights. Containing sixteen articles, the Virginia Declaration devoted nine articles to the principles of republican government and seven to a list of individual rights. Those rights

included the freedom from unreasonable searches and seizures, the right against self-incrimination, a prohibition against excessive fines and cruel and unusual punishment, and the right to a speedy trial and an impartial jury. Because Virginia was the first state to draft such a comprehensive document, its Declaration of Rights "expanded the conception of personal rights of citizens as no other document before its adoption had done." Paving the way for the rest of the states, Virginia's bold declaration was copied by most other states. By 1787, the citizens of the new republic could rest comfortably as their personal liberties were preserved from arbitrary government and irrational impulse through written bills of rights. Paralleling the development of analogous rights in England, a "formidable array of liberties" to protect the citizen against the sovereign had become entrenched in both England and America by the late eighteenth century. Those liberties included the criminal safeguards embodied in the Bill of Rights: the right to a fair trial, freedom from arbitrary governmental oppression, and the right to the inviolability of the human personality.

Given the widespread protection of rights by state governments, it is not surprising that a bill of rights received scant attention in the Philadelphia Convention of 1787. As a prominent historian of the Bill of Rights has remarked, by the time of the Convention, "[s]atisfaction among the public regarding personal rights was established. Thus neither [George] Mason nor his colleagues at Philadelphia found it necessary to come into the convention hall ready to serve as watchdogs for civil liberty." Ultimately, the debate over the need for a federal bill of rights became a part of the attempt by the Antifederalists to rein in what they perceived as the broad powers granted to the new federal government through the Constitution.

The principal argument marshalled by the Federalists against a bill of rights was that it was "irrelevant." It was irrelevant for two reasons: First, it constituted a mere "paper check" that could be and had been violated repeatedly by the states; second, and more important, the people had vested plenary power in their state governments while expressly limiting the federal government's power. To the extent the people re-

19. Id. at 38-40.
20. Id. at 41-100.
22. Id.
tained power not specified in the Constitution, an explicit declaration of rights was superfluous.

Though this contention seemingly blunted the Antifederalist objection to the concentration of power in the hands of the new federal government, it failed to carry the day. Rather, the momentum for a federal bill of rights became irrepressible. The Antifederalists, who were not as concerned with personal liberty as they were with curbing the power of the federal government, gained a "Pyrrhic" victory. In effect, the Antifederalists saw the "strongest of their objections" to the Constitution "turned against them."25

B. Functions of the Bill of Rights

The irony behind the passage of the Bill of Rights raises a fundamental issue: What did the Framers envision as the objective to be served by a catalogue of guarantees embodied within the Constitution? Thomas Jefferson provided the philosophical impetus for a bill of rights, which he saw as an indispensable element of a free society. In a letter to James Madison, who was not enthusiastic about the need for a bill of rights, Jefferson wrote that "a bill of rights is what the people are entitled to against every government on earth, general or particular, & what no just government should refuse, or rest on inference."26 What Jefferson's remarks betrayed was a distrust of centralized governmental power. This concern was heightened because state bills of rights could not furnish protection against the federal government.27

Madison ultimately became convinced of the necessity and wisdom of having a federal bill of rights for two essential reasons. First, he believed that such an instrument might serve as a check against majoritarian impulses. Second, Madison considered "the possibility that the arbitrary acts of the government, rather than oppressive majorities, might invade citizens' rights."28 A third rationale, closely connected to the fear of oppressive majorities, was the didactic purpose served by a declaration of fundamental rights.29 The notion underlying the Federal

25. Id. at 543.
27. RUTLAND, supra note 16, at 197.
Bill of Rights, therefore, was not only countermajoritarian but also majoritarian in the sense that it protected the citizenry against the potential abuse of power by the federal government.\textsuperscript{30}

Within the context of the criminal provisions of the Bill of Rights, one may discern both majoritarian and antimajoritarian objectives. The concern over protection of criminal defendants' rights against the potentially overwhelming power of the federal government no doubt played a role in the forging of the criminal safeguards contained in the Bill of Rights. The experience of the colonials taught them that the government could deprive the majority of basic freedoms. In this respect, the Fourth Amendment was drafted in reaction to the abuses of the British government in relying on general warrants to invade the privacy of the home. These warrants, known as writs of assistance, gave officials untrammeled authority to search for goods imported in violation of the British tax laws. Providing the spark for the revolution, the warrants were described by James Otis in 1761 as “the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book.”\textsuperscript{31}

Similarly, the right to counsel and the other trial-related rights embodied in the Sixth Amendment emerged as a counter to the tremendous power exercised by the public prosecutor.\textsuperscript{32} More important, the right to a jury trial signified America’s ratification of participatory democracy.\textsuperscript{33} Together with the grand jury, guaranteed by the Fifth Amendment, both the criminal and the civil jury served dual functions: They safeguarded against governmental overreaching and ensured political participation by the populace. In short, the jury was the quintessential majoritarian device that enshrined “the ideals of populism, federalism, and civic virtue that were the essence of the original Bill of Rights.”\textsuperscript{34}

\textsuperscript{30} See generally Amar, \textit{supra} note 13. Professor Amar contends that the primary aim of the Bill of Rights was not to safeguard minority rights, but rather to allow state and local governments to detect and prevent “federal abuse,” to ensure citizen participation in federal administration of justice, and to maintain the right of the majority to “alter or abolish government and thereby pronounce the last word on constitutional questions.” \textit{Id.} at 1133.

\textsuperscript{31} Stanford v. Texas, 379 U.S. 476, 481 (1965). As Professor Amar points out, the Fourth Amendment may be seen as an attempt to protect the people from “self-interested government policy” rather than as an instrument for “protecting minorities against majorities of fellow Citizens.” Amar, \textit{supra} note 13, at 1177-80.

\textsuperscript{32} \textit{GARCIA, supra} note 8, at 4.

\textsuperscript{33} \textit{Id.} at 183.

\textsuperscript{34} Amar, \textit{supra} note 13, at 1183-90.
At the same time, antimajoritarian strains permeate the four amendments dealing with the criminal process. The history of the Fourth Amendment, for example, is linked to the attempt by the British government to stifle and destroy dissent.\textsuperscript{35} Likewise, the Fifth Amendment's Self-Incrimination Clause and the Eighth Amendment's prohibition against cruel and unusual punishment reflect solicitude for the rights of minorities against oppressive majorities. The Sixth Amendment, which undergirds the criminal adversary system of adjudication, provides a shield for the defendant against the formidable resources at the government's disposal.\textsuperscript{36}

In similar fashion, the criminal provisions of the Bill of Rights incorporate negative restraints on governmental action and correlative positive duties imposed on officials. Although the Fourth Amendment forbids unreasonable searches and seizures, it also requires officials to secure warrants based on probable cause. The Fifth Amendment's prescription against compelled self-incrimination has been construed to require prophylactic warnings before a suspect is questioned.\textsuperscript{37} In addition, while the Sixth Amendment compels the government to furnish the accused with such fundamental rights to a fair trial as the assistance of counsel, a jury of her peers, confrontation, and compulsory process,\textsuperscript{38} it also implicitly condemns a trial lacking such rudiments.

Discerning the political and philosophical foundations of the Bill of Rights is a treacherous enterprise. Nevertheless, it is possible to extract majoritarian as well as countermajoritarian values from the list of rights accorded to criminal defendants. Though couched in both negative and positive terms, the criminal provisions of the Bill of Rights can properly be interpreted as constraints on governmental power as well as positive commands to afford the accused fundamental protections against unbridled governmental power that threaten her liberty and dignitary interests.

\textbf{C. The Values Underlying Criminal Safeguards}

The purposes served by a federal bill of rights, as we have seen, reveal a common thread. They both constrain the government and em-

\textsuperscript{35} Stanford, 379 U.S. at 482.
\textsuperscript{36} See generally Garcia, supra note 8.
\textsuperscript{37} Miranda v. Arizona, 384 U.S. 436 (1966). The point that the Constitution embraces both positive as well as negative requirements has been persuasively made by Professor Susan Bandes. See Bandes, supra note 2, at 2282-83 (stating that Fourth and Fifth Amendments embody positive and negative commands).
\textsuperscript{38} Bandes, supra note 2, at 2276.
power the majority against governmental abuse. These values are reflected in the stipulations in the Bill of Rights governing the criminal process. A substantial portion of the first ten amendments to the Constitution involve the criminal adjudicatory system. Indeed, as one scholar notes, "[t]he federal Bill of Rights devotes more attention to the requirements for a fair criminal process than it does to any other right or group of rights." The puzzling aspect of this cluster of related guarantees is that few attempts have been made to connect them. Though this cluster of rights shares common values, these concepts have not been linked in a consistent manner.

On several occasions, the United States Supreme Court has recognized that the interest in human autonomy, dignity, and privacy underlie the First, Fourth, and Fifth Amendments. In *Boyd v. United States*, the Court acknowledged the vital link between the Fourth and Fifth Amendments. The right to personal security, liberty, and private property safeguarded by the Fourth Amendment was coterminous with the Fifth Amendment's prohibition against "forcible and compulsory extortion of a man's own testimony." In other words, the right to human dignity, freedom, and security was a substantive right common to both amendments.

