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ARTICLE

QUASI-AFFIRMATIVE RIGHTS IN CONSTITUTIONAL CRIMINAL PROCEDURE

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ONE common understanding of constitutional law—of what it is and of what it should be—places great weight on a distinc-

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tion between negative and affirmative obligations of government. Constitutional law is said to consist almost entirely of the former: "[T]he Constitution is a charter of negative rather than positive liberties."[1]

Someone holding this view might think it especially well illustrated by constitutional criminal procedure—the set of restrictions placed on criminal investigations and trials by the Fourth, Fifth, and Sixth Amendments. These restrictions, particularly those of the Fourth and Fifth Amendments, are often seen as starkly and paradigmatically libertarian. They are viewed, that is, as simply protecting individuals against certain particularly frightening forms of government overreaching. Nothing is required of the government so long as it leaves people alone.

I want to suggest that this view of constitutional criminal procedure is oversimplified and misleading. My argument is not that constitutional criminal procedure is full of affirmative rights against the government, nor that the distinction between affirmative and negative rights is incoherent or useless. Rather, it is that constitutional criminal procedure is replete with what I call quasi-affirmative rights—constitutional conditions on actions that government cannot realistically be expected to forego—and that, in some important respects, these quasi-affirmative rights resemble genuine affirmative rights more closely than might be imagined.

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[1] DeShaney v. Winnebago County Dep't of Soc. Servs., 812 F.2d 298, 301 (7th Cir. 1987) (Posner, J.), aff'd, 489 U.S. 189 (1989); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.). The classic defense of this view is David P. Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864 (1986). For a more recent and more elaborate defense, see Frank B. Cross, The Error of Positive Rights, 48 UCLA L. Rev. 857, 864–74 (2001).

The terminology of "negative" and "positive" liberties traces, of course, to Professor Isaiah Berlin. See Isaiah Berlin, Two Concepts of Liberty, *in* Four Essays on Liberty 118 (1969). Professor Berlin, though, used these terms not to distinguish between negative and affirmative rights against the government, but rather to distinguish between freedom from "being interfered with by others" and "[t]he freedom which consists in being one's own master." Id. at 123, 131. Therefore one can have an affirmative right in Judge Posner's sense to negative liberty in Professor Berlin's sense: a right, for example, to state protection against private violence. This was, in fact, the kind of affirmative right that the United States Court of Appeals for the Seventh Circuit and later the Supreme Court refused to recognize in *DeShaney*. See, e.g., Steven J. Heyman, The First Duty of Government: Protection, Liberty and the Fourteenth Amendment, 41 Duke L.J. 507 (1991).

This is important, I claim, for at least three interrelated reasons. First, it casts doubt on the wisdom of resting arguments in constitutional criminal procedure, or in constitutional law more broadly, on a sharp and dichotomous distinction between affirmative and negative rights. There may be other reasons to question the wisdom of that approach. Several scholars have advanced one or more of the broader claims that I avoid here: that constitutional law is or should be full of genuine affirmative rights, or that the distinction between affirmative and negative rights is incoherent or useless.[2] Someone convinced by those arguments may find no new lessons here. But for those who find the distinction between negative and affirmative rights generally intelligible and constitutionally relevant, the prevalence of quasi-affirmative rights in constitutional criminal procedure should give pause regarding the easy assumption that the Constitution grants only "negative liberties."

Second, and more importantly, the prevalence of quasi-affirmative rights in constitutional criminal procedure has particular implications for the further development of that body of law. Courts have often shied away from doctrinal paths in criminal procedure that seem to pose affirmative obligations on government. On closer look, though, some of these untraveled roads appear to involve only quasi-affirmative rights, not all that different from most well established rules of constitutional criminal procedure. If courts recognize the common features, they may find the new paths less forbidding. This would be a particularly welcome development because quasi-affirmative rights are the norm, not the exception, in criminal procedure. The judicial bias against quasi-affirmative rights has therefore stunted the development of criminal procedure overall.

Third, recognizing quasi-affirmative rights for what they are may help courts construct them more intelligently. Quasi-affirmative rights, like genuine affirmative rights, pose special problems of judicial manageability. One way to approach those problems is to study what tactics have been tried in the past in similar settings and

[2] See, e.g., Susan Bandes, The Negative Constitution: A Critique, 88 Mich. L. Rev. 2271 (1990); Arthur Selwyn Miller, Toward a Concept of Constitutional Duty, 1968 Sup. Ct. Rev. 199; Louis Michael Seidman, The State Action Paradox, 10 Const. Comment. 379, 382–85 (1993); Laurence H. Tribe, The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics, 103 Harv. L. Rev. 1 (1989).

how those tactics have fared. To do that, though, courts must see how the settings are similar.

I will develop each of these points in more detail below, proceeding as follows. Part I of this Article will describe quasi-affirmative rights and the middle ground they occupy between affirmative and negative rights. I will also describe the traditional objections to affirmative rights and show that although these objections also apply to quasi-affirmative rights, they do so less forcefully. In Part II, I will explore the pervasive role that quasi-affirmative rights play in constitutional criminal procedure. In this field, it turns out, they are the rule rather than the exception.

Nonetheless, courts often appear to shy away from developing new quasi-affirmative rights in criminal procedure. This will be the topic of Part III, the heart of the Article. I will provide four examples of quasi-affirmative rights in criminal procedure that courts have failed to develop, in each case largely because the rights in question seem affirmative rather than negative. The first example involves the government's obligation to make provision for reasonably expeditious processing of warrant applications before claiming that "exigent circumstances" excused the failure to obtain a warrant in a particular case. The second concerns the government's duty to tape-record custodial interrogations. The third has to do with the responsibility of police departments to promulgate rules reasonably constraining the discretion of individual officers in deciding when and how to carry out searches and seizures. The fourth pertains to the obligation of the government to provide court-appointed counsel with some minimally adequate level of financial support. In each of these four cases, the evidence that the judicial aversion results from the quasi-affirmative nature of the right in question is suggestive rather than conclusive, and after reviewing the evidence, I will consider a competing explanation: that courts are avoiding not quasi-affirmative rights, but rights with systemic implications. I will conclude, however, that for practical purposes this amounts to the same thing.

Part IV of the Article will offer some tentative thoughts regarding how courts can best develop quasi-affirmative rights, so as to minimize the special risks they present. I will suggest that those risks are most effectively minimized through judicial strategies designed to promote ongoing dialog between the judiciary on the one

hand and the political branches on the other. Two classes of such strategies seem particularly promising, and are in fact already in use in criminal procedure. The first consists of announcing rules that are in some sense "reversible" by the political branches, and the second depends on rules that, at least initially, require only that the government pay attention to a problem and articulate the reasons for its response, or lack thereof.

I. AFFIRMATIVE, NEGATIVE, AND QUASI-AFFIRMATIVE RIGHTS

An affirmative right against the government is a right to have the government do something; it is a legal power to impose on the government an affirmative obligation. A negative right against the government is a right to have the government *not* do something; it is a legal power to impose on the government a negative obligation. One common and influential view of the Constitution suggests that it creates, almost exclusively, negative obligations of government and negative rights.[3]

At least two different kinds of considerations underlie this view. The first is ideological; it draws on the deep and longstanding commitments in Anglo-American political culture to individualism and limited government. "The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them."[4] The second is institutional; it builds on the simple notion that doing something generally costs money, whereas refraining from action typically does not. Affirmative rights therefore generally have budgetary implications. They require the government to spend money in one place that it could otherwise spend elsewhere.[5] Many people think courts are ill-suited to make decisions with implications of this kind. Not only are judges often politically unaccountable, but "[c]ourts are not institutionally equipped to make the adjustments and readjustments necessary to resolve budget-allocation issues," because "[t]hey are limited to the facts and information made

[3] Despite the formal difference between rights and obligations, for the sake of convenience I will often refer to the two concepts interchangeably.

[4] *Jackson*, 715 F.2d at 1203; see also, e.g., Cross, supra note 1, at 872 (stating that "[t]he Framers of the Constitution and especially of the Bill of Rights primarily concerned themselves with rights against government").

[5] See, e.g., Cross, supra note 1, at 873–74.

available by the parties before them"; legislators, by contrast, "can gather information, hold public hearings, and promote negotiation and debate among affected interests."[6] In addition, the limited remedial powers of courts may poorly equip them for determining how public resources should be allocated: Judges lack both "the political power to compel compliance with controversial decisions" and "the institutional capacity to implement their opinions" on their own.[7]

In the voluminous debates over the merits of the "negative Constitution,"[8] criminal procedure has played only a small role. But many adherents to the view I have been discussing may view the provisions of the Fourth and Fifth Amendments, and to a lesser extent those of the Sixth Amendment, as particularly straightforward examples of negative rights. In both content and cadence, after all, these amendments seem to echo the famous negative guarantee of the Magna Carta: "No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land."[9] They seem central components of that "most comprehensive" and "most valued" of rights, "the right to be let alone."[10]

On closer inspection, however, matters are not so simple. The criminal provisions of the Constitution, and the doctrine drawn from those provisions, are shot through with what I will call quasi-affirmative rights: affirmative constitutional conditions on actions that, realistically, the government cannot entirely forego. Formally, these rights obligate the government to do something, but only if the government first chooses to do something to the holder of the right. Thus they occupy a kind of middle ground between affirmative rights and negative rights. They occupy a middle ground from

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[6] Barbara Armacost, Affirmative Duties, Systemic Harms, and the Due Process Clause, 94 Mich. L. Rev. 982, 1005–06 (1996).

[7] Cross, supra note 1, at 893.

[8] See, e.g., Bandes, supra note 2.

[9] Magna Carta § 39 (1215), *reprinted in* J.C. Holt, Magna Carta 326–27 (J.C. Holt trans., 1965). The original text reads: "*Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terre.*" Id.

[10] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

a functional perspective as well, because—for reasons I will explain—they implicate both sets of concerns underlying the case for a "negative Constitution," but they implicate those concerns less strongly than do affirmative rights.[11]

Outside the field of criminal procedure, perhaps the most familiar examples of quasi-affirmative rights are the obligations of protection and support the government owes to people it has placed in custody.[12] Calling these "affirmative obligations" misses something important: They require nothing of the government, so long as the government leaves people alone. In this way they are like negative rights. They simply bar the government from acting in particularly abusive ways. By locking up someone, disabling him from obtaining certain important things on his own, and then refusing to provide him those things, "the government has *deprived* him of them in the most traditional sense."[13] And "while courts may mandate a variety of improvements in prison conditions, the government could evade these affirmative requirements simply by shutting down the prison, granting the negative right of freedom from government incarceration."[14]

But calling a prisoner's entitlement to food, medical care, and law books a negative right oversimplifies matters as well. Some people are so dangerous that the government realistically has no choice but to lock them up. On a broader level, while a strong case can be made that the United States should incarcerate many fewer people than it now does,[15] completely eliminating prisons does not seem feasible. As a consequence, the government has de facto, un-

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[11] Because these rights lie midway between affirmative rights and negative rights, I could plausibly call them either quasi-affirmative or quasi-negative. I have chosen the former term because their affinity to negative rights is well understood, and because I want to emphasize the under-appreciated ways in which they resemble affirmative rights.

[12] See, e.g., City of Revere v. Mass. Gen. Hosp., 463 U.S. 239 (1983) (obligation to provide medical care to pretrial detainees); Youngberg v. Romeo, 457 U.S. 307 (1982) (obligation to ensure physical safety of involuntarily committed mental patients); Bounds v. Smith, 430 U.S. 817 (1977) (obligation to provide law books to prisoners); Estelle v. Gamble, 429 U.S. 97 (1976) (obligation to provide medical care to prisoners).

[13] Currie, supra note 1, at 874 (emphasis added).

[14] Cross, supra note 1, at 869 n.49.

[15] See, e.g., Vivien Stern, A Sin Against the Future: Imprisonment in the World 36–63, 307–43 (1998).

avoidable obligations to pay for prison kitchens, prison medical services, and prison law libraries. These look like affirmative obligations, and they function much like them, too. They require the government to do something, and to do something that costs money, diverting resources from other public or private projects. Enforcing these obligations thus requires courts to make "the adjustments and readjustments necessary to resolve budget-allocation issues."[16] The political branches, of course, can substantially reduce the extent of the required outlay by limiting the number of people sent to prison; this is one reason it makes sense to distinguish prisoners' rights from pure affirmative rights.[17] But the political branches exercise this control within significant constraints. They cannot reduce the relevant costs to zero. And, of course, *any* significant reduction in incarceration, even to levels well above zero, could conceivably have large "costs" of its own, and not just monetary ones.[18]

The distinction between affirmative and negative obligations of the government, and between affirmative and negative rights against the government, is tightly connected to the distinction between benefits and burdens. An affirmative right is the right to a benefit; a negative right is the right to avoid a burden. So it is not surprising that the complicating middle ground I have been describing has a close analogy in the context of benefits and burdens conferred by the government. The analogy is conditional benefits: benefits provided on the condition that the recipients agree to a burden. Because of the connection between affirmative and negative rights on the one hand, and benefits and burdens on the other, believers in a "negative Constitution" are apt to think that the Constitution generally regulates government burdens, but not government benefits. The problem is what to make of conditional benefits: an offer of unemployment compensation, for example, conditioned on giving up the right to keep sabbath on Saturday.[19] At one time, the

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[16] Armacost, supra note 6, at 1005–06.

[17] On the importance of such matters of degree, see id. at 1009–14.

[18] See, e.g., William Spelman, What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime, 27 Crime & Just. 419 (2000) (reviewing evidence regarding the relationship between incarceration and crime).

[19] This was the situation in *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987).

Supreme Court took the position that conditional benefits were still benefits, and therefore largely matters of government grace. If one did not want the burden, one simply had to decline the benefit. Some members of the Supreme Court may still incline to this view, but the Court as a whole has rejected it for close to eighty years, repeatedly holding that "government may not grant a benefit on the condition that the beneficiary surrender a constitutional right, even if the government may withhold that benefit altogether."[20]

In essence, the Court has recognized that offering people a benefit on the condition that they forfeit a right is too similar, in important ways, to requiring that they forfeit the right. "In reality" conditions of this kind seem to leave the recipient "no choice."[21] Precisely why they seem this way is notoriously difficult to untangle, and the Court's application of the principle has been inconstant.[22] But there is little support for returning to the view that the government has the same discretion in fashioning conditions on benefits that it has in bestowing benefits unconditionally—that for constitutional purposes a conditional benefit is simply a benefit, in the gift of the government. Few judges or scholars today are attracted to the notion that a conditional benefit requires nothing of its recipients because they are free to decline the benefit; that just seems simplistic.

So, too, it can be simplistic to suggest that a particular right against the government requires nothing affirmative from the government because the right is triggered only by action from which the government is free to refrain. In some circumstances, we may want to say that this leaves the government no real choice. Our reasons for saying this may differ from our reasons for finding conditions on government benefits comparable to burdens. When dealing with obligations placed on the government, for example, we may be less worried about coercion in and of itself.[23] But the important point for present purposes is that obligations on government, like obligations on persons, may not lose all of their

[20] Kathleen M. Sullivan, Unconstitutional Conditions, 102 Harv. L. Rev. 1413, 1414–17, 1415 (1989).

[21] Frost & Frost Trucking Co. v. R.R. Comm'n, 271 U.S. 583, 593 (1926).

[22] See Sullivan, supra note 20, at 1428–56.

[23] See Sherbert v. Verner, 374 U.S. 398, 410 (1963); Speiser v. Randall, 357 U.S. 513, 518–19 (1958); Sullivan, supra note 20, at 1433–34.

obligatory character simply because they come formally as conditions on something from which the obligee could conceivably walk away.[24]

II. THE CASE OF CONSTITUTIONAL CRIMINAL PROCEDURE

Those sympathetic to the view that the Constitution can usefully be understood as "a charter of negative rather than positive liberties"[25] tend to see decisions regarding prisoners' rights as a limited, special case.[26] This is how the Supreme Court described those rulings when it held that children have no constitutional right to protection from violently abusive parents.[27] Scholars have sharply criticized virtually every aspect of the Court's decision in that case,[28] but the observation I want to make about it is relatively modest. Constitutional rights that look like those obligating the government to care for prisoners are not uncommon. On the contrary, they pervade one particular field of constitutional law: constitutional criminal procedure.

This is perhaps most obvious with respect to the Sixth Amendment, which grants criminal defendants a range of trial rights: notice of charges; "a speedy and public trial"; confrontation of prosecution witnesses; "compulsory process" for securing defense witnesses; an "impartial jury" drawn from a "fair cross section" of the local community;[29] and, of course, "the Assistance of Coun-

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[24] In fact, the analogy may be even closer. Dean Kathleen Sullivan has argued persuasively that the true basis for treating conditional benefits as burdens is partly that in some circumstances the two classes of government action "present the same structural threat" to the "realm of private autonomy" the Constitution seeks to protect. Sullivan, supra note 20, at 1421, 1492–96. So, too, I have suggested that quasi-affirmative rights and affirmative rights will often pose comparable "structural threats" of judicial manageability and displacement of the political processes of budget allocation, although the extent of the risk may differ.

[25] DeShaney v. Winnebago County Dep't of Soc. Servs., 812 F.2d 298, 301 (7th Cir. 1987), aff'd, 489 U.S. 189 (1989).

[26] See, e.g., Currie, supra note 1, at 874.

[27] See DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200 (1989).

[28] See, e.g., Bandes, supra note 2, at 2287–98; Heyman, supra note 1; Seidman, supra note 2, at 380–94; Tribe, supra note 2, at 8–14. For a helpful summary of the criticism and a thoughtful response, see Armacost, supra note 6.

[29] See Taylor v. Louisiana, 419 U.S. 522, 526, 530 (1975).

sel"—supplied, if the defendant is impecunious, at public expense.[30] All of these obligations cost the government money, and some of them cost a lot of money. Trials would be cheaper if they could be scheduled at the government's convenience, if prosecution and defense witnesses did not need to be brought to court, if juries could be empanelled more casually, and if defense attorneys did not need to be hired. All of these obligations can be characterized as negative. They arise only when "the government reaches out to deprive" someone of "life, liberty, or property by execution, jail, or fine"; they "merely determine[] . . . the process due" in such circumstances.[31] But there are some defendants the government cannot realistically refrain from prosecuting, and, on a broad scale, the government cannot realistically get out of the business of criminal trials altogether. Like the duties the government owes to prisoners, therefore, the rights granted by the Sixth Amendment are best viewed as quasi-affirmative. They place affirmative obligations on the government conditioned on actions that, realistically, the government cannot wholly avoid.[32]

The same may be said of the Fifth Amendment's rule that felony prosecutions must commence with a charge from a grand jury. Grand juries cost money; it would be cheaper to proceed without them. The government could dispense with grand juries if it were willing to give up prosecuting felonies, but that is not much of a choice. As for the broad command of the Fifth Amendment that "life, liberty, or property" may be taken only with "due process of law," this is a quasi-affirmative obligation writ large. In contrast, the Fifth Amendment's guarantee against double jeopardy looks

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[30] U.S. Const. amend VI; see also Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) (requiring counsel to be supplied to indigent defendants under the Sixth Amendment's Assistance of Counsel Clause); Johnson v. Zerbst, 304 U.S. 458, 465, 467–68 (1938) (same).

[31] Currie, supra note 1, at 873–74; see also Cross, supra note 1, at 869 ("While these rights of criminal defendants are phrased as if they were positive rights to government assistance, they in fact are negative rights, not to be convicted or to be held by the government, unless such assistance is provided.").

[32] Cf. Akhil Reed Amar, The Constitution and Criminal Procedure 140 (1997) ("The appointment of counsel requires government to act 'affirmatively,' but so does the compulsory process clause, which requires government to act affirmatively to enforce subpoenas. Government payment of defense counsel costs money, but so does convening an impartial jury, holding a public trial, informing the accused of the 'nature and cause' of charges, and so on.").

like a purely negative obligation: It never requires the government to do anything, not even as a condition for doing something else. The Fifth Amendment right against compelled self-incrimination looks the same way, but not once one examines the gloss the Supreme Court has placed on this provision. The Supreme Court has construed the Self-Incrimination Clause to require affirmative protections against coercive interrogations of suspects in police custody: either the famous *Miranda* warnings and the availability of counsel, publicly funded where necessary, or procedures "at least as effective in appraising accused persons of their right of silence and in assuring a continuous opportunity to exercise it."[33] The government could avoid the need for these protections if it gave up interrogating suspects in custody, or perhaps if it merely gave up using those statements in its case-in-chief,[34] but these are not realistic options. The *Miranda* rights, too, are best understood as quasi-affirmative.[35]

Of all the criminal procedure rights granted by the Constitution, those extended by the Fourth Amendment may seem the most resolutely libertarian, and thus the most obviously negative in

[33] Miranda v. Arizona, 384 U.S. 436, 467 (1966); see also Dickerson v. United States, 530 U.S. 428, 432 (2000) (reaffirming that "*Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts").

[34] The Court couched its holding in *Miranda* as a restriction on the use of evidence: "[T]he prosecution may not use statements . . . stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." *Miranda*, 384 U.S. at 444. More recently the Court has characterized the case as holding "that unwarned statements may not be used as evidence in the prosecution's case in chief." *Dickerson*, 530 U.S. at 443–44. Nonetheless, some lower courts have held that custodial interrogations lacking the protections prescribed in *Miranda* violate the decision regardless whether the police later make use of the suspect's statements. See Cal. Attorneys for Criminal Justice v. Butts, 195 F.3d 1039 (9th Cir. 1999); People v. Peevy, 953 P.2d 1212, 1224 (Cal. 1998). For arguments in defense of this view, see Charles D. Weisselberg, In the Station House After *Dickerson*, 99 Mich. L. Rev. 1121 (2001); Charles D. Weisselberg, Saving *Miranda*, 84 Cornell L. Rev. 109 (1998). For a thoughtful response, see Steven D. Clymer, Are Police Free to Disregard *Miranda*? 6–63 (June 13, 2002) (unpublished manuscript on file with the Virginia Law Review Association).

[35] So is the protection the Fifth Amendment provides against the taking of "private property . . . for public use, without just compensation," U.S. Const. amend. V, but I am trying to stay focused on criminal procedure.

character.[36] The Fourth Amendment prohibits "unreasonable searches and seizures," and it prohibits warrants unsupported by probable cause or insufficiently particular in describing what the police may do. These are the prohibitions that Justice Brandeis thought reflected the broad, paradigmatically negative "right to be let alone."[37] And they do seem at first blush to tell the government nothing more than to keep its hands to itself.

By now it should be clear why that assessment is mistaken. The Fourth Amendment requires nothing of the government so long as the government refrains from searches or seizures—but foreswearing these practices altogether is wildly impractical. Realistically, then, the Fourth Amendment *does* require something of government: It requires government to ensure that the searches and seizures it carries out are not "unreasonable." Satisfying that requirement, particularly as it has been applied by the Supreme Court, can be quite costly.

The Court has held, for example, that a warrantless arrest is "unreasonable" unless it is followed by a "prompt" judicial assessment of the grounds for the arrest,[38] and—more recently—that "prompt" generally means within forty-eight hours.[39] Unless a state wants to get out of the business of arresting suspected criminals, complying with these rules requires it to hire and support more magistrates than it might otherwise think appropriate, and to establish a more elaborate system for the processing of arrested persons than it might otherwise find worthwhile.[40] The tighter the time limit, obviously, the more a state must spend to comply. In crafting these rules the Court thus confronted the very issues of institutional

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[36] Cf. Anthony G. Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349, 353, 400 (1974) (describing the Fourth Amendment as a "profoundly anti-government document[]" and arguing that it "should be read to assure that any form of [governmental] interference is at least regulated by fundamental law so that it may be" properly restrained).

[37] Olmstead v. United States, 277 U.S. 438, 478 (1928) (dissenting opinion).

[38] Gerstein v. Pugh, 420 U.S. 103 (1975).

[39] County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

[40] As Justice Scalia pointed out, the requirement of a prompt post-arrest hearing would be "worthless" if a state could delay the hearing for, say, a year "because only a single magistrate had been authorized to perform that function throughout the State." Id. at 67 (Scalia, J., dissenting). Justice Scalia dissented from the Court's decision because he thought the hearings generally should be held within twenty-four hours of arrest. See id. at 70 (Scalia, J., dissenting).

competence and legitimacy typically raised when judges fashion affirmative rights—albeit muted somewhat, as in cases involving prisoners' rights, by the government's ability, within strong constraints, to limit its costs by curtailing its criminal justice operations.