Justice Douglas saw the bond among the First, Fourth, and Fifth Amendments in his dissenting opinion in *Frank v. Maryland*. He viewed the amendments as guarantors not only of privacy and freedom from self-incrimination, but also as protectors of "conscience and human dignity and freedom of expression as well." Ultimately, Justice Douglas's minority position would portend his tour-de-force in the landmark case of *Griswold v. Connecticut*.

In *Griswold*, Douglas implied a penumbral "zone" of privacy in the First Amendment. In essence, this "zone" derived from a citizen's right to freedom from governmental intrusion in that citizen's intimate affairs. Justice Douglas bolstered his rationale through reference to the right to privacy inherent in the Fourth Amendment's proscription against unreasonable searches and seizures and the Fifth Amendment's prohibition against self-incrimination. In this seminal case, therefore, Justice

39. BODENHAMER, supra note 16, at 5.
40. 116 U.S. 616 (1886).
41. Id. at 630.
43. Id. at 376 (Douglas, J., dissenting) (citation omitted).
44. 381 U.S. 479 (1965).
45. Id. at 483-85.
Douglas provided a conceptual framework for assessing the values intrinsically to the criminal provisions of the Bill of Rights.

From a historical standpoint, the Douglas opinion stood on solid ground. The radical Whig tradition, which provided the ideological underpinnings of the American Revolution, placed a premium on the preservation of liberty. This liberty was simultaneously personal and communal. As Gordon Wood notes in his magisterial work on the American republic, Whig viewed public liberty as the combination of “each man’s individual liberty into a collective governmental authority,” which yielded “the institutionalization of the people’s personal liberty.” More important, the liberty held jointly by the populace constituted the essential obstacle against arbitrary power. “Free” people were characterized by their ability to exercise a constitutional “check” on governmental oppression. Individual autonomy, therefore, meant not only personal dignity, privacy, and moral autonomy, but also freedom from governmental abuse.

Given the nexus between the purposes served by the Fourth and Fifth Amendments, it is possible to see the emphasis on the substantive value of human dignity that underlies both amendments. But if the two amendments stress this value, they also jealously guard the freedom of the individual from oppressive state interference. Thus, Justice Field, condemning the “cruelty” of compelling someone to confess his guilt, defended the privilege against self-incrimination as the “result of the long struggle between the opposing forces of the spirit of individual liberty on the one hand and the collective power of the State on the other.” Accentuating the potential abuses posed by uncontrolled searches and seizures, Justice Jackson justified the application of the exclusionary rule as a way of “extending protection against the central government’s agencies.” Individual liberty and freedom from governmental oppression, therefore, are obverse sides of the same coin; one is critical to the preservation of the other.

The remaining two criminal provisions of the Fifth Amendment, the right to a grand jury indictment for a serious crime and the protection

46. Wood, supra note 24, at 21-25; see also MacDonald, supra note 15, at 70-71. Because promotion of the public good was the goal of republican government, minority rights were an anomaly for the American Whigs. In the Whig conception, majority tyranny was “theoretically inconceivable, because the power held by the people was liberty.” Wood, supra note 24, at 62.
47. Wood, supra note 24, at 25.
against double jeopardy, also combine protection for individual autonomy with safeguards against governmental excesses. A grand jury indictment must be founded on substantial evidence against the accused, which is proved by witnesses other than the defendant. This requirement dovetails with the privilege against self-incrimination by requiring the government to establish proof of a crime through evidence independent of the accused's statements. Additionally, the prohibition against double jeopardy secures individual autonomy against unwarranted state domination by preserving the finality of either a jury's or a court's judgment and preventing reprosecution for the same offense.

Of course, the Eighth Amendment's proscription against excessive fines or bail and cruel and unusual punishment represents the ultimate glorification of individual dignitary interests against the state's monopoly on the application of force. Together with the prohibition against self-incrimination, this amendment embodies the notion that even the "evil man" is a human being who must be accorded the fundamental decency that comports with a civilized society. Indeed, both the Fifth and the Eighth Amendments run into each other in the sense of championing human autonomy against the collective power of the state.

Although the Sixth Amendment implements fair play values essential to the proper functioning of the American adversary process, it also underscores human autonomy as a central tenet of the adversary system. The fulcrum of the criminal adversary system is the right to counsel, which gives the defendant a measure of autonomy through an attorney who is the accused's "champion against a hostile world." Taking autonomy to its outer limits, the United States Supreme Court relied on history in holding that an attorney may not represent a criminal defendant against his or her wishes; rather, the defendant may opt, when properly advised of the consequences, to engage in self-representation. Indeed, in Faretta v. California, the Court left no doubt that the primacy of the individual is the hallmark of the American criminal adversary system.

50. DUMBAULD, supra note 12, at 78 n.2.
53. See GARCIA, supra note 8, at 40-45.
54. 422 U.S. 806 (1975).
55. Id. at 834; GARCIA, supra note 8, at 41. Professor Toni Massaro contends that the Confrontation Clause also fosters dignitary values. Toni M. Massaro, The Dignity Value of Face-to-Face Confrontations, 40 U. FLA. L. REV. 863 (1988).
Other facets of the Sixth Amendment provide a buffer against the power wielded by the government. For example, the paradigmatic right to a jury trial interposes the common sense judgment of the community as a shield against the overzealous prosecutor or the corrupt judge. To the extent that the Sixth Amendment affords the criminal defendant the means to combat the resources and strength of the prosecution, it furnishes a crucial check upon the "awesome" power of the government. Therefore, the Sixth Amendment embodies the complementary values of human autonomy and protection from governmental overreaching.

Closely related to the restriction on governmental overreaching are the fair play norms that underlie the criminal adversary system. Because the Sixth Amendment safeguards a defendant's right to a fair trial, it signifies a commitment to a modicum of equality in which a defendant is given a chance to contest charges that may result in the deprivation of liberty. The Fifth Amendment protection against self-incrimination also recognizes that fair play requires the government to amass evidence against the accused without having to extract it from him or her. Moreover, the requirement of a grand jury indictment also obligates the prosecution to develop its case without the defendant's assistance. To a large extent, these provisions of the Bill of Rights are "designed to redress the advantage that inheres in a government prosecution."

Further, it is possible to discern fair play motives behind the Fourth Amendment. Historically, the use of warrants to authorize searches or seizures was limited. This limitation stemmed from the fact that juries traditionally determined the reasonableness of a search or seizure in a trespass action. Judicial warrants were restricted, therefore, because they usurped the jury's function in assessing the propriety of searches and seizures. Consequently, the Fourth Amendment served as a bulwark against governmental overreaching by allowing a jury, rather than a magistrate, to sanction governmental excesses and thus to foster fairness.

In sum, the criminal provisions of the Bill of Rights advance three core values: human autonomy, fairness, and freedom from governmental overreaching. These values are not mutually exclusive; rather, they are complementary and represent the crux of the Bill of Rights: a check by the judiciary on governmental power as a means of preserving the peo-

56. See, e.g., Williams v. Florida, 399 U.S. 78, 100 (1970); Garcia, supra note 8, at 183-84.
58. Id.
59. Amar, supra note 13, at 1178-79.
It is critical, therefore, to delve into the ability of the Court to apply these values in a consistent, logical manner.

III. Application of the Values Underlying the Bill of Rights

The breadth and complexity of the Supreme Court's interpretation of the criminal provisions of the Bill of Rights precludes an exhaustive analysis of its jurisprudence. Nevertheless, three areas reveal the Court's doctrinal predilection and its direction in applying the values underlying the criminal amendments. The most controversial sphere of criminal jurisprudence is the development and scope of the exclusionary rule. Because the rule has been extended to the states and applies across the range of criminal amendments, it serves as a heuristic device when one examines the Court's jurisprudence. Particularly, the means by which the Court has constrained the rule's effect deserve close scrutiny. In addition, the way the Court has employed and construed "prophylactic" rules, which are designed to avert constitutional violations, evokes its value judgment regarding the norms pervading the Bill of Rights. Finally, the Court's resolution of cases involving potential multiple constitutional violations yields rich avenues for analysis.