Nor did these problems escape the Court's attention when it selected the figure of forty-eight hours. Justice O'Connor's majority opinion voiced reluctance "to announce that the Constitution compels a specific time limit," and stressed that forty-eight hours was only a presumptive guideline: Shorter delays are still unconstitutional if shown to be unjustified, and longer delays are permissible if the state can "demonstrate the existence of a bona fide emergency or other extraordinary circumstance."[41] Even so, the dissent complained with some justification that the figure of forty-eight hours seemed to come out of thin air.[42] But the alternative to a specific time limit, however arbitrary, seemed even more unpalatable to the Court: The "vague standard" of promptness had "led to a flurry of systemic challenges to city and county practices, putting federal judges in the role of making legislative judgments and overseeing local jailhouse operations."[43]

The forty-eight-hour rule is hardly the only quasi-affirmative obligation imposed on the government by Fourth Amendment law. The Court has long held, subject to an ever-expanding set of exceptions, that searches and seizures without warrants are presumptively unreasonable.[44] This requires a state, if it wishes to conduct searches and seizures, to set up an apparatus for the judicial review of warrant applications—much as the forty-eight-hour rule, and the underlying "promptness" standard, require the state to set up an apparatus for timely judicial review of warrantless arrests. In practice, for reasons I will describe shortly, the obligation to establish procedures for issuing warrants has less bite than it should. But for now the important point is that the warrant requirement—a pillar

[41] Id. at 56–57 (majority opinion).
[42] Id. at 67 (Scalia, J., dissenting).
[43] Id. at 56 (majority opinion).
[44] One exception is for felony arrests based on probable cause. See United States v. Watson, 423 U.S. 411 (1976). Hence the frequent need for a post hoc hearing regarding the grounds for an arrest.

of modern Fourth Amendment law—is, like the forty-eight-hour rule, quasi-affirmative in character.[45]

III. UNTRAVELED ROADS

The quasi-affirmative rights that pervade constitutional criminal procedure have implications both for constitutional criminal procedure and for constitutional law more broadly, but the former implications are clearer. For constitutional law more broadly, the rights I have been discussing may cast doubt on arguments that rest on a simple dichotomy between negative and affirmative rights. But criminal procedure may be something of a special case. The very gravity of the burdens meted out by the criminal justice system—searches, arrests, imprisonment, executions—justify greater obligations on the part of the government.[46] The political powerlessness of criminal defendants may justify a heightened degree of judicial protection.[47] And, as I will suggest later, the remedial structure of constitutional criminal procedure—in particular, its heavy reliance on the exclusionary rule—may help to make quasi-affirmative rights more manageable.[48] That quasi-affirmative obligations are so common in criminal procedure thus may not tell us much about other areas of constitutional law.

Within criminal procedure itself, on the other hand, certain implications of the discussion so far are less ambiguous. In particular,

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[45] Nor does this exhaust the quasi-affirmative obligations imposed by the Fourth Amendment. One of the exceptions to the warrant requirement, for example, allows warrantless "inventory searches" of impounded property and arrested persons, but only if the searches are conducted pursuant to a "standard procedure." See Illinois v. Lafayette, 462 U.S. 640, 645 (1983); South Dakota v. Opperman, 428 U.S. 364, 375 (1976). Because most police departments do not find it practical to refrain from inventory searches, this exception creates, in effect, a quasi-affirmative obligation to develop standard procedures for such searches. To some extent, the Supreme Court has imposed similar "obligations," in similarly indirect ways, on administrative searches and vehicle checkpoints, but the Court has consistently declined to make police rulemaking a more general requirement of searches and seizures. See infra notes 157–174 and accompanying text.

[46] Cf. Currie, supra note 1, at 873–74 ("The due process clauses explicitly require government deprivation, the first amendment requires government abridgment; the 'right' to assistance of counsel is not so negatively phrased.").

[47] See Donald A. Dripps, Criminal Procedure, Footnote Four, and the Theory of Public Choice; or, Why Don't Legislatures Give a Damn About the Rights of the Accused?, 44 Syracuse L. Rev. 1079 (1993).

[48] See infra notes 222–228 and accompanying text..

given the ubiquity of quasi-affirmative rights in constitutional criminal procedure, there is little justification for courts to shy away from doctrinal paths in this field simply because those paths involve the creation and refinement of new rights of this kind. Repeatedly, however, courts appear to do precisely that. For as much as quasi-affirmative rights pervade constitutional criminal procedure, in many ways they are underdeveloped. Indeed, because of the judicial aversion to quasi-affirmative rights, the entire edifice of criminal procedure may be underdeveloped.

I describe below four areas in which courts appear to have shied away from quasi-affirmative rights precisely because they require something affirmative of the government. The first area concerns the government's obligation to make provision for reasonably expeditious processing of warrant applications before claiming that "exigent circumstances" excused the failure to obtain a warrant in a particular case. The second involves the government's duty to tape-record custodial interrogations. The third concerns the responsibility of police departments to promulgate rules reasonably constraining the discretion of individual officers in deciding when and how to carry out searches and seizures. The last pertains to the obligation of the government to provide court-appointed counsel with some minimally adequate level of financial support. Courts have been notably reluctant to recognize any of these obligations on the part of the government.

I argue below that the reluctance appears attributable to the fact that each of the obligations requires the government to do something affirmative, albeit only as the price of doing something else that the government chooses to do—that is, conduct a search or seizure, interrogate an arrested suspect and later use his words against him in court, or prosecute a defendant on criminal charges. But the evidence supporting this attribution is suggestive rather than conclusive, and after reviewing the evidence, I consider a competing explanation: that courts are avoiding not quasi-affirmative rights, but rights with systemic implications. I conclude, however, that for practical purposes this amounts to the same thing.

The judicial aversion I describe here plainly is not absolute. Since quasi-affirmative rights are the norm in constitutional criminal procedure, courts clearly are willing to recognize them

sometimes. Perhaps they do so when the need for the right is especially compelling, or the textual basis for the right is especially clear. I do not attempt to explain here what distinguishes the quasi-affirmative rights they are willing to recognize from the ones they avoid. This is plainly an important question, but it is tangential to my central inquiries: whether courts *do* tend to avoid recognizing quasi-affirmative rights in constitutional criminal procedure, and whether the aversion is justifiable.

A. The New Age of Warrants, and Why It Never Arrived

Not so long ago, there were reasons to think that by the new millennium there would be many fewer warrantless searches—at least in homes, where the warrant requirement still has relatively few exceptions. Of course the Supreme Court has long allowed warrantless searches of homes when "exigent circumstances" leave no time to seek a warrant. But advances in telecommunications over the past decades have made it easier and easier to get warrants quickly, and therefore harder and harder to excuse the failure to do so. What counts as "exigent circumstances" has never been entirely clear, but at a minimum they must involve reason to fear that something bad will happen in the time it takes to get a warrant. As this time shortens, the category of exigent circumstances should shrink.

A century ago, a police officer who wanted a warrant had to go find a judge or magistrate. This could take hours, particularly in rural areas or at night. Today even officers on foot patrol carry two-way radios or telephones, and most police cars have computer terminals linked to wireless networks.[49] Judges and magistrates, of course, have telephones, too, and most of them probably have networked computer terminals as well. So do prosecutors. Technology thus allows law enforcement personnel anywhere to communicate with prosecutors and judicial officers, orally or in writing, almost instantaneously.

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[49] A nationwide survey of police departments in 1999 found that "[d]epartments using car-mounted terminals or computers employed 57% of all officers," and that 73% of all officers worked for departments using some kind of in-field computers or terminals. Matthew J. Hickman & Brian A. Reaves, U.S. Dep't of Justice, Local Police Departments 1999, at 17 (2001).

Beginning in the early 1970s, moreover, the federal government and an initially small but growing number of states explicitly authorized law enforcement agents to obtain warrants telephonically or electronically, without personally appearing before a judge or magistrate. The new statutes were widely applauded, in no small measure because they promised to make searches without warrants much rarer. With judicial officers "only a phone call away," prosecutors would "have to go much further to demonstrate sufficient exigency to justify the constitutionality of a warrantless search."[50]

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[50] Edward F. Marek, Telephonic Search Warrants: A New Equation for Exigent Circumstances, 27 Clev. St. L. Rev. 35, 38–39 (1978); see also State v. Ringer, 674 P.2d 1240, 1249 (Wash. 1983) (concluding that "the availability of a telephone warrant must also be considered in determining whether exigent circumstances exist"); State v. Thompkins, 423 N.W.2d 823, 839–41 (Wis. 1988) (Bablitch, J., dissenting) (noting that the majority's view of the exigent circumstances doctrine allows police to conduct warrantless searches when they could obtain warrants by expending "a few minutes of police time"); Geoffrey P. Alpert, Telephonic Search Warrants, 38 U. Miami L. Rev. 625 (1984) (discussing telephonic search warrants and noting reduced delay as the impetus for their introduction in Arizona and California); Donald L. Beci, Fidelity to the Warrant Clause: Using Magistrates, Incentives, and Telecommunications Technology to Reinvigorate Fourth Amendment Jurisprudence, 73 Denv. U. L. Rev. 293, 296–99 (1996) (noting warrantless searches could be avoided with the establishment of modern telephonic warrant systems); John Heisse, Warrantless Automobile Searches and Telephonic Search Warrants: Should the "Automobile Exception" Be Withdrawn?, 7 Hastings Const. L.Q. 1031, 1033 (1980) (noting telephonic search warrants allow police to obtain "valid warrants . . . where formerly only warrantless searches could be conducted"); Edwin L. Miller, Jr., Telephonic Search Warrants: The San Diego Experience, 9 The Prosecutor 385 (1975) (noting the speed and ease of telephonic search warrants); Paul D. Beechen, Comment, Oral Search Warrants: A New Standard Of Warrant Availability, 21 UCLA L. Rev. 691, 706 (1974) (noting "the availability of oral search warrants should inhibit the police from initiating a warrantless search . . . without a compelling justification").

Telephonic warrants obviously make little sense if much of the value of the warrant process involves an officer's personal appearance before a judge or magistrate. But virtually no one thinks that it does. Judges and magistrates reviewing warrant applications rarely if ever scrutinize the applicant's demeanor. Nor should they: Wholly aside from the strong reasons to doubt the reliability of demeanor evidence in general, see, for example, George Fisher, The Jury's Rise as Lie Detector, 107 Yale L.J. 575, 701 (1997), there are special grounds to doubt its helpfulness when a witness with extensive courtroom experience appears in an ex parte, nonadversarial proceeding, see Beechen, supra, at 702–03. Requiring the affiant's physical appearance before a judge or magistrate does, of course, serve to slow down the process, and not everyone thinks this is a bad thing. Part of the value of warrants may be precisely that they take effort to get, and therefore will be sought only when officers truly believe a search is necessary and well founded. See Donald Dripps, Living With *Leon*, 95 Yale L.J. 906, 926–29 (1986); William J. Stuntz, Warrants and Fourth Amendment

In "the near future," one court predicted, the warrant requirement could be satisfied "virtually without exception."[51]

Such optimism may have been strengthened, at least for residential searches, by doctrinal developments in the early 1980s. While loosening the warrant requirement in some other settings,[52] the Supreme Court tightened it in the home. Barring exigent circumstances, the Court ruled, police need a warrant to enter a private home, even to arrest a violent felon.[53] Even exigent circumstances, the Court later added, would rarely—if ever—excuse a warrantless home arrest for "extremely minor" offenses.[54]

Still more significant was the narrowing of the exclusionary rule in *United States v. Leon*.[55] The Court held in *Leon* that evidence the police obtain through "good faith" reliance on a search warrant is admissible even if the warrant is later found invalid. The case is usually viewed as anti-exclusionary rule, not pro-warrant. But by making warrants a kind of safe harbor, *Leon* gave police and prosecutors an additional reason to use them. This was particularly significant because the Court had largely eliminated an older reason to use warrants, namely immunity from tort suits. At one time, warrants protected officers from liability for searches later deemed

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Remedies, 77 Va. L. Rev. 881, 891 (1991). There may in theory be an optimum level of hassle for warrants: just enough to discourage officers from pursuing frivolous searches, but not enough to seriously expand the scope of the exigent circumstances exception. There is no reason, though, to think that current warrant procedures have been set anywhere near that level—and the large number of warrantless searches excused because of exigent circumstances suggest otherwise. Cf. Stuntz, supra. The benefits of extending the scope of the warrant requirement almost certainly outweigh the costs of dispensing, when necessary, with personal appearances before reviewing judges and magistrates.

[51] State v. Brown, 721 P.2d 1357, 1363 n.6 (Or. 1986); see also Craig M. Bradley, Two Models of the Fourth Amendment, 83 Mich. L. Rev. 1468, 1471 (1985) (suggesting that, where warrants are available electronically, "the number of cases where 'emergencies' justify an exception to the warrant requirement should be very small").

[52] See, e.g., Illinois v. Lafayette, 462 U.S. 640 (1983); United States v. Ross, 456 U.S. 798 (1982).

[53] See Payton v. New York, 445 U.S. 573 (1980); see also Steagald v. United States, 451 U.S. 204 (1981) (finding a violation of the Fourth Amendment when the police entered the defendant's home without a warrant despite the fact the police had an arrest warrant for another individual whom they believed to be in the house).

[54] Welsh v. Wisconsin, 466 U.S. 740, 753 (1984).

[55] 468 U.S. 897 (1984); see also Massachusetts v. Sheppard, 468 U.S. 981 (1984) (similarly upholding use of evidence obtained in good faith reliance on defective warrant).

improper; searching without a warrant, by contrast, exposed officers at least theoretically to the possibility of substantial judgments.[56] Modern doctrines of official immunity, however, usually protect law enforcement personnel from liability even when they act without a warrant.[57] In a sense, *Leon* returned warrants to their old job of safeguarding a search against later attack, except that the attack now guarded against is a suppression motion, not a tort suit.[58]

Consequently, fifteen or twenty years ago there were several reasons to expect warrantless searches of homes to soon grow less excusable, less necessary, less attractive to law enforcement—and therefore much less common. In fact, nothing like this appears to have happened. Reliable statistics are hard to find, but there is no evidence that police have grown less likely over the past thirty years to search without a warrant. Reported cases and the limited empirical evidence suggest that telephonic and electronic applications for warrants are still relatively unusual.[59] This was also my personal impression when I worked as a federal prosecutor in the late 1980s and early 1990s, and it remains the impression of the

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[56] See, e.g., Amar, supra note 32, at 20–21; Stuntz, supra note 50, at 899–910.

[57] See, e.g., John C. Jeffries, Jr., Disaggregating Constitutional Torts, 110 Yale L.J. 259, 270, 282–83 (2000).

[58] *Leon* could do little to encourage the use of warrants, of course, if the "good faith" doctrine shielded evidence from suppression *whenever* officers obtained it in "good faith," with or without a warrant. In fact, the Court opined in *Leon* that its general "balancing approach" to criminal procedure "'forcefully suggest[s] that the exclusionary rule be more generally modified to permit the introduction of evidence obtained in the reasonable good-faith belief that a search or seizure was in accord with the Fourth Amendment.'" 468 U.S. at 909 (quoting *Illinois v. Gates*, 462 U.S. 213, 255 (1983) (White, J., concurring)). Subsequently, however, the Court has extended *Leon* only to searches carried out in "good faith" reliance on statutes later invalidated or court records later found inaccurate. See Arizona v. Evans, 514 U.S. 1 (1995); Illinois v. Krull, 480 U.S. 340 (1987). Thus, the *Leon* safe harbor remains generally unavailable for warrantless searches.

[59] See, e.g., Laurence A. Benner & Charles T. Samarkos, Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project, 36 Cal. W. L. Rev. 221 (2000). Although the San Diego County District Attorney's Office was an early and enthusiastic backer of telephonic warrants, see Miller, supra note 50, Professors Benner and Samarkos found that only 11.5% of San Diego narcotics warrants in the first half of 1998 were issued by telephone. Benner & Samarkos, supra, at 263. They conclude that "[o]ne of the most puzzling questions" raised by their study is "why the use of statutorily authorized telephonic search warrant procedures has been so limited." Id. at 265.

judges, prosecutors, and defense attorneys I know. Many states, in fact, still have not authorized the procedure. Anecdotal evidence suggests that the majority of searches, including those of residences, continue to be carried out without a warrant, most commonly on grounds of exigent circumstances.[60] The new age of warrants never arrived.

What happened? Part of the explanation, of course, is that sometimes the police cannot spare even a minute to get a warrant. When bullets fly into an apartment through the floor of the unit above, taking time to telephone or e-mail a judge or magistrate may be reckless.[61] And many residential searches require no warrant because they are consensual, at least under the Supreme Court's test for consent in this context. They are approved, that is to say, by someone the police "reasonably believe to possess common authority over the premises," regardless whether the police are correct.[62] The case reports and other anecdotal information, however, suggest that many warrantless searches of homes fall into neither of these categories. There is no claim of consent, and no claim that a delay of minutes, as opposed to hours or days, would have been impractical. Why do the police proceed without a warrant?

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[60] In Broward County, Florida, for example, "[o]btaining a formal search warrant is the exception, rather than the norm." Memorandum from Chief George Brennan, Deerfield Beach District, Broward County Sheriff's Office, to Larry Deetjen, Deerfield Beach City Manager (Apr. 21, 2000) (on file with the Virginia Law Review Association). Similarly, police in Ann Arbor, Michigan estimate they enter dwellings without a warrant on a daily basis but execute a search warrant at most once a week. Telephone interview by Michael Gelfond with Lieutenant Sheikh, Ann Arbor Police Department (Aug. 1, 2000). Some of the warrantless entries are based on consent, but most are based on exigent circumstances. Id.; see also Los Angeles Police Department Board of Inquiry into the Rampart Area Corruption Incident, Public Report 67 (2000) (noting that Los Angeles anti-gang officers frequently arrested suspects in their homes without a warrant, because they believed getting a warrant "takes too long").

[61] See State v. Hicks, 707 P.2d 331, 332 (Ariz. App. 1985), aff'd, 480 U.S. 321 (1987); cf., e.g., State v. Raines, 778 P.2d 538, 543 (Wash. Ct. App. 1989) (upholding warrantless entry in response to report of domestic violence, because requiring telephonic warrant "would unduly restrict police officers responding to domestic violence incidents in performing their duty to ensure the present and continued safety of the residence's occupants"). The Ann Arbor police report they enter homes without a warrant most often in response to reports of domestic violence or 911 callers who hang up. Telephone Interview with Lieutenant Sheikh, supra note 60.

[62] Illinois v. Rodriguez, 497 U.S. 177, 179 (1990).

The short answer is that in most cases getting a warrant still takes hours or days. Many states, as previously noted, have never authorized telephonic warrants. In other states, and in some federal districts, it can take appreciable time to find a judicial officer willing and able to take the call. Moreover, the formal procedures for seeking a telephonic warrant are often cumbersome. The federal rule, for example, requires the applicant to write a "duplicate original warrant" and read it over the telephone to the magistrate, who must enter the contents on a document called "the original warrant," and then, if probable cause is found, sign the original warrant and ask the applicant to sign the magistrate's name to the duplicate original warrant. The entire conversation must be tape-recorded and later transcribed, and the magistrate must certify the accuracy of the transcription; alternatively, the magistrate can keep a "stenographic or longhand verbatim record" of the call.[63] At both the state and federal levels, local courts and prosecutors typically impose additional requirements, which frequently include prosecutorial screening both of probable cause and of the need to proceed telephonically.[64] Screening of this kind not only takes time, it often ends with the prosecutor deciding that a regular warrant should be sought.[65]

An officer's decision to seek a telephonic warrant rather than to proceed without a warrant thus can mean significant delay. Arranging and completing the telephone calls and the associated

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[63] Fed. R. Crim. P. 41(c)(2); see also United States v. Good, 780 F.2d 773, 775 (9th Cir. 1986) (noting that "[o]btaining a telephonic warrant is not a simple procedure").

[64] See, e.g., Benner & Samarkos, supra note 59, at 263 n.108.

[65] For prosecutors, telephonic warrants carry special costs. First, they require bothering a judge or magistrate, often at home or when the magistrate is busy with something else. Prosecutors dislike annoying judges and magistrates, with whom they often must deal repeatedly on a wide range of matters. Second, in federal court and in jurisdictions with similar requirements, applying for a telephonic warrant means creating a verbatim, transcribed statement by an officer who may wind up being a key prosecution witness. The statement is typically created when the prosecutor still knows little about the case, and without the control over nuance and protection against carelessness that prosecutors can exercise in written affidavits submitted for regular warrants. Like most trial lawyers, prosecutors tend to prefer their witnesses to speak on the record before trial as little as possible, and in writing rather than orally; this cuts down on the material that can be used for impeachment. Third, by their nature applications for telephonic warrants do not wait for normal business hours. This is one of their advantages, of course, but it also means they often interfere with a prosecutor's time away from the office.

paperwork can itself take hours, and the upshot of the calls may be that the agent must wait and seek a regular warrant. Police continue to forego warrants in large part because governments have kept warrants cumbersome to obtain. Doing so has saved governments from considerable expense: Magistrates cost money, and so do tape recorders and transcription services. But it also has allowed countless searches to proceed without the safeguards of prior judicial review.

Courts have barely raised a peep of protest. Judges seem to recognize that modern technology can make getting a warrant easier, and many have noted that the availability of telephonic warrants must be taken into account when assessing claims of exigent circumstances.[66] But usually that is as far as they go. Courts limit their analysis of exigency to the options presented to the officers in each particular case. They take as a given—and outside the scope of constitutional consideration—whatever constraints are placed on telephonic warrants by prosecutorial policy, local court practice, and statutory command.[67] Faced with the task of determining the time needed to apply for a warrant, most courts rely on the testimony of law enforcement agents, or occasionally prosecutors, about how long the existing procedures actually take to complete.[68]

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[66] See, e.g., United States v. Alvarez, 810 F.2d 879, 883 (9th Cir. 1987); United States v. Cuaron, 700 F.2d 582, 589 (10th Cir. 1983); United States v. McEachin, 670 F.2d 1139, 1146 (D.C. Cir. 1981); United States v. Baker, 520 F. Supp. 1080, 1084 (S.D. Iowa 1981); State v. Brown, 721 P.2d 1357, 1363 n.6 (Or. 1986); State v. Ringer, 674 P.2d 1240, 1249 (Wash. 1983).

[67] See, e.g., United States v. Marshall, 157 F.3d 477, 483 (7th Cir. 1998), cert. denied, 525 U.S. 1045 (1998); United States v. Halliman, 923 F.2d 873, 879 n.3 (D.C. Cir. 1991); United States v. Aquino, 836 F.2d 1268, 1273 (10th Cir. 1988); United States v. Mabry, 809 F.2d 671, 679 (10th Cir. 1987); United States v. Harris, 629 A.2d 481, 491 (D.C. 1993); United States v. Minick, 455 A.2d 874, 878 n.3 (D.C. 1983) (en banc); State v. Chapman, 813 P.2d 557 (Or. Ct. App. 1991); State v. Kinzer, No. 16023-8-III, 1997 Wash. App. LEXIS 1438, at *7 (Wash. Ct. App. Aug. 26, 1997) (unpublished).

[68] For decisions relying on the testimony of officers, see, for example, United States v. Rodea, 102 F.3d 1401, 1409 (5th Cir. 1996); United States v. Wihbey, 75 F.3d 761 (1st Cir. 1996); United States v. Lai, 944 F.2d 1434, 1442 n.2 (9th Cir. 1991); United States v. Maroun, Nos. 89-10460, 89-10606, 1991 U.S. App. LEXIS 5012, at *14 (9th Cir. Mar. 21, 1991) (unpublished); United States v. Kane, 887 F.2d 568, 574 (5th Cir. 1989); United States v. Aquino, 836 F.2d 1268, 1273 (10th Cir. 1988); United States v. Alexander, 923 F. Supp. 617, 624 (D. Vt. 1996); United States v. Chun, 857 F. Supp. 353, 361 (D.N.J. 1993); State v. Flannigan, 978 P.2d 127 (Ariz. Ct. App. 1998); State v. Kempton, 803 P.2d 113 (Ariz. Ct. App. 1990); People v. Camilleri, 269 Cal. Rptr. 862, 865 (Cal. Ct. App. 1990); People v. Higbee, 802 P.2d 1085, 1090 (Colo. 1990); State v.

Courts generally arrive at a figure somewhere between two and four hours.[69] Courts almost never try to determine how long the process *should* take. They restrict their consideration to how long the process *does* take. Occasionally, courts have chastised govern-

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Reagan, 556 A.2d 183, 185 (Conn. App. Ct. 1989); United States v. Harris, 629 A.2d 481, 491 (D.C. 1993); United States v. Minick, 455 A.2d 874, 878 (D.C. 1983) (en banc); Jones v. State, 648 So. 2d 669, 674, 676 (Fla. 1994); Commonwealth v. Ngo, 439 N.E.2d 839, 840 & n.3 (Mass. App. Ct. 1982); State v. Allen , 844 P.2d 105, 110 (Mont. 1992); State v. Basinger, No. CA84-04-017, 1984 Ohio App. LEXIS 11903, at *10 (Ohio Ct. App. Dec. 17, 1984) (per curiam); State v. Bennett, 721 P.2d 1375, 1377 (Or. 1986) (en banc); State v. Shaw, 603 S.W.2d 741, 743 (Tenn. Crim. App. 1980); Fry v. State, 639 S.W.2d 463, 466 (Tex. Crim. App. 1982); Covarrubia v. State, 902 S.W.2d 549, 554 (Tex. App. 1995); Coffey v. State, 744 S.W.2d 235 (Tex. App. 1987); State v. Shingleton, 301 S.E.2d 625, 627 (W. Va. 1983) (per curiam). For decisions relying on the testimony of prosecutors, see, for example, United States v. Talkington, 701 F. Supp. 681, 686 (C.D. Ill. 1988) and State v. Wynn, 792 P.2d 1234, 1235 (Or. Ct. App. 1990).