A. Development and Justification for the Exclusionary Remedy

Shrouded in controversy, the exclusionary rule elicits passionate discourse about the wisdom of barring probative evidence in the criminal process. This discourse reflects the tension between the values underlying the criminal safeguards enumerated in the Bill of Rights. Although

60. Wood, supra note 24, at 543.
62. The rule is applicable to Fourth, Fifth, and Sixth Amendment violations. See United States v. Wade, 388 U.S. 218, 237-39 (1967) (excluding identification by witness because post-indictment lineup was conducted without counsel in violation of Sixth Amendment); Malloy v. Hogan, 378 U.S. 1 (1964) (holding that Fifth Amendment privilege against self-incrimination applies to states and applying same standard of admissibility of confessions decreed by Bram v. United States, 168 U.S. 532 (1897)); Massiah v. United States, 377 U.S. 201, 206-07 (1964) (excluding statements deliberately elicited by government agent after the defendant had been indicted and secured counsel); Mapp v. Ohio, 367 U.S. 643 (1961); Bram, 168 U.S. at 542-43 (holding that Fifth Amendment privilege against self-incrimination bars the use of involuntary confessions in federal court).
63. See generally Wayne R. LaFave & Jerold H. Israel, Criminal Procedure 81-83 (2d ed. 1992). Succinctly defined, a "prophylactic" rule "imposes a preventive safeguard that may reach beyond the presence of an actual constitutional violation." Id. at 81.
the rule is a relatively modern phenomenon, it underscores the fundamental link between constitutional imperatives and the proper means to enforce those norms. Since constitutional norms are not self-enforcing, the means by which the values inherent in the criminal amendments are implemented says much about the judiciary's role as the arbiter of the Constitution.

When the Supreme Court first applied the exclusionary remedy to the federal government in *Weeks v. United States*, the members of the Court could not have foreseen the conflict that the rule would create. Indeed, the categorical fashion in which the rule was expounded supports this conclusion. An analysis of *Weeks*, moreover, reveals the tie between individual liberties, governmental excesses, and fair play standards.

Acknowledging the interrelationship between the Fourth and Fifth Amendments in advancing individual autonomy, the *Weeks* Court also recognized that autonomy was linked to the ability of the individual to prevent unbridled governmental discretion. Consequently, the Fourth Amendment's proscription against unreasonable searches and seizures promotes dual norms: autonomy and protection against governmental overreaching. The Court, therefore, viewed the Amendment as serving, in Professor Amsterdam's succinct words, both an "atomistic" and a "regulatory" function.

Implicit in the *Weeks* opinion is the notion that fair play criteria militate against the admission of unconstitutionally obtained evidence. Justice Day, writing for the Court, observed that law enforcement agents should not secure convictions through unlawful searches or seizures or coerced confessions. As he put it, such practices "should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

Having linked the core values underlying both the Fourth and the Fifth Amendments, the *Weeks* Court further stated in forceful terms the

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64. The rule was first enunciated in the twentieth century in *Weeks v. United States*, 232 U.S. 383 (1914).
65. *Id.* at 391-92.
66. *Id.* at 392.
67. *Id.* at 392.
68. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974). Professor Amsterdam concludes that an "atomistic" view of the Fourth Amendment is "too narrow" and that the Constitution "commands" the exclusionary remedy in order to avoid unreasonable searches and seizures. *Id.* at 432-33.
necessity for an enforcement mechanism to secure those rights. Without the exclusionary sanction, the safeguards of the Fourth Amendment would become hollow prescriptions. In fact, Justice Day stated that if evidence obtained in violation of the Fourth Amendment is admitted in a criminal trial, the right against unreasonable searches and seizures "might as well be stricken from the Constitution."\(^70\)

However categorical the *Weeks* Court’s prescription might have appeared, a debate ensued regarding the basis for the exclusionary rule. The debate centered on whether the rule was constitutionally derived or a mere prophylactic device "designed to safeguard Fourth Amendment rights generally through its deterrent effect."\(^71\) Concluding that the rule was a "judicially created" remedy, the Court in *United States v. Calandra*\(^72\) sought to circumscribe the effects of a putatively costly sanction.\(^73\) The problem with the *Calandra* approach and the debate over whether the exclusionary sanction has constitutional roots is that it views the Fourth Amendment from a monolithic perspective.

Perhaps the best argument for the restriction of the exclusionary sanction is based on the notion that the sole value the Fourth Amendment fosters is individual privacy. Consequently, the nexus "between the wrong of the search and a subsequent official proceeding will remain somewhat mystical."\(^74\) To the degree that one’s privacy has been violated, it is indefensible to contend that suppression of the discovered evidence will further buttress privacy rights.\(^75\)

Moreover, the defense of exclusion on the basis of its deterrent effect suffers from similar logical and empirical flaws. The deterrence rationale presupposes that police officers know what conduct is constitutionally proscribed and that they will not engage in such behavior. Unfortu-
nately, research suggests that neither of these propositions is empirically sound.⁷⁶ In fact, if deterrence is the only justification for the exclusionary remedy, then its viability is severely undermined. Because the Supreme Court has embraced the deterrent rationale as the only foundation for the rule,⁷⁷ it ought to acknowledge the obvious and dispense with the rule.

Rather than focusing on this narrow vista, one must explore the critical values behind the Fourth Amendment specifically, and all of the criminal amendments in general. Justice Frankfurter aptly summed up the “core” concern of the Fourth Amendment as “[t]he security of one’s privacy against arbitrary intrusion by the police.”⁷⁸ As we have seen, however, the criminal amendments promote not only individual autonomy and principles of fair play, but also collective protection against arbitrary police behavior. Simply looking at the privacy part of the equation leaves gaping holes in the justification, or lack thereof, for the exclusionary rule.

From this broad vantage point, the exclusionary sanction is defensible because it furthers the “principle”⁷⁹ that the government ought not to profit from its own lawlessness.⁸⁰ Symbolically, the criminal amendments imply that “[d]ecency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen.”⁸¹ Although not all law enforcement officials will adhere faithfully to constitutional commands, or know about such imperatives, democratic “fair process norms” preclude the government from profiting from its own wrongs. The implication to a democratic

⁷⁷. See, e.g., Leon, 468 U.S. at 906, 916-17; Calandra, 414 U.S. at 347-48.
⁷⁹. I use “principle” here as defined by Ronald Dworkin: A principle is a “standard that is to be observed... because it is a requirement of justice or fairness or some other dimension of morality.” Ronald Dworkin, Taking Rights Seriously 22 (1977).
⁸⁰. The California Supreme Court adhered to this principle in People v. Martin, 290 P.2d 855 (Cal. 1955), abrogated by CAL. CONST. art. I, § 28(d), as stated in People v. Dann, 207 Cal. Rptr. 228 (Ct. App. 1984). As the Court stated, the defendant’s “right to object to the use of the evidence must rest, not on a violation of his own constitutional rights, but on the ground that the government must not be allowed to profit by its own wrong and thus encouraged in the lawless enforcement of the law.” Id. at 857. Martin was abrogated by a state constitutional amendment, passed in 1982, which provides that “relevant evidence shall not be excluded in any criminal proceeding.” CAL. CONST. art. I, § 28(d); see also Wayne R. LaFave, Being Frank About the Fourth: On Allen’s “Process of ‘Factualization’ in the Search and Seizure Cases,” 85 Mich. L. Rev. 427, 432 (1986).
society from such a value system is ominous. As Justice Brandeis observed in 1927, "[i]f the Government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy." 82

Ultimately, this basis for exclusion was transformed into the "judicial integrity" rationale in Elkins v. United States. 83 However, the Elkins Court construed Justice Brandeis's point too narrowly. The principle enunciated by Brandeis does not mean merely that judicial integrity will be compromised by the introduction of illegally obtained evidence. Instead, Brandeis implies a broader value: Law enforcement officials will not profit from their violation of constitutional precepts. A corollary to this value is that the judiciary should not condone such behavior and thereby sully its hands in the process.

One might take issue with this explanation on the ground that governmental overreaching, as noted, is not necessarily averted through the exclusionary remedy. 84 Nevertheless, the principles undergirding the criminal amendments support the notion that governmental abuse is not tolerable and thus should not be sanctioned. In addition, the fair play standards that pervade the adversary system militate against rewarding constitutional violations.

As Professor Amsterdam points out, the prevailing view of the exclusionary rule is shortsighted because it is grounded on an "atomistic conception" of the Fourth Amendment. 85 That is, the rule is viewed as a means of deterring specific "episodes" of unconstitutional police conduct. 86 The same point could be made about the rest of the criminal amendments; that is, one must view them broadly as protecting values that are more encompassing than individual autonomy. A system without the exclusionary sanction might not necessarily multiply inducements to violate the criminal amendments. 87 It would, however, create the impression that constraints against unbridled discretion are meaningless.

Paradoxically, the Court has identified this principle while simultaneously limiting the scope of the exclusionary rule. In Stone v. Powell, 88

82. Id.
84. See supra notes 74-77 and accompanying text.
85. Amsterdam, supra note 68, at 432.
86. Id.
87. Professor Amsterdam reaches the opposite conclusion in justifying the exclusionary rule. In his view, a system without the exclusionary rule "produces incentives to violate the fourth amendment." Id. at 433.
the exclusionary remedy was circumscribed to preclude *habeas corpus* relief when a state prisoner has had a "full and fair" litigation of a Fourth Amendment claim in state court. In limiting the reach of exclusion, however, the Powell majority acknowledged the lack of empirical foundation for the deterrent effect of the exclusionary sanction. Nevertheless, Justice Powell, writing for the majority, recognized that attaching sanctions to constitutional violations encourages law enforcement policy makers "to incorporate Fourth Amendment ideals into their value system." In the Fifth Amendment context, the exclusionary remedy is built into the text of the Constitution. As the Court has acknowledged, the language of the Amendment "command[s] against the admission of compelled testimony." In this respect, the language of the text provides a definitive answer to an otherwise intricate dilemma. As discussed later, the Court has managed to inject confusion into this area by applying the deterrence rationale in construing the scope of the *Miranda* decision.

The Supreme Court has also excluded evidence secured through a Sixth Amendment violation. Although the text of the Sixth Amendment does not prescribe the exclusionary sanction, the Court has revealed a certain reluctance to invoke the remedy in this regard, and its assessment of the objectives served by the Amendment suffers from serious doctrinal and logical flaws. We will revisit this issue later within the context of discussing "prophylactic" remedies aimed at avoiding constitutional violations.

Returning to the Fourth Amendment, the Court clearly has manifested a distaste for applying the exclusionary rule. The Court has diluted the rule by adhering to a utilitarian calculus based on the cost of excluding probative evidence versus the benefit derived from its exclusion. In following this rationale, the Court has stressed the regulatory function of the exclusionary remedy rather than individual rights. While

89. *Id.* at 481-82.
92. See infra part II.B.
93. *See, e.g.*, Gilbert v. California, 388 U.S. 263, 273 (1967) (holding that postindictment lineup identification obtained without presence of counsel is per se inadmissible); United States v. Wade, 388 U.S. 218, 226-27 (1967) (holding that excluding identification by witness because postindictment lineup was conducted without counsel is violation of the Sixth Amendment). *Gilbert* and *Wade* were the first two cases in which the Court applied the exclusionary rule with respect to the Sixth Amendment.
94. *See generally* GARCIA, supra note 8.
emphasizing this regulatory perspective, however, the Court has further restricted the exclusionary sanction through the "atomistic" rule of "standing" to challenge the admission of illegally obtained evidence.

The standing requirement is based on the notion that constitutional violations are "personal" and that evidence illegally seized is suppressible only if the claimant's rights have been violated.96 Thus, this requirement contradicts the regulatory function behind the exclusionary remedy. In effect, standing "operates in practice as a limitation on the exclusionary rule . . . [and] necessarily undermines the rule's regulatory objectives."97 Perhaps the most egregious example of the perverse results fostered by the standing limitation is United States v. Payner.98

Colloquially described as the "briefcase caper," Payner involved the deliberate violation of the victim's Fourth Amendment constitutional right to secure evidence against the target of the search. The unlawful theft of the victim's briefcase was perpetrated willfully by the Internal Revenue Service with the knowledge that the target of the search would not be able to object to the introduction of the seized evidence because he would lack standing to do so.99

Reversing the lower courts' suppression of the evidence based on their supervisory power to "suppress evidence tainted by gross illegalities," the Supreme Court held that the deterrence rationale did not extend that far.100 In effect, the majority feared that suppression would confer unbridled discretionary power on federal courts in applying the exclusionary remedy.101

Payner demonstrates the poverty of the Court's exclusionary rule jurisprudence. Although Justice Powell, writing for the majority, acknowledged the unconstitutional and "possibly criminal" behavior of the government agents in this case, he was constrained by the fear that the exclusionary sanction would open up a Pandora's Box. Moreover, his conclusion that the deterrent effect of exclusion is counterbalanced by the need to introduce the probative evidence is relegated to a footnote and belies common sense.102 Payner provides an open invitation to gov-

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96. The classic rationale and statement of the standing requirement may be found in Alderman v. United States, 394 U.S. 165, 171-74 (1969).
99. Id. at 728-30.
100. Id. at 733.
101. Id. at 733-37.
102. Id. at 735 n.8.
ernment agents steeped in the nuances of Fourth Amendment law to trample upon the rights of innocent citizens with relative impunity.¹⁰³

The Payner majority stressed the atomistic conception of the Fourth Amendment to the detriment of its regulatory function. Had it emphasized the regulatory perspective, the majority would have suppressed the evidence as a means of deterring such illegal behavior. Some would claim that Payner reinforces the fact that the sole objective of the exclusionary remedy is the regulatory one of deterring police misconduct.¹⁰⁴ Viewed from a multifaceted perspective, however, Payner illustrates how the exclusionary remedy safeguards the three fundamental values underlying the Fourth Amendment.

Not only did the search in Payner violate an innocent party’s right to privacy, it also encouraged lawless governmental behavior. Though the evidence was not used against the aggrieved party, the government accomplished its goal: a conviction obtained through illegal means. Individual, and potentially collective, privacy was compromised, governmental overreaching was condoned, and fair play values were ignored by the Payner Court’s disregard of the fundamental values sustaining the Fourth Amendment.

It is useful to contrast this individualistic approach with the Court’s recent collective interpretation of the Fourth Amendment. In United States v. Verdugo-Urquidez,¹⁰⁵ Chief Justice Rehnquist, writing for the majority, held that the Fourth Amendment did not apply to an “extraterritorial” search conducted against a defendant “with no voluntary attachment to the United States.”¹⁰⁶ Examining the text, history, and scope of the Amendment, the Chief Justice underscored the collective reference to the “people” in the text of the Amendment as signifying a commitment to “protect the people of the United States against arbitrary action by their own [g]overnment.”¹⁰⁷ This regulatory function being the primary purpose of the Fourth Amendment, it necessarily

¹⁰³. Id. at 738 (Marshall, J., dissenting). It should be noted that the agents who concocted this illegal activity were not prosecuted. Indeed, the only action by the government to stem this activity was to suspend “Operation Tradewind” (the investigation that prompted the "briefcase caper") and to issue guidelines designed to prevent such behavior. In fact, the majority chastised the Internal Revenue Service for such “less than positive” measures. Id. at 733 n.5.


¹⁰⁶. Id. at 274-75.

¹⁰⁷. Id. at 266.
followed that the proscriptions embodied in the Amendment were never intended to "restrain the actions of the [f]ederal [g]overnment against aliens outside of the United States territory."\textsuperscript{108}

In his dissent, Justice Brennan underlined the regulatory role of the Fourth Amendment, noting that the Bill of Rights forbids governmental infringement of fundamental liberties and rights.\textsuperscript{109} Brennan believed that, in prosecuting Verdugo-Urquidez, the United States ought to be bound by its own charter or rules of the game.\textsuperscript{110}

Comparing \textit{Payner} with \textit{Verdugo-Urquidez} evinces the Court's flawed analysis of the norms underlying the Fourth Amendment and the criminal amendments in general. In both circumstances, the government's conduct violated the Fourth Amendment. In \textit{Verdugo-Urquidez}, the government searched the defendant's property abroad without a warrant and, arguably, without a reasonable basis for the search.\textsuperscript{111} In \textit{Payner}, the governmental misconduct was even broader, extending to an illegal search of an innocent party's briefcase. In both cases, the government infringed upon individual and collective privacy, overstepped its constitutional limitations, and offended fair process norms.

Ironically, the \textit{Payner} decision rests on the atomistic concern for individual rights embodied in the Fourth Amendment. \textit{Verdugo-Urquidez}, on the other hand, relies on a reading of the collective phrase "people," which protects the polity from governmental infringement of fundamental liberties. If the Court is faithful to its commitment to apply the exclusionary remedy to encourage law enforcement officials "to incorporate Fourth Amendment ideals into their value system,"\textsuperscript{112} both \textit{Payner} and \textit{Verdugo-Urquidez} represent inauspicious vehicles to attain the Court's purported objective.

In this vein, the Court employed the \textit{Payner} rationale in \textit{United States v. Alvarez-Machain}.\textsuperscript{113} That case involved the forcible abduction of a Mexican national to the United States with the full participation of Drug Enforcement Administration Agents. Although \textit{Alvarez-Machain} is grounded on due process notions, the lesson one derives from it is similar to \textit{Payner}'s teachings. Indeed, the \textit{Alvarez-Machain} majority rests its holding on the formalistic conception that nothing explicit in the Extra- 

\textsuperscript{108} Id.
\textsuperscript{109} Id. at 288 (Brennan, J., dissenting).
\textsuperscript{110} Id. at 284-86 (Brennan, J., dissenting).
\textsuperscript{111} Id. at 294 n.13 (Brennan, J., dissenting).
\textsuperscript{113} 112 S. Ct. 2188 (1992).
napping of foreign nationals. Although the majority had precedent to establish that forcible abductions abroad did not deprive United States courts of jurisdiction to try the defendant, *Alvarez-Machain* was different from that precedent. *Alvarez-Machain* did not involve an abduction by a private citizen nor the capture of an American fugitive within the confines of U.S. territory; rather, it entailed the abduction by the U.S. government of a foreign citizen on foreign soil in violation of Mexico's territorial integrity. Common sense dictates that Mexico did not consent to forcible abduction of its citizens simply because it did not include a provision prohibiting such a practice in its extradition treaty with the United States.

Unmistakably, the message conveyed by the Court to law enforcement officials in its recent Fourth Amendment exegesis is the following: The criminal provisions of the Bill of Rights rest on formalistic distinctions. While promoting adherence to fundamental constitutional values, the Court simultaneously fosters their subversion by interpreting such norms in a technical and contradictory fashion. A cynical interpretation of the Court's jurisprudence would lead to the conclusion that the individualistic and regulatory perspectives are alternatively employed to preclude the application of the exclusionary sanction.