[69] See, e.g., People v. Camilleri, 269 Cal. Rptr. 862, 865 (Cal. Ct. App. 1990) (two hours); People v. Galdine, 571 N.E.2d 182, 189 (Ill. App. Ct. 1991) (two hours); Angulo v. State, No. 01-83-0655-CR, 1984 Tex. App. LEXIS 6546, at *3 (Tex. Ct. App. Oct. 25, 1984) (two hours); State v. Dorson, 615 P.2d 740, 746 (Haw. 1980) (two and a half hours); People v. Higbee, 802 P.2d 1085, 1090 (Colo. 1990) (two to three hours); People v. Miller, 773 P.2d 1053, 1058 (Colo. 1989) (two to three hours); United States v. Minick, 455 A.2d 874, 878 (D.C. 1983) (en banc) (two to three hours); State v. Shingleton, 301 S.E.2d 625, 627 (W. Va. 1983) (per curiam) (two to three hours); State v. Avery, 414 N.W.2d 319 (Wis. Ct. App. 1987) (per curiam) (two to three hours); Covarrubia v. State, 902 S.W.2d 549, 554 (Tex. Ct. App. 1995) (two to four hours); Coffey v. State, 744 S.W.2d 235, 241 (Tex. Ct. App. 1987) (two to four hours); United States v. Rodea, 102 F.3d 1401, 1409 (5th Cir. 1996) (three hours); United States v. Aquino, 836 F.2d 1268, 1273 (10th Cir. 1988) (three hours); State v. Reagan, 556 A.2d 183, 185 (Conn. App. Ct. 1989) (three hours); United States v. Lai, 944 F.2d 1434, 1442 n.2 (9th Cir. 1991) (three to four hours); United States v. Alexander, 923 F. Supp. 617, 624 (D. Vt. 1996) (four hours); Commonwealth v. Ngo, 439 N.E.2d 839, 840 & n.3 (Mass. App. Ct. 1982) (four hours); State v. Allen, 844 P.2d 105, 110 (Mont. 1992) (four hours).

For a longer estimate, see Jones v. State, 648 So. 2d 669, 674, 676 (Fla. 1994) (three to six hours "in an emergency situation"). For shorter estimates, see, for example, United States v. Kiba, No. 91-50149, 1992 U.S. App. LEXIS 301, at *6 (9th Cir. Jan. 8, 1992) (unpublished) (forty-five minutes); United States v. Anderson, No. 89-50035, 1990 U.S. App. LEXIS 20159 (9th Cir. Nov. 16, 1990) (unpublished) (forty-five minutes to one hour); United States v. Kane, 887 F.2d 568, 574 (5th Cir. 1989) (one hour); United States v. Nigro, 727 F.2d 100, 110 (6th Cir. 1984) (Keith, J., dissenting) ("a few moments"); United States v. Baker, 520 F. Supp. 1080, 1084 (S.D. Iowa 1981) (twenty to thirty minutes); State v. Flannigan, 978 P.2d 127 (Ariz. Ct. App. 1998) (fifteen to forty-five minutes); State v. Kempton, 803 P.2d 113, 118 (Ariz. Ct. App. 1990) ("less than an hour"); State v. Pidcock, 287 S.E.2d 647, 648 (Ga. Ct. App. 1981) (forty minutes); State v. Wynn, 792 P.2d 1234, 1235 (Or. Ct. App. 1990) (forty-five minutes to one hour).

ment officials for failing to make telephonic warrants simpler to obtain, or for failing to encourage their use.[70] Almost always, though, the criticism is dicta; it has no effect on the constitutional analysis or on the outcome.[71]

Courts rarely offer any explanation for taking warrant procedures as fixed; the possibility of a broader inquiry seems not to occur to them. What could explain their narrow focus? They cannot think that the Fourth Amendment applies only if the *police* act unreasonably; neither the language nor the context of the amendment suggest anything of the kind,[72] and the Supreme Court has

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[70] See, e.g., United States v. Wulferdinger, 782 F.2d 1473, 1476–77 (9th Cir. 1986); United States v. Cuaron, 700 F.2d 582, 590 (10th Cir. 1983); United States v. Jones, 696 F.2d 479, 487–88 (7th Cir. 1982); United States v. Alexander, 923 F. Supp. 617, 624 (D. Vt. 1996); State v. Ashe, 745 P.2d 1255, 1267 n.59 (Utah 1987); State v. Komoto, 697 P.2d 1025, 1034 & n.7 (Wash. Ct. App. 1985).

[71] Cf. Illinois v. McArthur, 531 U.S. 326 (2001). In *McArthur*, the Supreme Court reversed a ruling by the Appellate Court of Illinois that the defendant's Fourth Amendment rights had been violated when the police "secured" his residence "for approximately two hours while awaiting a search warrant," allowing him inside only when accompanied by an officer. People v. McArthur, 713 N.E.2d 93, 95 (Ill. App. Ct. 1999). The Illinois court did not address whether a seizure of substantially shorter duration would have been constitutional. Before the Supreme Court, the State of Illinois conceded that the time it took to get a warrant was "a relevant consideration" in assessing the constitutionality of the temporary seizure of the residence, but suggested that the actual time taken was "almost . . . per se reasonable" and "surprisingly brief . . . particularly in light of the fact that this is a small rural jurisdiction with a small police force." Transcript of Oral Argument at 10, Illinois v. McArthur, 531 U.S. 326 (2001) (No. 99-1132). The Supreme Court, too, gave the matter little thought, noting only that "[a]s far as the record reveals, this time period was no longer than reasonably necessary . . . to obtain the warrant." *McArthur*, 531 U.S. at 332.

[72] In general, the Constitution constrains government action, not individual conduct, and the bulk of the Bill of Rights addresses legislative and judicial abuses, not official misconduct. See, e.g., Larry Alexander & Paul Horton, Whom Does the Constitution Command? (1988); Richard S. Kay, The State Action Doctrine, the Public-Private Distinction, and the Independence of Constitutional Law, 10 Const. Comment. 329 (1993). The Fourth Amendment itself follows its ban on "unreasonable searches and seizures" with a provision clearly aimed at courts: the requirement that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. Moreover, much of the motivation for the Fourth Amendment arose from "reaction against the ancient Act of Parliament authorizing indiscriminate general searches by writ of assistance." Illinois v. Krull, 480 U.S. 340, 362 (1987) (O'Connor, J., dissenting); see also, e.g., David A. Sklansky, The Fourth Amendment and Common Law, 100 Colum. L. Rev. 1739, 1776 & n.230 (2000) (reviewing historical evidence).

repeatedly held that searches and seizures can be "unreasonable," and hence unconstitutional, when carried out pursuant to overly permissive statutes, regulations, or administrative practices.[73] Part of the explanation may be that the warrant requirement is often written off today as unworkable,[74] useless,[75] or contrary to original intent;[76] perhaps some courts simply are uninterested in bolstering what they see as a dubious formality. But most judges, like most Supreme Court Justices, still seem to believe that the warrant requirement serves a useful role, particularly with respect to residential searches.[77] So the explanation must lie elsewhere. It seems plausi-

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[73] See, e.g., Knowles v. Iowa, 525 U.S. 113 (1998); Ybarra v. Illinois, 444 U.S. 85 (1979); Torres v. Puerto Rico, 442 U.S. 465 (1979); Delaware v. Prouse, 440 U.S. 648 (1979); Marshall v. Barlow's, Inc., 436 U.S. 307 (1978); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); Sibron v. New York, 392 U.S. 40 (1968); Berger v. New York, 388 U.S. 41 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967).

To be sure, the Court has held—over sharp dissents—that the *exclusionary rule* will not always apply to evidence obtained through such searches and seizures. Specifically, the Court has extended *Leon* to exempt from the exclusionary rule evidence the police obtain when they rely in good faith on statutes later found unconstitutional, see *Krull*, 480 U.S. 340, or court records later shown to be inaccurate, see *Arizona v. Evans*, 514 U.S. 1 (1995). The Justices reasoned that the exclusionary rule is aimed at deterring the police, not legislators or court officials, and indeed that exclusion of evidence cannot be expected to deter legislators or court officials. It is hard to make the same argument about prosecutors, so evidence seized without a warrant because prosecutors fail to make telephonic warrants readily and quickly available could well be subject to exclusion. Given the Supreme Court's extension of *Leon*, the exclusionary rule might *not* apply when magistrates or other nonprosecutorial officials fail to adopt procedures making telephonic warrants available quickly, and the police therefore act without a warrant. But even then, *Leon* would give the government only one free pass: Once the deficient procedures were ruled unconstitutional, the "good faith" defense would no longer be available. And the *Leon* doctrine provides a court no justification for failing to determine whether challenged policies in fact violate the Fourth Amendment. See supra notes 55-58 and accompanying text.

[74] See, e.g., Amar, supra note 32, at 3–10.

[75] See, e.g., Sybil Sharpe, Search Warrants: Process Protection or Process Validation?, 3 Int'l J. Evidence & Proof 101 (1999).

[76] See Amar, supra note 32, at 5–7; Telford Taylor, Search, Seizure, and Surveillance, *in* Two Studies in Constitutional Interpretation 38–44 (1969).

[77] Similarly, Professor Craig Bradley fifteen years ago found the warrant requirement "largely a sham" and suggested it feasibly could be abandoned. Bradley, supra note 51, at 1486. Nonetheless he proposed in the alternative "a simple, easily obeyed rule . . . requiring a warrant in all but genuine emergencies" and making warrants readily available by telephone or radio. Id. at 1492. He argued that such a rule would help the police by pre-screening their grounds for searching and would protect the public both by interjecting the independent judgment of a judicial officer

ble to suppose that it lies in the notion that courts applying the Fourth Amendment should not be ordering the government to do something affirmative, like creating the necessary procedures and apparatus to make telephonic warrants easier to obtain.[78] What principled standards could a court employ in deciding the extent to which public resources should be devoted to extending the protection of the warrant requirement, instead of, say, reducing illiteracy or traffic accidents? And why should courts be making this decision, anyway, instead of elected officials, who have better information about the tradeoffs and are democratically accountable?

Beyond the standard difficulties courts confront in deciding budgetary questions, courts may have an additional motivation for

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into the search process and by preventing post hoc justification of searches with evidence found in the searches themselves. Id. at 1494–95.

The virtue of interjecting the "neutral and detached" assessment of a judicial officer into the search process is, of course, the most traditional justification of the warrant requirement. Johnson v. United States, 333 U.S. 10, 13–14 (1948); see also Tracey Maclin, The Central Meaning of the Fourth Amendment, 35 Wm. & Mary L. Rev. 197 (1993) (tying historical development of the warrant requirement to "distrust of police power and discretion"). Even if that assessment is often less probing than widely assumed, see, for example, Richard Van Duizend et al., *The Search Warrant Process* 26–27 (1984), it is likely to be particularly valuable precisely in those cases where the quick availability of telephonic warrants might make a difference: situations in which there is time to seek a warrant if the process takes only, say, fifteen minutes, but not if the process takes three hours. For it is precisely when officers are operating under time pressure that their judgment is likely to be most clouded, and detached review, even if cursory, most important.

Regarding the benefits of warrants in guarding against the dangers of post hoc justification of searches—dangers not just of hindsight, but also of police perjury—see Stuntz, supra note 50. My own view is that the most important work done by the warrant requirement may be the self-screening it prompts from police officers and prosecutors. In part this may result, as Professor Stuntz suggests, from the fact that police officers cannot manufacture a convincing story if they must go on record about the basis for the search before it takes place. Id. at 915. But much of the benefit probably comes simply from forcing police officers to articulate the basis for their suspicions, rather than proceeding on unexamined impressions. See, e.g., Silas J. Wasserstrom, The Incredible Shrinking Fourth Amendment, 21 Am. Crim. L. Rev. 257, 302 (1984). This benefit, too, is likely to be especially pronounced when officers are operating under time pressure.