A different interpretation of the exclusionary remedy based on the norms inherent in the Fourth Amendment would have prevented the Court's slippery path. This method would take into account the interests of privacy, fairness, and protection from governmental abuse when determining the scope of the exclusionary sanction. To the extent that privacy values are the linchpin of the Fourth Amendment, they should predominate in the balancing process. However, as we have seen, the regulatory function is inextricably tied to the individual autonomy objective of the amendment. Finally, the fairness rationale questions whether admission of the evidence should reward the government for its unlawful behavior.

In each instance, the government engaged in a brazen violation of individual autonomy. Since law enforcement agents suffered no retribution for their conduct, they received implicit authority to continue such practices in the future. In fact, the police were taught not to internalize Fourth Amendment norms, but rather to openly flout them. From a fair play standpoint, the Court teaches that the ends (catching criminals)
may sometimes justify dubious means (kidnapping, breaking and entering, and dispensing with the warrant requirement).

If the values underlying the Fourth Amendment are to act as a guide, then such ideals are portrayed as unnecessary luxuries when the Court skirts their application. Indeed, the Court seems to be saying that, in some circumstances, the standards promoted by the Fourth Amendment are "unrealistic" or "extravagant." Thus, the Court seems to avoid its own warning in *Coolidge v. New Hampshire*: 117

In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, [the Fourth Amendment] and the values that it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won . . . a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important. 118

B. Prophylactic Rules as a Way of Limiting Exclusion

Just as the Court has used its atomistic conception of the Fourth Amendment as a way of blunting the impact of the exclusionary remedy, it has described certain judicial doctrines as "prophylactics" in order to avoid the "drastic" sanction of exclusion. The parallel here is striking: the exclusionary rule is labeled a "judicially created" remedy designed to prevent constitutional violations; similarly, the *Miranda* 119 decision and other distasteful precedents are viewed as prophylactic devices that are judicially created and therefore not constitutionally mandated. In turn, "[w]hether or not a rule is prophylactic depends entirely on how the Court describes the rule and its underlying rationale." 120 As a consequence, the Court gives short shrift to the values enshrined in both the Fifth and Sixth Amendments.

While narrowing the reach of the exclusionary remedy through the atomistic standing limitation, the Court also constrained the effect of *Miranda* by putting the decision outside the constitutional ambit of the Fifth Amendment privilege against self-incrimination. In *Michigan v.*

117. 403 U.S. 443 (1971).
118. *Id.* at 455.
Tucker, the Court held that the Miranda warnings, designed to deflect the inherent compulsion of custodial interrogation, are not constitutionally based. Rather, as the Court explained later, "[t]he Miranda exclusionary rule . . . serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation."

The parallels between the Court's treatment of the Fourth Amendment exclusionary sanction and Miranda's exclusionary proscription are striking. The prophylactic rationale undergirding Miranda is the deterrent value of averting a possible Fifth Amendment violation. Thus, in the most prominent case circumscribing Miranda's impact, the Court focused on a cost-benefit, deterrent analysis in finding that a "public-safety" exception to Miranda was warranted.

A significant flaw in this reasoning is that the Fifth Amendment is "itself an exclusionary rule." Thus, deterrence of future violations is irrelevant if one accepts Miranda as premised on the fundamental value of freedom from self-incrimination. In essence, Miranda has become a second-class citizen and, thus, is not subject to the exclusionary remedy because, arguably, some statements taken in violation of Miranda are not necessarily compelled.

This analysis fails to account for the values underlying the Miranda opinion. Quite simply, Miranda is grounded on the three critical Fifth Amendment values: individual dignity, a "fair state-individual balance," and freedom from governmental overreaching. Rather than constraining its scope, the Court ought to recognize the obvious and overrule Miranda. In essence, if the Court will not recognize the fundamental norms supporting Miranda, then it should not hypocritically erode its rationale.

Perhaps the Court implicitly acknowledges that Miranda might imbue police officers with a value system consistent with the Fifth Amendment. Ironically, it has done so explicitly with respect to the Fourth Amendment exclusionary remedy. Nevertheless, the Court has an

122. Id. at 444. The majority stated that the Miranda warnings are prophylactic devices and thus are "not themselves rights protected by the Constitution but [are] instead measures [designed] to insure that the right against compulsory self-incrimination [is] protected." Id.
128. See supra note 90 and accompanying text.
odd way of attempting to command respect for the values inherent in the criminal amendments. The message it seems to convey to law enforcement agents is contradictory: adopt Fourth and Fifth Amendment ideals as part of your "value system," but remember that there are always means of avoiding those ideals when their application is either inconvenient or unpalatable.

Going beyond the confines of Miranda, a majority of the Court has detracted from the autonomy values inherent in the Fifth Amendment by holding that erroneously admitted coerced confessions are subject to harmless error analysis.\(^\text{129}\) The striking feature of Arizona v. Fulminante is Chief Justice Rehnquist’s discourse about the extent to which the harmless error doctrine has been applied to constitutional violations involving police misconduct. In distinguishing the application of the harmless error rule to trial errors from "structural defects" in the "mechanics" of the trial, Chief Justice Rehnquist betrays a hostility toward the suppression of coerced confessions.\(^\text{130}\)

Chief Justice Rehnquist emphasized that in Fulminante the coercion exerted was psychological, not physical.\(^\text{131}\) This fact somehow ameliorates the violation of the suspect’s right to be free from governmentally induced coercion. However, the Chief Justice, speaking for a bare majority, overlooked the Fifth Amendment exclusionary rule, which is built into the text of the Constitution and which definitively establishes the proposition that coerced confessions are to be excluded from the trial process.\(^\text{132}\) Further, Fulminante’s logic contradicts the Court’s long-standing practice of recognizing that psychological coercion, whether subtle or blatant, contravenes Fifth Amendment norms.\(^\text{133}\)

\(^{129}\) Arizona v. Fulminante, 499 U.S. 279, 295 (1991). In Chapman v. California, 386 U.S. 18 (1967), the Court subscribed to the rule that a constitutional error does not require automatic reversal of a conviction. Rather, such error might be deemed harmless if the admission of the evidence was harmless beyond a reasonable doubt. As Justice White noted in dissent from the majority’s application of the harmless error standard to coerced confessions, Chapman identified three constitutional errors that would not be classified as harmless: "using a coerced confession against a defendant in a criminal trial, depriving a defendant of counsel, and trying a defendant before a biased judge." Fulminante, 499 U.S. at 290 (White, J., dissenting in part).

\(^{130}\) Fulminante, 499 U.S. at 310.

\(^{131}\) Id. at 311.


\(^{133}\) In Spano v. New York, 360 U.S. 315 (1959), for example, the Court determined that a confession was involuntary when secured by a policeman who traded on his friendship with the defendant to secure a confession. In that case, the policeman told the defendant that he would get into trouble unless the defendant confessed. Id. at 318-19. Spano bears striking factual parallels to Fulminante because in Fulminante the police agent relied on his "friend-
In stripping *Miranda* from its constitutional moorings, the Court has simultaneously ignored Fifth Amendment commands in *Fulminante*. Similarly, the prophylactic methodology has infused Sixth Amendment jurisprudence. Construing the Sixth Amendment guarantee of counsel as a fundamental right in *Gideon v. Wainwright*, the Court left no doubt about the constitutional basis of the assistance of counsel. Yet, Justice Powell's concurring opinion in *Argersinger v. Hamlin* implied that the right to counsel is a prophylactic rule that safeguards the broader right to a fair trial. This perspective is problematic because the right to a fair trial is the goal behind the distinct provisions of the Sixth Amendment. Therefore, it is counterintuitive to contend that deprivation of counsel at trial is constitutional as long as the defendant receives a fair trial.

Consistent with this philosophy, the Court has ignored its own precedent in characterizing the rule set forth in *Massiah v. United States* as merely prophylactic. In that case, the Court held that the government could not secretly elicit incriminating statements from an indicted defendant without the benefit of counsel. This prohibition rested on the belief that the right to counsel safeguards a defendant who has been formally charged with a crime by interposing counsel as a "medium" between the prosecution and the accused.

*Massiah* is predicated on a proper adversarial balance between the prosecution and the defendant once the government has committed its resources toward the prosecution of the defendant. The right to counsel is viewed as the mechanism to ensure the defendant's right to a fair trial. The lawyer is seen as the protector of the accused when the accused is "confronted with both the intricacies of the law and the advocacy of the

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136. *Id.* at 52, 62 (Powell, J., concurring).
139. *Id.* at 206.
140. *Maine v. Moulton*, 474 U.S. 159, 176 (1985). The Court had extended *Massiah*'s reach in both *Kirby v. Illinois*, 406 U.S. 682 (1972), and *Brewer v. Williams*, 430 U.S. 387 (1977). Both cases stand for the proposition that after the initiation of formal charges against the accused, law enforcement personnel must deal with the accused through her counsel. The rationale behind these cases is that, once the prosecution has committed itself to prosecute the accused, the government's role has markedly changed, since its proper focus is accusatory rather than investigatory. *See Garcia*, supra note 8, at 20-27.
The inexorable logic behind this principle is that when government's function has shifted from investigation to formal accusation, it has purportedly gathered sufficient evidence to prosecute the accused. Therefore, the prosecution must deal with the accused through counsel to secure the defendant's right to a fair adversarial process.\textsuperscript{142}

Nevertheless, the Court has qualified this principle through a formalistic perspective of its rationale. In \textit{Michigan v. Jackson},\textsuperscript{143} two suspects invoked their right to counsel at their arraignment. Subsequently, they were interrogated by detectives and confessed after executing a waiver of their \textit{Miranda} rights. Both the confessions and the waiver were nullified because the suspects had invoked their right to counsel after formal proceedings against them had begun.\textsuperscript{144} In \textit{Patterson v. Illinois},\textsuperscript{145} however, a majority of the Court relied on a stilted view of \textit{Jackson} by holding that, regardless of whether formal prosecution had begun, law enforcement could obtain a confession as long as the accused had not asserted the right to counsel and executed a \textit{Miranda} waiver.\textsuperscript{146}

Furthermore, the Court, in \textit{Michigan v. Harvey},\textsuperscript{147} mislabeled the \textit{Jackson} rule, which adhered to the precept embodied in \textit{Massiah} as a "prophylactic" device. This erosion of \textit{Jackson}'s impact was compelled by the notion that statements taken in violation of \textit{Jackson}'s "prophylactic" rule are admissible to impeach a defendant's false or inconsistent testimony at trial.\textsuperscript{148} The right to counsel, therefore, rests on a formalistic distinction: the accused's invocation of the assistance of counsel when the adversary process begins. The \textit{Massiah} rationale is now grounded upon a thin reed, allowing the government to boost its case even though it allegedly has amassed sufficient evidence to prosecute the defendant. More important, it permits the prosecution to circumvent the adversarial process by going behind defense counsel's back.\textsuperscript{149}

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\textsuperscript{141} United States v. Ash, 413 U.S. 300, 309 (1973).

\textsuperscript{142} It should be noted that law enforcement is not precluded from continuing the investigation of a defendant who has been formally charged with a crime. Rather, the government is free to investigate the defendant with respect to crimes as to which the right to counsel has not attached (i.e., as long as adversary proceedings have not begun against the defendant). Moreover, the government does not violate \textit{Massiah}, even if adversary proceedings have begun, if it does not deliberately elicit incriminating information from the suspect in the absence of counsel. \textit{See, e.g., Moulton, 474 U.S. at 176}.

\textsuperscript{143} 475 U.S. 625 (1986).

\textsuperscript{144} \textit{Id.} at 636.


\textsuperscript{146} \textit{Id.} at 300.

\textsuperscript{147} 494 U.S. 344 (1990).

\textsuperscript{148} \textit{Id.} at 1178.

\textsuperscript{149} \textit{Garcia, supra} note 8, at 26-27.
\end{flushleft}
Although the premises underlying Miranda may arguably be categorized as "prophylactic," no justification exists for labeling the right to counsel, defined and elaborated in Massiah, as a mere protective device. As Professor Grano has pointed out, Justice Rehnquist erred in stating that the Massiah rule "rests on a prophylactic application of the Sixth Amendment right to counsel that... entirely ignores the doctrinal foundation of that right." There is nothing prophylactic about the Massiah doctrine. Rather, Massiah rests on a fundamental principle of the adversarial process: Once the government has decided to formally prosecute an individual, it must deal with the accused through counsel. Fair play norms undergird this precept; the adversarial balance would be upset if the government were given free reign to extract evidence from the defendant without the assistance of an attorney.

What values is the Court seeking to advance through its use of the prophylactic methodology? A skeptical observer would conclude that the Court is using this device as a means of restricting the scope of the exclusionary remedy. As a consequence, the lesson derived from the Court's Miranda and Sixth Amendment jurisprudence is a negative one: Miranda is well-intentioned reform gone astray, and the right to counsel is a technical, prophylactic remedy that is merely a means toward the ultimate end of affording a criminal defendant a fair trial. Lost in the translation are the values fostered by both Miranda and the Sixth Amendment right to counsel: an interest in individual and collective dignity and autonomy, an attempt to curtail governmental abuses, and the need to uphold fair play rules essential to the operation of the adversarial system. Indeed, the Court's analysis skirts the essential values that underlie both the Fifth Amendment's proscription against self-incrimination and the Sixth Amendment's guarantee of counsel.

C. Multiple Constitutional Violations: The Intersection of the Bill of Rights

The values underlying the criminal amendments intersect when potential violations of multiple provisions of the Bill of Rights arise. When

illegally obtained evidence is admitted at trial, for whatever purpose, the threat exists that other constitutional safeguards will be undermined. Similarly, when a constitutional right is abridged, such as the right to confront one's accusers, another constitutional provision might be eroded, such as the right against self-incrimination. Moreover, from a pragmatic standpoint, multiple constitutional violations threaten the symmetry upon which the adversarial process is built.

Two prominent examples demonstrate the Court's failure to assess the implications behind multiple violations: the impeachment exception to the exclusionary rule and the tendency to equate the confrontation clause with evidentiary principles. A brief examination of these doctrines will reveal how the values behind the criminal amendments intersect in the "real world" of criminal law, and how the Court has overlooked the manner in which these values converge.

The impeachment exception to the exclusionary rule allows the prosecution to introduce illegally secured evidence to impeach the defendant's testimony. First established by the Court in the case of Walder v. United States, the rule rests on the notion that the incremental value to the deterrent purpose of the exclusionary rule is minimal when illegally seized evidence is admitted to impeach the defendant's testimony. In contrast, the truth-finding mission of the adversary system is undermined when a defendant may rely on the exclusionary remedy as a "shield" to commit perjury. Nevertheless, the Court has refused to extend the exception to cover defense witnesses; the exception applies only to the defendant's own testimony.

Perhaps the best vehicle for analyzing the doctrine is the case of United States v. Havens. The defendant, along with a codefendant, was charged with smuggling narcotics. The codefendant pleaded guilty and testified against the defendant at trial. The codefendant had concealed the narcotics in a T-shirt made with special pockets. The pockets were made with patches cut from another T-shirt found in the defendant's luggage. The defendant's luggage was seized illegally and was not

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152. In Lee v. Illinois, 476 U.S. 530 (1986), Justice Blackmun chided his brethren for ignoring the "significant realities that so often characterize a criminal case." Id. at 547-48 (Blackmun, J., dissenting).
156. 446 U.S. 620 (1980).
admissible in the government's case-in-chief. When the defendant denied possession of the T-shirts, the cut T-shirt, excluded because Havens's luggage was seized without a warrant, was introduced as rebuttal evidence.\(^{157}\)

_Havens_ is important because the majority broadened the reach of the impeachment exception. On previous occasions, the Court had limited the exception to those instances in which illegal evidence contradicted the defendant's testimony on direct examination.\(^{158}\) In _Havens_, however, the defendant referred neither to the incriminating T-shirt nor to contents of his luggage during the course of the direct examination. Rather, the testimony about the T-shirt emerged as a result of the prosecutor's cross-examination of Havens.\(^{159}\) The majority sought to distinguish _Havens_ on the shaky premise that the cross-examination about the T-shirt and the luggage were closely tied to the gist of the direct examination.\(^{160}\) In effect, _Havens_ gives the prosecution a formidable weapon with which to admit illegally seized evidence because "the prosecutor can lay the predicate for admitting otherwise suppressible evidence with his own questioning."\(^{161}\) Thus the defendant potentially will be deterred from testifying in his behalf due to the looming threat of the admission of illegally seized evidence.\(^{162}\) This probability undermines three constitutional provisions: the right to a fair adversary proceeding grounded in

\(^{157}\) Id. at 622-23.

\(^{158}\) In Agnello v. United States, 269 U.S. 20 (1925), the Court barred the use of illegally obtained evidence in an unrelated case because the defendant did not refer to the evidence during the scope of direct examination. Moreover, the Court, quoting from Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920), noted that the exclusionary rule dictates that illegally seized evidence should not be used "at all"; that is, it saw the function of the rule as precluding the introduction of illegally seized evidence for any purpose. _Agnello_, 269 U.S. at 35. Although the Court retreated from this categorical position in _Walder_, it still cabined the exception to encompass the use of illegally secured evidence only when the evidence contradicts a statement made by the defendant during the scope of direct examination.

\(^{159}\) _Havens_, 446 U.S. at 625.

\(^{160}\) Id. at 626.

\(^{161}\) Id. at 631 (Brennan, J., dissenting).