[78] Cf. United States v. Gallo-Roman, 816 F.2d 76, 81 (2d Cir. 1987) (reasoning that "it would be quite unrealistic to expect busy magistrates to be immediately available at all times" for a telephonic warrant application); United States v. Malik, 642 F. Supp. 1009, 1012 (S.D.N.Y. 1986) (arguing that applications for telephonic warrants "should be the exception rather than the rule," because magistrates are already burdened with work).

letting the political branches decide how much to spend on reducing the time necessary to get a warrant. Many people find the argument for judicial review strongest with respect to burdens allocated chiefly to groups that cannot fend for themselves in the political process.[79] But residential searches, it can be argued, are experienced by Americans of all races and levels of income, except those so poor they have no home. Indeed, since the warrant requirement has been categorically eliminated for so many nonresidential searches, and since residential privacy may help those with large residences even more than it helps those with modest homes, the availability of telephonic warrants might seem like a rich person's Fourth Amendment question.[80]

If courts are thinking this way, they are mistaken. Police departments generally do not keep statistics on the wealth of the people whose homes they search, but the impression one receives from reading search-and-seizure case reports is that residential searches—particularly those conducted without a warrant, because of claims of exigent circumstances—are concentrated in poor neighborhoods, especially in poor, minority neighborhoods. And the case reports probably exaggerate the percentage of such searches carried out in wealthy neighborhoods, because wealthy subjects are more likely to challenge these searches in court, both civilly and, if they are prosecuted, in criminal suppression motions.[81] Moreover, most people whose homes are searched by the police are criminal suspects, and those in a position to bring a suppression motion are, necessarily, criminal defendants. Neither criminal suspects nor criminal defendants have ever been a politi-

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[79] See, e.g., John Hart Ely, Democracy and Distrust 135–79 (1980).

[80] Cf. William J. Stuntz, The Distribution of Fourth Amendment Privacy, 67 Geo. Wash. L. Rev. 1265, 1276 (1999) (suggesting that the warrant requirement, in conjunction with other features of Fourth Amendment law, "pushes the police away from wealthier suspects and toward poorer ones").

[81] The available statistics support these intuitions. In San Diego, Blacks are "about four times more likely to be the subject of a search warrant for narcotics than Whites," "[m]embers of the Hispanic community are about twice as likely as Whites to experience such a search," and "the majority of the narcotics search warrants [are] for locations clustered in zip code areas in the southeast portion of the city." Benner & Samarkos, supra note 59, at 229–36. Southeast San Diego is poorer and has a higher concentration of minority residents than the city as a whole. E-mail to author from Laurence A. Benner, Professor of Law, California Western School of Law (Dec. 22, 2000) (on file with author).

cally popular group, in part because neither has ever been a group that many Americans outside the group imagine themselves ever joining. Precisely because they are democratically accountable, legislators rarely push for effective accommodation of the interests of criminal suspects and potential criminal suspects—even when the legislators, along with many of their most powerful constituents, are themselves potential criminal suspects.[82] The whole point of constitutional criminal procedure, in a way, is to protect us against our tendency to worry too little about the possibility that one night the police might come after *us*.[83]

There may be good reasons for some of the restrictions placed on telephonic warrants. Prosecutorial pre-screening, for example, helps to minimize demands on the time of judicial officials, both by weeding out inappropriate applications and by directing the applicant's attention to the facts that are legally most pertinent. Furthermore, prosecutors may catch some problems—deficiencies in probable cause, lack of specificity, or overbreadth—that the magistrate or judge might overlook.[84] But prosecutorial pre-screening essentially requires an officer to apply for a warrant twice—first to the prosecutor, and then to the judge or magistrate—and it can easily more than double the time that the process requires.[85] In some areas of the country, the benefits may be worth

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[82] See Daniel C. Richman, Federal Criminal Law, Congressional Delegation, and Enforcement Discretion, 46 UCLA L. Rev. 757 (1999).

[83] See, e.g., Dripps, supra note 47.

[84] See Dripps, supra note 50, at 930.

[85] It can be misleading to speak simply in terms of "strengthening" or "weakening" the warrant requirement. The warrant process has historically had several different components, serving overlapping but distinct purposes: a written affidavit, sworn testimony before a judicial officer, consultation with a prosecutor, etc. Weakening one of these components—for example, waiving the requirement of live, in-person testimony—does not necessarily weaken the warrant requirement, because it may make warrants available in a wider set of circumstances, and therefore narrow the range of situations in which warrantless searches will be reasonable. Conversely, strengthening one of the traditional components of the warrant process—for example, insisting on prosecutorial screening—does not necessarily strengthen the warrant requirement, because by lengthening the time required to get a warrant it may expand the scope of the "exigent circumstances" doctrine.

There thus is an inherent tension in implementing the warrant requirement. The harder it is to get a warrant, the larger will be the category of cases in which failing to get a warrant will be excusable; but the easier it is to get a warrant, the less the warrant requirement can accomplish in the cases in which it applies. The tension is but one instance of a more general tradeoff between how much rules require and how

the costs.[86] Nevertheless, courts have not even asked the question; they have left the matter entirely to the political branches. Along one important dimension, in essence, courts have ceded authority to decide how far the protection provided by the warrant requirement should extend.

If, as I have suggested, their reason for doing so is a sense that they lack institutional competence to require broader availability of telephonic warrants, they might well change their minds if they recognized the structural similarity between such an obligation and other well-established doctrines of constitutional criminal procedure. The obligation that courts have avoided creating is quasi-affirmative: It requires something of the government only to the extent that the government chooses to engage in searches and seizures. Determining how far the government should go in reducing the time necessary to get a warrant does, at least implicitly, require making budgetary tradeoffs and involves questions of degree that do not easily lend themselves to principled resolution. But in these

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broadly they sweep. Extending a rule along one of these dimensions inevitably puts pressure on the legal system to trim it back along the other. This is notoriously true of the Fourth Amendment's general command that "searches and seizures" not be "unreasonable." The more things qualify as "searches" or "seizures," the more pressure there is to weaken the criteria of reasonableness; the more stringent the criteria of reasonableness, the more pressure there is to narrow the definitions of "searches" and "seizures." But the tradeoff is particularly stark with respect to the warrant requirement because the rule of exigent circumstances *mandates* it. Here the inverse relationship between the strictness and scope does not rely on tacit judicial balancing; it is built into the very structure of the doctrine.

[86] In other instances, the best answer may be to require prosecutorial pre-screening when there is time for it, but to allow the officer to call a judicial officer directly when there is not. But a solution of this kind obviously imposes its own costs, both in the form of erroneous determinations regarding whether or not there was time to call the prosecutor, and in the form of after-the-fact second-guessing of those determinations. The same may be said for the current, widespread requirement that officers seek a telephonic warrant only when there is no time for an in-person application. See, e.g., Fed. R. Crim. P. 41(c)(2)(A) (allowing a telephonic warrant only "[i]f the circumstances make it reasonable to dispense, in whole or in part, with a written affidavit"); State v. Apostolis, 459 A.2d 1158, 1159 (N.J. 1983) (finding that the government must show exigent circumstances before using a telephonic warrant as opposed to a written search warrant); State v. Valencia, 459 A.2d 1149, 1154 (N.J. 1983) (same). But see State v. Johnston, 503 N.W.2d 346, 352 (Wis. Ct. App. 1993) (noting that the state amended the telephonic warrant procedure to eliminate "the preference for written affidavits as the basis for search warrants"), rev'd on other grounds, 518 N.W.2d 759 (Wis. 1994).

respects the question is little different from other quasi-affirmative rights in constitutional criminal procedure.

A rule requiring reasonable availability of telephonic warrants would be particularly analogous to the rule mandating a "prompt" judicial hearing following a warrantless arrest, the rule the Supreme Court has said generally requires a hearing within forty-eight hours.[87] In both cases, reducing the time required for judicial review takes money, in part to pay for more magistrates. In both cases, the selection of any particular time limit threatens to appear arbitrary. And in both cases, failing to impose any kind of limit means leaving a certain aspect of the reasonableness of searches and seizures without judicial protection.

B. The Puzzling Persistence of Unrecorded Interrogations

Telephones and electronic communication are not the only technological advances to have had disappointingly small effects on criminal procedure over the last quarter-century. Tape recorders are in the same category. It has been obvious for more than three decades that recordings can significantly strengthen judicial review of procedures for which police and criminal suspects are often the only witnesses, and that among the most important of these procedures are interrogations of suspects in official custody.[88] The difficulty of determining "what in fact goes on in the interrogation rooms," coupled with the great significance of this question for enforcement of the constitutional right against compelled self-incrimination, provided much of the motivation for the Supreme Court's ruling in *Miranda v. Arizona*[89] that police officers must begin custodial interrogations with a series of now famous admonitions.[90] It was apparent from the outset that the *Miranda* warnings, and the waivable rights to silence and counsel the warnings incorporate, are at best an imperfect solution to the problem

[87] See, supra notes 38–43 and accompanying text.

[88] For similar reasons, there have been repeated calls for routine tape recording of line-ups and, more recently, of traffic stops. I focus here on tape recording of custodial interrogations because this is the context in which the calls for mandatory taping are the most longstanding, persistent, and compelling.

[89] 384 U.S. 436 (1966).

[90] Id. at 444–45, 448.

of involuntary confessions.[91] Waivers can be obtained by threat or trick, and coercion may be employed to ensure that waivers, once given, are not retracted.[92] And of course, when no waiver is provided, it is possible for police officers to claim to the contrary.[93]

For these reasons, it has long been recognized that judicial review of the constitutionality of a confession typically will be more meaningful if the interrogation producing the confession was tape-recorded—all the more so because coercion can often depend on the nuances of language and inflection. Judges and commentators began calling in the late 1960s and early 1970s for routine tape recording of stationhouse interrogations,[94] calls that continue to this day.[95] The basic argument remains the same. Professor James Vorenberg, serving as reporter for the American Law Institute's *A Model Code of Pre-Arraignment Procedure*, summarized it well in 1975:

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[91] See, e.g., Anthony G. Amsterdam, The Supreme Court and the Rights of Suspects in Criminal Cases, 45 N.Y.U. L. Rev. 785, 809 (1970). But cf., e.g., Moran v. Burbine, 475 U.S. 412, 427 (1986) (professing confidence that "full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process").

[92] Justice White touched on this problem in his dissent from the ruling in *Miranda*: "[I]f the defendant may not answer without a warning a question such as 'Where were you last night?' without having his answer be a compelled one, how can the Court ever accept his negative answer to the question of whether he wants to consult his retained counsel or counsel whom the court will appoint?" *Miranda*, 384 U.S. at 536 (White, J., dissenting).

[93] Again, the point was made in the *Miranda* dissents, this time by Justice Harlan: "Those who use third-degree tactics and deny them in court are equally able and destined to lie as skillfully about warnings and waivers." Id. at 505 (Harlan, J., dissenting).

[94] See, e.g., James P. Barber & Philip R. Bates, Videotape in Criminal Proceedings, 25 Hastings L.J. 1017, 1020–26, 1040 (1974); Yale Kamisar, Foreword: Brewer v. Williams—A Hard Look at a Discomfiting Record, 66 Geo. L.J. 209, 238–43 (1977); Lawrence S. Leiken, Police Interrogation in Colorado: The Implementation of *Miranda*, 47 Denv. L.J. 1, 45 (1970); Roger J. Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U. Chi. L. Rev. 657, 678 (1966).

[95] See, e.g., Mandy DeFilipo, You Have the Right to Better Safeguards: Looking Beyond *Miranda* in the New Millenniun, 34 J. Marshall L. Rev. 637, 701–12 (2001); Daniel Donovan & John Rhodes, Comes a Time: The Case for Recording Interrogations, 61 Mont. L. Rev. 223 (2000); Steven A. Drizin & Beth A. Colgan, Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois' Problem of False Confessions, 32 Loy. U. Chi. L.J. 337 (2001); Richard A. Leo, The Impact of *Miranda* Revisited, 86 J. Crim. L. & Criminology 621, 681–92 (1996); Wayne T. Westling, Something is Rotten in the Interrogation Room: Let's Try Video Oversight, 34 J. Marshall L. Rev. 537 (2001).

> It is obvious that reliance upon the oral testimony of the officer to establish the conditions of interrogation will often lead to a swearing contest between the police officer and the suspect, a contest which the suspect will rarely win, whether he is telling the truth or not.... [T]he system is a demeaning one for the officer who is telling the truth as well, for in any case of conflicting testimony, the credibility of that officer will be called into question, even though his version may eventually be accepted. Sound recordings would relieve the officer of this pressure. In addition, in some cases it is possible that conflicts in the testimony concerning the interrogation period result not from lying on anyone's part, but rather from different recollections or interpretations of the events which transpired. Sound recordings would allow the court to make its own independent interpretation, based on an accurate picture of what really happened.
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> ... [T]ape recordings are the most efficient and effective means at this time of reconstructing the conditions of stationhouse interrogation for the purpose of determining whether the proper procedural safeguards have been followed.[96]

Professor Vorenberg acknowledged that routine tape recording of stationhouse interrogations would "involve some administrative and financial burden."[97] But he suggested that for many jurisdictions the burden might be minimal, because they already recorded some statements.[98] In any event, he concluded, the advantages of tape recording clearly justify the cost, and "[i]t should ... be a condition of permitting stationhouse investigation that the police do what is necessary to furnish a reliable record of what took place."[99] The *Model Code* therefore mandated audiotaping of post-arrest in-

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[96] A Model Code of Pre-Arraignment Procedure § 130.4 cmt. at 346–47 (1975) [hereinafter Model Code]; cf., e.g., State v. Davis, 438 P.2d 185, 194 (Wash. 1968) (noting that "a review of cases, in which the issue of the admissibility of a confession had to be resolved on the basis of a 'swearing contest,' indicates that almost invariably the police officer was held by the trial court to be more credible than the accused").