\(^{162}\) Id. at 632 (Brennan, J., dissenting). One could argue that this deterrence applies only when the defendant and his lawyer "conclude that the costs of introducing the suppressed proof outweigh the benefits of the favorable testimony." See James L. Kainen, _The Impeachment Exception to the Exclusionary Rules: Policies, Principles, and Politics_, 44 STAN. L. REV. 1301, 1316 (1992). However, if the prosecutor feels that the evidence is crucial to obtaining a conviction, as was apparently the case in _Havens_, the defendant and his counsel are apt to conclude that the costs outweigh the benefits of the favorable testimony. Indeed, it is questionable whether the defendant would have chosen to testify in _Havens_ had he and his counsel known that the government would introduce the suppressed evidence. This conclusion is buttressed by the fact that counsel made sure not to bring up either the incriminating T-shirt or the luggage during the course of Havens's direct examination.
the right to due process; the Sixth Amendment right to compulsory pro-
cess, which by inference covers the defendant's right to testify on her
own behalf; and the Fifth Amendment guarantee against self-incrimina-
tion, which encompasses the obverse side of its safeguard—the right to
testify.163

The ramifications of Havens are more far-reaching than the limited
nature of the impeachment exception suggests. Although the illegally
obtained T-shirt arguably was used only to impeach the defendant's tes-
timony (brought up by the prosecutor's cross-examination), it was em-
ployed by the jury substantively. In essence, "the rebuttal of the
defendant's testimony could only have been based on the jury's belief in
the substantive truth of the fact that the altered T-shirt was used in the
smuggling, and that it belonged to the defendant."164 When a piece of
evidence critical to the government's case is suppressed, but is brought in
through the back door of impeachment, the likelihood that the jury will
not weigh it substantively in assessing the defendant's guilt is minuscule.

In this context, the Court's refusal to extend the parameters of the
impeachment exception in James v. Illinois165 defies reason. The flawed
logic underlying James stems from the majority's attempt to distinguish
Havens because that case permits the admission of suppressed evidence
only when it "directly contradict[s]" the defendant's testimony.166 As
the previous discussion illustrates, however, Havens did not involve self-
contradiction; rather, it permitted the prosecution to introduce the evi-
dence through cross-examination of the defendant as a means of estab-
lishing a predicate for admission.

What has the Court accomplished by broadening the impeachment
exception with regard to the defendant's testimony, besides limiting it by
not extending the rule to defense witnesses? First, it has undermined the
rationale behind the exception because its attempt to distinguish James
from Havens has failed. Second, and most important, the Court has sub-
sumed the values underlying the criminal amendments under evidentiary
concepts.167 In the search for "truth" within the adversary system, the

163. This was the Court's reasoning in Rock v. Arkansas, 483 U.S. 44 (1987), in which it
held that the defendant has a constitutional right to testify in his behalf at trial.
166. Id. at 314. Paradoxically, Justice Brennan, who wrote the dissent in Havens, wrote
the majority opinion in James and thus contradicted his previous stance in Havens.
167. See Kainen, supra note 162, at 1305, 1367. As Professor Kainen notes, the Court
operates under the false assumption that the "contradictory values reflected in constitutional
criminal procedure and evidentiary principles are susceptible to neutral accommodation." Id.
at 1305.
Court ignores the autonomy of the individual, the need to curb governmental excesses, and the fairness that defines the adversary process.

Coinciding with this approach is the Court's failure to recognize the divergence between the Confrontation Clause of the Sixth Amendment and the hearsay rule. Indeed, a majority of the Court has crafted a conclusive presumption that hearsay evidence complies with the Confrontation Clause as long as it falls within a "firmly rooted" exception to the rule.168 Again, the search for accuracy in fact-finding obscures the fair play norms guaranteeing the defendant an adversarial proceeding and a fair trial. The outer limits of this doctrine threaten to "revive" the trial by affidavit that the Confrontation Clause was designed to prevent.169

Not only does the Court's tendency to equate the Confrontation Clause and evidentiary law imperil Sixth Amendment values, it also undermines the Fifth Amendment guarantee against self-incrimination.170 This proposition is evident in cases that construe the scope of the Bruton doctrine.171 In Bruton, the Court held that the admission at trial of the confession of a nontestifying codefendant that implicates the defendant violates the defendant's Sixth Amendment right to confrontation.172 Designing remedies, other than severance, that avert Bruton violations has been a difficult task.

The most prominent example of the futility of this method is Richardson v. Marsh.173 That case involved the application of redaction as a remedy for a potential Bruton violation. Redaction allegedly cures the Bruton problem by deleting all references to the defendant from the codefendant's confession. This seemingly ideal solution evaporates when the codefendant's confession, linked to other evidence introduced at trial, implicates the defendant in the crime. This is precisely what occurred in Marsh. All references to Marsh were excluded from her absent codefendant's confession, which was introduced at the defendant's trial.174 Combined with the victim's testimony, however, the confession showed that Marsh had the requisite intent to commit the crimes with which she was charged.175

168. See, e.g., White v. Illinois, 112 S. Ct. 736 (1992); United States v. Inadi, 475 U.S. 387 (1986); see also Garcia, supra note 8, at 94-96.
170. See Garcia, supra note 8, at 96-98.
172. Id. at 126.
174. Id. at 203.
175. Id. at 203-04.
Marsh faced the stark dilemma of allowing the codefendant’s confession derivatively linking her to the crime to stand unchallenged, or testifying to rebut the incriminating nature of the confession and thereby surrendering her Fifth Amendment privilege against self-incrimination.\textsuperscript{176} Significantly, the confession formed the linchpin of the prosecution’s case, since it was the only evidence establishing the \textit{mens rea} required for a conviction.\textsuperscript{177} If Marsh was considering exercising her right not to testify, that option was foreclosed through the admission of her codefendant’s confession.

In summary, both the impeachment exception to the exclusionary rule and the Court’s failed attempt to link evidentiary principles with the Confrontation Clause yield the potential for multiple constitutional violations. With regard to the impeachment exception, a defendant could be deterred from exercising his Fifth Amendment right to testify in his behalf because of the introduction of evidence seized in violation of his Fourth Amendment rights. Conversely, in the \textit{Bruton} context, a defendant might be forced to give up her right not to testify in order to compensate for the inability to confront her most devastating accuser. The values underlying the criminal amendments are sacrificed in the interests of efficiency and accurate fact-finding.

IV. \textsc{An Integrated Vision of Criminal Rights}

The previous section has shown that Justice Brennan’s criticism of the Court’s “doctrinally destructive nihilism”\textsuperscript{178} was not the hyperbolic reaction of a frustrated justice whose philosophy was overshadowed by the changing composition of the Court. But how might Brennan and scholars who have embraced his critique have fashioned a better argument against the majority’s drift? More important, how could the Burger and Rehnquist Courts have justified some of their decisions that were the object of intense criticism and scrutiny? Quite simply, the answer lies in defining and applying the values underlying the criminal amendments in a consistent, coherent, and holistic manner.

One must begin by recognizing the obvious: The Constitution, and particularly the Bill of Rights, is an extremely fluid, open-textured document.\textsuperscript{179} Moreover, as Justice White has explained, the “Constitution is

\textsuperscript{176} Garcia, supra note 8, at 82-83, 96-97.
\textsuperscript{177} Richardson, 481 U.S. at 214-15 (Stevens, J., dissenting).
\textsuperscript{178} See supra note 4 and accompanying text.
not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it. The challenge lies in defining those values and in applying them in a consistent manner. This is a formidable duty in light of the competing interests fostered by the Constitution.

Looking at the criminal amendments as a whole, one draws the conclusion that they principally advance libertarian, individualistic values against overweening governmental power. As we have seen, however, majoritarian concerns against governmental abuse and in promoting citizen participation through the jury process form an integral part of the criminal amendments. Defining the values that underlie the criminal amendments is the first part of the analysis; weighing the importance of those values against the countervailing public and governmental interests when applying the amendments is the second step in the process.

Three overriding values that are common to the criminal amendments have been identified. These values, however, carry different emphases depending upon the particular amendment involved. For example, the Fourth Amendment’s main goal is to “safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.” Privacy in the Fourth Amendment context means security, particularly in one’s home, against unwarranted invasions by governmental authorities. Thus, a majority of the Court has concluded that the “personal” and “societal” values underlying the Fourth Amendment do not extend protection to activities in “open fields.”

Privacy is not a commodity the Court, from a normative perspective, believes soci-


181. Id. at 766-67. Professor Tribe identifies the competing “visions” as liberal individualism versus civic republicanism, national supremacy versus states’ rights, and positivism versus natural law. See Tribe, supra note 179, at 765-66.

182. Supra note 122.

183. This analysis is partially derived from Professor Faigman’s analysis of the proper way to accommodate individual rights and government interests. See David L. Faigman, Reconciling Individual Rights and Government Interests: Madisonian Principles Versus Supreme Court Practice, 78 VA. L. REV. 1521 (1992). Professor Faigman argues that values sustaining individual liberty define the Constitution and that countervailing majoritarian values predominate in applying the Constitution. Id. at 1529. Of course, my position differs from Professor Faigman’s because majoritarian values are part of the criminal amendments.


ety is willing to recognize with respect to open fields. On the other hand, a majority of the Court is willing to extend protection to the curtilage because it is intimately associated with the home.186

Privacy within the Fourth Amendment context also means protection of one's liberty and property interests. As the paradigmatic case delineating the scope of the Amendment shows, the Fourth Amendment protects "people, not places."187 The right to personal security and property interests are safeguarded through the Amendment's proscription against unreasonable seizures.188 In emphatic terms, moreover, the Court has recently stated that the Fourth Amendment protects property interests, even when neither privacy nor liberty concerns are involved.189

By contrast, other provisions within the criminal amendments protect personal privacy against different types of governmental invasion. Indeed, the Katz opinion acknowledged this fundamental precept.190 For example, the Fifth Amendment prohibition against self-incrimination protects "a private inner sanctum of individual feeling and thought and proscribes state intrusion to exact self-condemnation."191 This privacy value is different from the Fourth Amendment's because it protects the inner being of the individual against governmental action that violates, through either overt or subtle coercion, not only the right to be left alone but also the "inner sanctum" of individual freedom.

The privacy interest that the Sixth Amendment fosters is also distinct from that secured by the Fourth and Fifth Amendments. That privacy value emphasizes the autonomous values of dignity and self-determination by allowing the individual to determine his or her fate. The rights to counsel, confrontation, compulsory process, speedy trial, and a jury trial all underscore the dignitary values that both underlie and differentiate our adversary system of adjudication from other methods of determining guilt or innocence. Rather than protecting the "inner sanctum" of pri-

186. Id. at 180 n.11. The majority pointed out that the petitioners had not claimed that the property searched was within the curtilage. Further, Justice Powell noted that the term "open field" is a misnomer, since "an open field need be neither 'open' nor a 'field' as those terms are used in common speech." Id. Thus, a wooded area would constitute an open field under the majority's analysis.

187. Katz v. United States, 389 U.S. 347, 351 (1967). The Katz opinion gave a broad definition of what constitutes "privacy" for Fourth Amendment purposes. First, the majority noted that the Amendment was not absolute in that it only safeguards privacy "against certain kinds of governmental intrusion." Id. at 350. At the same time, the Amendment supposedly sweeps more broadly, thus protecting values other than privacy. Id.


190. Katz, 389 U.S. at 350 n.5.

vate thoughts and feelings, or the security in one's home, property, or person, the Sixth Amendment promotes self-actualized individuals who control their own destiny when the powerful forces of the organized state are arrayed against them.

In this respect, the Eighth Amendment prohibition against excessive fines and cruel and unusual punishment mirrors the autonomy values championed by the Sixth Amendment. The Eighth Amendment autonomy interests, however, differ from the Sixth Amendment protections because they are designed to prevent the government from abusing its monopoly on the legal application of force. That is, while the Sixth Amendment advances the fair play norms essential to the adversary system, the Eighth Amendment circumscribes the potentially limitless power of the government to use force in penalizing criminal behavior. Therefore, the individual autonomy the Sixth Amendment promotes is designed to curtail governmental abuses in the process of determining guilt; the autonomy the Eighth Amendment fosters is devised to thwart governmental abuse in meting out punishments for criminal violations.

Personal privacy differs depending on the interest sought to be protected. As the Katz Court observed, "Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution." 192 The degree and severity of the privacy violation, together with the specific type of protection against governmental intrusion the amendment at issue seeks to safeguard, should guide the analysis of any given case.

In conjunction with this analysis, it is important to weigh the paramount value engendered by the adversary process—fair play. Fair play should limit the kind, degree, and severity of the governmental intrusion. Moreover, fair play norms play a role not only in the adjudicatory phase, but also in the investigative and postadjudicatory stages. 193

To apply the foregoing approach, therefore, requires assessing the particular value the amendment involved protects, the degree and severity of the governmental intrusion against that interest, and the impact of the intrusion on the fair play precepts underlying the adversary system. Balanced against this analysis of values is "the utility of the conduct as a technique of law enforcement." 194 The more intrusive the conduct, the more likely the practice is to run afoul of the normative values protected

193. See supra part II.C.
by the amendment. No matter how useful the conduct is to law enforce-
ment or public interests, those considerations should be subordinate to
the values inherent in the criminal amendments if the governmental
practice severely encroaches upon privacy and fair play norms.

The best way to illustrate this analysis is to compare two cases that
have received harsh criticism from scholars and commentators as exam-
pies of the Court’s failed jurisprudence: United States v. Payner and
United States v. Leon. Although both cases deal with the Fourth
Amendment, they are representative of the Court’s and the legal acad-
emy’s failure to account for fundamental values when determining the
scope of the criminal amendments.

Payner demonstrates the flaws associated with a value-less approach
toward the Fourth Amendment. Payner involved the flagrant violation
of Fourth Amendment privacy norms. The government infringed
upon the individual and collective privacy right to security in one’s home
and private effects. Moreover, the government profited from the viola-
tion through the admission of the evidence. Thus, not only was the se-
curity of the bank president’s home breached, but so was his interest in
the privacy of the contents of his briefcase. This was done without the
protection of a search warrant, which was designed to prevent the very
abuse perpetrated by government agents in Payner.

Rather than hiding behind the shield furnished by the “standing”
doctrine, the Court should have recognized the degree and severity of
the governmental intrusion and suppressed the evidence. However use-
ful the conduct was as a “technique of law enforcement,” it encouraged
the type of violation against personal and property security that the
Fourth Amendment was intended to protect. It is hard to discern a more
blatant instance of governmental overreaching than the Payner scenario.
The introduction of the evidence flouted the fair play precepts underly-
ing the criminal amendments by allowing the government to use the law
as a means of effecting an egregious violation of privacy rights. In short,
the government had no justification for its violation of an innocent
party’s constitutionally derived privacy rights.

On the other hand, the Court seemed to have missed an opportunity
for defending the “good faith” exception to the exclusionary rule in
Leon. The majority’s reliance upon a cost-benefit, deterrence approach
to the exclusionary rule was subject to instant criticism. Not only is de-

197. See supra notes 98-104 and accompanying text.
terrence difficult to prove from an empirical perspective, but the costs due to the suppression of evidence in cases when police secure a warrant but make objectively reasonable mistakes with respect to probable cause are negligible.

Leon is defensible from a value perspective because it involved minimal, if not nonexistent, breaches of privacy values. The irony behind Leon, and its companion case Massachusetts v. Sheppard, was succinctly explained by Justice Stevens: "It is . . . disturbing that the Court chooses one case [Sheppard] in which there was no violation of the Fourth Amendment, and another [Leon] in which there is grave doubt on the question, in order to promulgate a 'good faith' exception to the . . . exclusionary rule."

Governmental authorities complied with every dictate set forth in the Fourth Amendment in Leon. They sought a warrant based on what they believed to be probable cause to find evidence of drug transactions. The search warrant was specific and authorized police officers to search without giving the authorities the license of a general warrant that the Fourth Amendment was designed to prevent. The probable cause issue in Leon was allegedly "close." In light of the relaxed probable cause standard set forth in Illinois v. Gates, one could conclude that the Leon warrant complied with the Fourth Amendment.

Even if one does not reach this conclusion, the violation of privacy rights in Leon was minimal compared to the flagrant privacy breach committed in Payner. Moreover, no governmental overreaching occurred in Leon. Justice Brennan's dissent takes pain to point out that the police officers in that case acted with admirable "self-restraint."

Thus, the privacy infringement in Leon was arguably minimal given the degree and lack of severity of the intrusion; governmental overreaching was nonexistent; and the government did not, as in Payner, profit from its own wrong. From a fair play viewpoint, therefore, the admission of the evidence in Leon is much more justified and defensible than it is in Payner. Furthermore, the utility of the government's conduct as a means

198. See supra part II.A.
199. Leon, 468 U.S. at 951 (Brennan, J., dissenting).
201. Leon, 468 U.S. at 962 (Stevens, J., dissenting).
202. Id. at 971-73 (Stevens, J., dissenting).
203. 462 U.S. 213 (1983). That standard requires that the magistrate make a "common sense" decision that "there is a fair probability that contraband or evidence of a crime will be found in a particular place." Id. at 238.
204. Leon, 468 U.S. at 961 (Stevens, J., dissenting).
205. Id. at 948 (Brennan, J., dissenting).
of furthering law enforcement interests is more than marginally greater in Leon than it is in Payner.

V. Conclusion

How can the debate over criminal procedure emerge from its current state of stagnation? Have the “liberals” resigned themselves to defeat by acknowledging that it is impossible to make substantive inroads in the area? Are the “conservatives” fearful that a new administration might have the opportunity to alter the Court’s drift through new appointments? Whatever the ideological and philosophical predispositions may dictate, an analysis of the field of criminal procedure demands a return to a value-laden, rather than a value-less, approach to constitutional adjudication. Further, a holistic viewpoint is critical to constitutional analysis. The criminal amendments promote common values and ought not be viewed in isolation.

The time has arrived for a new perspective on criminal procedural rights. It is not enough to critique the doctrinal “nihilism” of the Court or to identify the internal or external inconsistency permeating the criminal procedure jurisprudence. Instead, the Court and the legal academy ought to return to the rudimentary values that undergird the criminal amendments.