[97] Model Code § 130.4 cmt. at 342.

[98] Id. at 342 n.2.

[99] Id. at 342–43.

terrogations[100]—echoing, in this regard, the *Uniform Rules of Criminal Procedure* promulgated a year earlier by the National Conference of Commissioners on Uniform State Laws.[101]

A quarter-century has passed since the release of the *Model Code*. Tape recordings still are "the most efficient and effective means . . . of reconstructing the conditions of stationhouse interrogation."[102] All that has changed is that they are cheaper and—because tape recording now generally means videotaping, not just audiotaping—even more effective. England and Canada have required tape recording of interrogations since the 1980s,[103] and observers in both countries have found the procedure "a strikingly successful innovation providing better safeguards for the suspect and the police officer alike."[104] A growing number of American police departments have experimented with routine videotaping of interrogations; the overwhelming majority have found the costs negligible and the benefits considerable.[105] A striking consensus in

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[100] Id. § 130.4(3). The *Model Code* also required, subject to narrow exceptions, "a visual and sound record" of any post-arrest line-up. Id. § 160.4(2).

[101] Unif. R. Crim. Proc. 243 (1974).

[102] Model Code §130.4 cmt. at 347.

[103] See David Dixon, Law in Policing: Legal Regulation and Police Practices 151–52 (1997); William A. Geller, U.S. Dep't of Justice, Police Videotaping of Suspect Interrogations and Confessions 15–16 (1992); John Sopinka et al., The Law of Evidence in Canada § 8.65 (2d ed. 1999). Similarly, the High Court of Australia ruled in 1991 that in any case in which the police fail to record an interrogation, the jury must be instructed regarding the risks of police perjury. See McKinney v. The Queen (1991) 171 C.L.R. 468. As a result of that ruling, and of legislation preceding and following it, videotaping of interrogations is now "standard procedure" throughout Australia. Phil Kowalick, Silence May Be Golden No Longer, Platypus (Mar. 2000), http://www.afp.gov.au/raw/publications/platypus/mar00/silence.htm; see also Wayne T. Westling & Vicki Waye, Videotaping Police Interrogations: Lessons from Australia, 25 Am. J. Crim. L. 493, 497 (1998) (noting that "[r]ecording is either commonplace or mandatory in countries as far flung as England, Australia, and Canada").

[104] Royal Commission on Criminal Justice, 1993, Cm. 2263, at 26; see also Alan Grant, The Audio-Visual Taping of Police Interviews with Suspects and Accused Persons by Halton Regional Police Force, Ontario, Canada 80–83 (1987) (finding enthusiasm for videotaping of interrogations among both police officers and defense counsel exposed to the practice).

[105] See Geller, supra note 103, at 152; Leo, supra note 95, at 681–86. The benefits are not limited to documenting coercion and protecting against false claims of coercion. Tape recording helps the police conduct more thorough investigations by memorializing details of suspects' statements that may not initially seem important. Prosecutors frequently find tape-recorded confessions particularly valuable because

favor of mandatory tape recording has also persisted among legal scholars, even among those critical of *Miranda*.[106]

Nonetheless, many, if not most, stationhouse interrogations in the United States remain unrecorded. A nationwide survey in 1990 found that only one-sixth of all police and sheriffs' departments videotaped any of their interrogations.[107] Only three states require electronic recording of interrogations: Alaska and Minnesota by judicial decree and Texas by a statute barring admission of unrecorded oral confessions.[108] Illinois legislators recently sought to mandate videotaping of most interrogations for violent offenses, but the legislation was defeated by strong lobbying by law enforcement groups who called the proposed requirement "a major expansion of the rights of the accused at the expense of public safety."[109]

Why do so many law enforcement agencies continue to resist routine tape recording of interrogations, despite steadily dropping costs and the accumulating evidence of benefits? Some police officials fear that suspects will speak less freely if they know they are

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they document not only what a defendant said, but his or her demeanor and character. And false confessions, whether coerced or not, are easier to identify after the fact when the interrogation is recorded. See, e.g., Paul G. Cassell, *Miranda's* Social Costs: An Empirical Reassessment, 90 Nw. U. L. Rev. 387, 488–90 (1996); Drizin & Colgan, supra note 95, at 345–78; Leo, supra note 95, at 683–92; George Coppolo et al., Recorded Interrogations and Confessions in Alaska and Minnesota (Office of Legis. Research, Connecticut Gen. Assembly, No. 99-R-1062, 1999), http://www.cga.state.ct.us/ps99/rpt/olr/99-r-1062.doc.

[106] See, e.g., Craig M. Bradley, The Failure of the Criminal Procedure Revolution 84 (1993); Cassell, supra note 105, at 486–92; Phillip E. Johnson, A Statutory Replacement for the *Miranda* Doctrine, 24 Am. Crim. L. Rev. 303 (1986); William J. Stuntz, *Miranda*'s Mistake, 99 Mich. L. Rev. 975 (2001). Professor Stuntz notes that "[t]he need for video- and audiotaping is the one proposition that wins universal agreement in the *Miranda* literature." Id. at 981 n.19; see also Erik Luna, Transparent Policing, 85 Iowa L. Rev. 1107, 1170 n.243 (2000) (noting that "[l]egal scholars of all political persuasions have supported videotaping custodial interrogations").

[107] Geller, supra note 103, at 17.

[108] See Stephan v. State, 711 P.2d 1156 (Alaska 1985); State v. Scales, 518 N.W.2d 587 (Minn. 1994); see also Tex. Code Crim. Proc. Ann. art. 38.22(3) (Vernon 2002). Only the confession need be recorded in Texas, and the recording may take the form of an electronic record or a written document. For a discussion of the Texas statute and its history, see George E. Dix, Texas "Confession" Law and Oral Self-Incriminating Statements, 41 Baylor L. Rev. 1 (1989).

[109] Jeanne Galatzer-Levy, Harris Case a 'Wake-Up Call' on Kids' Confessions, Chi. Trib., Mar. 22, 2000, § 5, at 1 (quoting Paul Dollins, government relations manager for the Illinois Association of Chiefs of Police); see also Drizin & Colgan, supra note 95, at 385–419 (describing the lobbying effort).

being recorded,[110] although the experience of jurisdictions that have experimented with videotaping generally suggests otherwise.[111] Some observers have blamed the *Miranda* decision for discouraging the development of alternative approaches to regulating interrogation.[112] But nothing has prevented police departments from recording interrogations in addition to complying with *Miranda.* In fact the Supreme Court went out of its way in *Miranda* to encourage innovation—stressing that "the Constitution does not require any specific code of procedures for protecting the privilege against self-incrimination during custodial interrogation," and that "Congress and the States are free to develop their own safeguards for the privilege, so long as they are fully as effective" as those devised by the Court.[113] The real reason that so many police agencies continue to resist taping interrogations appears to be much sim-

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[110] See Drizin & Colgan, supra note 95, at 392; Leo, supra note 95, at 685–86; Coppolo, supra note 105, at 4. There is no legal requirement that suspects interrogated at a police station be told if they are on camera or their words are being recorded. See, e.g., *Stephan*, 711 P.2d at 1162 n.20; Leo, supra note 95, at 686. But some people find surreptitious recording objectionable, see, for example, *Model Code* § 130.4 cmt. at 348–49, and some officers fear, in any event, that "it wouldn't take long for the word to get out." Brian Brueggemann, Bill Would Require Police to Videotape Interrogations, Belleville News-Democrat (Ill.), Feb. 27, 2000, at 3B.

The *Model Code* required that interrogated suspects be informed that they were being tape-recorded. Model Code § 130.4(3), at 38. Professor Vorenberg thought it likely this would make many suspects less willing to talk, but he concluded this was no reason not to require taping or to allow the taping to proceed surreptitiously:

> [F]or many people, greater willingness to talk when they believe no recording is being made stems from an inability to understand the link between what is happening in the police station and what will happen in court and afterwards. Suspects should not be misled about the seriousness of their situation, and it is for this reason that disclosure is required, even though it is recognized that it may sometimes make questioning less effective.

Id. § 130.4 cmt. at 348; accord, e.g., *Stephan*, 711 P.2d at 1162 (finding the prospect of a "chilling effect" insufficient reason not to tape-record interrogations "[g]iven the fact that an accused has a constitutional right to remain silent . . . and that he must be clearly warned of that right prior to any custodial interrogation").

[111] See, e.g., Dixon, supra note 103, at 152; Geller, supra note 103, at 106; Carole F. Willis et al., The Tape-Recording of Police Interviews with Suspects: A Second Interim Report 13 (1988); John Baldwin, The Police and Tape Recorders, 10 Crim. L. Rev. 695, 702 (1985); Cassell, supra note 105, at 490–92; Leo, supra note 95, at 685–86; Coppolo, supra note 105, at 4.

[112] See, e.g., Cassell, supra note 105, at 498; Paul G. Cassell, Protecting the Innocent From False Confessions and Lost Confessions—And From *Miranda*, 88 J. Crim. L. & Criminology 497, 552–53 (1998); Stuntz, supra note 106, at 999.

[113] 384 U.S. at 490.

pler: Tapes expose police interrogation practices to second-guessing by judges, juries, prosecutors, and defense attorneys—and to internal criticism from supervisors and colleagues. Taping "threatens to expose the secrecy of interrogation to the scrutiny of others."[114]

For our purposes, though, the more important question is not why police officers fail to record more interrogations, but why courts have done so little about it. Given the well known difficulties of detecting coercive interrogation practices after the fact without an electronic record, the argument for mandatory taping is straightforward. The Supreme Court of Alaska outlined the argument in 1985, ten years after the *Model Code*:

> Human memory is often faulty—people forget specific facts, or reconstruct and interpret past events differently. . . .
>
> . . . In the absence of an accurate record, the accused may suffer an infringement upon his right to remain silent and to have counsel present during the interrogation. Also, his right to a fair trial may be violated, if an illegally obtained, and possibly false, confession is subsequently admitted. An electronic recording, thus, protects the defendant's constitutional rights, by providing an objective means for him to corroborate his testimony concerning the circumstances of the confession.
>
> . . . The concept of due process is not static; among other things, it must change to keep pace with new technological developments.[115]

Applying the guarantee of due process in the Alaska Constitution, the court therefore concluded that "when the interrogation occurs in a place of detention and recording is feasible," an elec-

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[114] Leo, supra note 95, at 687; see also Drizin & Colgan, supra note 95, at 392–93 (noting that some officers fear "that commonly used tactics such as aggressive behavior or profane language, or even attempts to gain the trust of a suspect, might make police seem less credible in the eyes of jurors"); Coppolo, supra note 105, at 2 (noting that most criminal practitioners surveyed in Alaska and Minnesota reported no adverse effect of taping on "legitimate police interrogation techniques," but that "an Alaska police chief and a Minnesota prosecutor believe some jurors are offended by the police tactic of lying to a suspect about the strength of the case against him or the existence of certain evidence" and may "punish the police by their verdict").

[115] *Stephan*, 711 P.2d at 1161.

tronic record "is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self-incrimination and, ultimately, his right to a fair trial."[116] The court added that "a recording also protects the public's interest in honest and effective law enforcement, and the individual interests of those police officers wrongfully accused of improper tactics" because, at bottom, "a recording will help trial and appellate judges to ascertain the truth."[117]

No serious challenge has ever been made to any of these claims. Nonetheless, in the decade and a half since the Supreme Court of Alaska mandated that stationhouse interrogations be tape-recorded whenever feasible, only one other jurisdiction has followed suit. Expressly endorsing the reasoning of the Alaska court, the Supreme Court of Minnesota exercised its supervisory power in 1994 to require that custodial interrogations "shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention."[118]

The courts of every other jurisdiction to consider the matter have declined to require taping.[119] With rare exceptions, they have

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[116] Id. at 1159–60.

[117] Id. at 1161.

[118] State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994). The court chose "not to determine at this time whether under the Due Process Clause of the Minnesota Constitution a criminal suspect has a right to have his or her custodial interrogation recorded." Id.

[119] See, e.g., United States v. Dobbins, No. 96-4233, 1998 WL 598717, at *3–4 (6th Cir. Aug. 27., 1998) (unpublished); United States v. Short, 947 F.2d 1445, 1451 (10th Cir. 1991); United States v. Coades, 549 F.2d 1303, 1305 (9th Cir. 1977); People v. Holt, 937 P.2d 213, 242–43 (Cal. 1997); People v. Raibon, 843 P.2d 46, 48–49 (Colo. Ct. App. 1993); State v. James, 678 A.2d 1338, 1357–60 (Conn. 1996); Coleman v. State, 375 S.E.2d 663, 664 (Ga. Ct. App. 1988); State v. Kekona, 886 P.2d 740, 744–46 (Haw. 1994); State v. Rhoades, 820 P.2d 665, 674–75 (Idaho 1991); People v. Everette, 543 N.E.2d 1040, 1047 (Ill. App. Ct. 1989); Stoker v. State, 692 N.E.2d 1386, 1388–90 (Ind. Ct. App. 1998); Brashars v. Commonwealth, 25 S.W.3d 58, 63 (Ky. 2000); State v. Buzzell, 617 A.2d 1016, 1018–19 (Me. 1992); Commonwealth v. Diaz, 661 N.E.2d 1326, 1328–29 (Mass. 1996); People v. Fike, 577 N.W.2d 903, 906–07 (Mich. Ct. App. 1998); Williams v. State, 522. So. 2d 201, 208 (Miss. 1988); Jimenez v. State, 775 P.2d 694, 696–97 (Nev. 1989); People v. Owens, 713 N.Y.S.2d 452, 453 (N.Y. Sup. Ct. 2000); State v. Smith, 684 N.E.2d 668, 686 (Ohio 1997); Commonwealth v. Craft, 669 A.2d 394 (Pa. Super. Ct. 1995); State v. James, 858 P.2d 1012, 1017–18 (Utah Ct. App. 1993); State v. Gorton, 548 A.2d 419, 421–22 (Vt. 1988); State v. Spurgeon, 820 P.2d 960, 961 (Wash. Ct. App. 1991); State v. Kilmer, 439 S.E.2d 881, 892–93 (W. Va. 1993).

not declined because they found the arguments for taping unconvincing.[120] On the contrary, several of these courts have gone out of their way to stress the "minimal" costs and burdens associated with taping,[121] and the considerable benefits of the procedure for suspects as well as for the police.[122] One court, after refusing to impose any legal obligation, noted that it could "discern few instances in which law enforcement officers would be justified in failing to record custodial interrogations in places of detention,"[123] and that to the best of its knowledge "no court in any jurisdiction has ever concluded that the tape recording of custodial interrogations in places of detention would be detrimental."[124] Instead, "the justification . . . for rejecting such a duty is solely that it is not a constitutional requirement."[125]

Courts outside Alaska and Minnesota have said little about *why* tape recording is not now constitutionally required, and why, even in the absence of a constitutional requirement, it should not be required as an exercise of supervisory power. Some courts have pointed to the decisions of the United States Supreme Court in *California v. Trombetta*[126] and *Arizona v. Youngblood*,[127] holding that the Due Process Clause of the Fourteenth Amendment ordinarily does not require the police to preserve evidence simply

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[120] But cf. *James*, 678 A.2d at 1360 (concurring that recording would sometimes be helpful, but noting that it would not be "foolproof" in "all circumstances," that its monetary costs "might be substantial," and that it might discourage successful interrogation practices and make suspects less willing to talk); *Brashars*, 25 S.W.3d at 62 (agreeing "that widespread electronic recording has its benefits," but "stop[ping] short of finding electronic recording a panacea which could end disputes over confessions to law enforcement officers").

[121] *Diaz*, 661 N.E.2d at 1328; see also *Stoker*, 692 N.E.2d at 1390 (remarking that "in light of the slight inconvenience" of recording interrogations, it "is strongly recommended").

[122] See *Kekona*, 886 P.2d at 745–46; *Stoker*, 692 N.E.2d at 1390; *Buzzell*, 617 A.2d at 1018; *Diaz*, 661 N.E.2d at 1328–29; *Williams*, 522 So. 2d at 208; *James*, 858 P.2d at 1018; *Kilmer*, 439 S.E.2d at 893.

[123] *Stoker*, 692 N.E.2d at 1390; cf. *Short*, 947 F.2d at 1451 (suggesting that "[i]t might be better procedure for the police to electronically record all conversations with criminal suspects").

[124] *Stoker*, 692 N.E.2d. at 1390 n.10.

[125] Id.

[126] 467 U.S. 479 (1984).

[127] 488 U.S. 51 (1988).

because it might later prove exculpatory.[128] Those decisions may themselves be examples of the Supreme Court's aversion to criminal procedure rights that seem "affirmative" but are really quasi-affirmative.[129] In any event, *Trombetta* and *Youngblood* do little to explain the failure of lower courts to require tape recording of stationhouse interrogations. To begin with, *Trombetta* and *Youngblood* construed only the *federal* guarantee of due process; by their very nature they impose no restrictions on the application of parallel guarantees in state constitutions, let alone on the exercise of supervisory power by state appellate courts.[130] Furthermore, *Trombetta* and *Youngblood* addressed the duty by the police to preserve physical evidence; thus, even as a matter of federal constitutional law, the implications of the decisions are at best unclear for the very different question of whether the Fifth Amendment privilege against compelled self-incrimination requires police officers, at least in some circumstances, to tape-record interrogations.[131] Finally, courts rejected calls for mandatory tape recording of inter-

[128] See United States v. Dobbins, No. 96-4233, 1998 WL 598717, at *4 (6th Cir. 1998) (unpublished); People v. Holt, 937 P.2d 213, 242 (Cal. 1997); People v. Everette, 543 N.E.2d 1040, 1047 (Ill. App. Ct. 1989); *Stoker*, 692 N.E.2d at 1389; People v. Owens, 713 N.Y.S.2d 452, 453 (N.Y. Sup. Ct. 2000); Commonwealth v. Craft, 669 A.2d 394, 396 (Pa. Super. Ct. 1995); State v. Spurgeon, 820 P.2d 960, 962–63 (Wash. Ct. App. 1991). The Alaska Supreme Court "accept[ed] the state's argument," based on *Trombetta*, "that custodial interrogations need not be recorded to satisfy the due process requirements of the *United States* Constitution." Stephan v. State, 711 P.2d 1156, 1160 (Alaska 1985) (emphasis added).

[129] Ironically, twelve years after the Supreme Court ruled against Larry Youngblood, DNA testing of evidence the police did preserve exonerated him. See Maurice Possley, DNA Exonerates Inmate Who Lost Key Test Case, Chi. Trib., Aug. 10, 2000, § 1, at 6.

[130] A 1982 amendment to the California Constitution prohibits California courts in criminal cases from excluding evidence on state constitutional grounds if the evidence is not made inadmissible by federal constitutional law. See Cal. Const. art. I, § 28(d); *Holt*, 937 P.2d at 242. But the California courts addressed and rejected arguments for mandatory taping of interrogations before this amendment, and indeed before *Trombetta* and *Youngblood* were decided. See People v. Johnson, 109 Cal. Rptr. 118, 124 (Cal. Ct. App. 1973); People v. Baxter, 86 Cal. Rptr. 812, 813–14 (Cal. Ct. App. 1970).

[131] Cf. *Stoker*, 692 N.E.2d at 1389 (acknowledging that the case before the court "does not involve the preservation of exculpatory evidence, but creation of evidence which would provide alternative, but perhaps more reliable, proof of a fact, or would confirm and be in addition to other evidence of the same fact").

rogations with equal ease before *Trombetta* and *Youngblood* were decided.[132]

Even today, most decisions refusing to require tape recording of interrogations do not rest their holdings on *Trombetta* and *Youngblood.* Either courts simply "decline" to announce such a rule and leave it at that,[133] or they suggest that taping should be mandated, if at all, through legislation, and not "by judicial fiat."[134] It is hard to read these opinions without becoming convinced that courts are reluctant to require taping largely because it seems beyond their province, and that it seems beyond their province largely because it demands affirmative action by the government. When courts are asked to grant criminal defendants new rights that seem purely negative, they may deny the request, but they generally do not do so by renouncing "judicial fiat." They generally feel called upon to provide more of an explanation.[135] When a defen-

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[132] See, e.g., *Johnson*, 109 Cal. Rptr. at 124; *Baxter*, 86 Cal. Rptr. at 813–14; Model Code § 130.4 cmt. at 346.

[133] State v. Kekona, 886 P.2d 740, 746 (Haw. 1994); State v. Rhoades, 820 P.2d 665, 675 (Idaho 1991); Commonwealth v. Diaz, 661 N.E.2d 1326, 1329 (Mass. 1996); State v. Kilmer, 439 S.E.2d 881, 893 (W. Va. 1993); see also, e.g., Coleman v. State, 375 S.E.2d 663, 664 (Ga. Ct. App. 1988) (calling defendant's argument "extremely interesting," but "find[ing] that neither the Georgia Constitution nor the Constitution of the United States mandates" taping); State v. Buzzell, 617 A.2d 1016, 1018 (Me. 1992) (explaining that the defendant "has not persuaded us that recording is essential to ensure a fair trial, or that the due process clause of our state constitution requires electronic recording of custodial interrogation"); Williams v. State, 522 So. 2d 201, 208 (Miss. 1988) (noting that "this Court has never held nor does our constitution require that the mere absence of a tape recording renders . . . statements [made during custodial interrogation] inadmissible").

[134] People v. Raibon, 843 P.2d 46, 49 (Colo. Ct. App. 1993); People v. Everette, 543 N.E.2d 1040, 1047 (Ill. App. Ct. 1989); State v. James, 858 P.2d 1012, 1018 (Utah Ct. App. 1993); State v. Gorton, 548 A.2d 419, 422 (Vt. 1988); see also United States v. Coades, 549 F.2d 1303, 1305 (9th Cir. 1977) (opining that "[t]he need for the rule suggested by appellant and the particular form such a rule should take are appropriate matters for consideration by Congress, not for a court exercising an appellate function"); People v. Fike, 577 N.W.2d 903, 906 (Mich. Ct. App. 1998) (declining "to 'fiat' our views of police practice into a constitutional mandate when the Michigan Legislature has not yet spoken on the subject"); State v. Spurgeon, 820 P.2d 960, 963 (Wash. Ct. App. 1991) (reasoning that "such a sweeping change in long standing police practice" should come only "in the form . . . of a rule of evidence or a statute").

[135] See, for illustration, recent opinions rejecting the contention that federal law prohibits prosecutors from bargaining for accomplice testimony: for example, United States v. Hunte, 193 F.3d 173 (3d Cir. 1999); United States v. Condon, 170 F.3d 687 (7th Cir. 1999); United States v. Singleton, 165 F.3d 1297 (10th Cir. 1999) (en banc),

dant claims a confession should be inadmissible because it was not tape-recorded, he or she seems to be asking courts to force the government to *do* something—to take on an obligation with "financial implications."[136] Courts appear to believe that this feature of the claim takes it out of their traditional bailiwick, and that therefore its rejection merits little explanation.

In this they are mistaken, for reasons that I have tried to make clear. The structure of the claim advanced in these cases is quasi-affirmative: The defendants assert that the government should be *barred* from doing something—introducing their confessions against them—unless it first does something else—tape recording the interrogations. Far from being unorthodox, this is the paradigmatic structure of rights in constitutional criminal procedure. The fact that a rule mandating tape recording of interrogations would share this structure is thus a very poor argument not to recognize it.

This is not necessarily to say that courts should require tape recording of all or even some stationhouse interrogations. There may be good reasons not to impose such a requirement, although they do not appear in the cases. That is precisely the point: not that courts should require tape recording (although I think that they probably should), but that the decision whether to impose such a requirement should be made on the merits rather than on the basis of a mistaken sense that the requirement departs in fundamental ways from the general nature of constitutional criminal procedure.

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rev'g 144 F.3d 1343 (10th Cir. 1998). For a helpful discussion of these cases, see, Julie R. O'Sullivan, Federal White Collar Crime 986–93 (2001). For further illustrations of the claim made in text, see, for example, Atwater v. City of Lago Vista, 532 U.S. 318 (2001) (rejecting claim that the Fourth Amendment prohibits warrantless arrests for minor offenses); Hudson v. United States, 522 U.S. 93 (1997) (rejecting double-jeopardy protection arising from prior imposition of civil fines). But cf. Whren v. United States, 517 U.S. 806 (1996) (rejecting, with relatively little discussion and with no dissent, a Fourth Amendment challenge to pretextual traffic stops). On the special circumstances that may help to explain the cursory nature of the analysis in *Whren*, see David A. Sklansky, Traffic Stops, Minority Motorists, and the Future of the Fourth Amendment, 1997 Sup. Ct. Rev. 271.

[136] *Spurgeon*, 820 P.2d at 963; see also *Everette*, 543 N.E.2d at 1047 (suggesting that judicial imposition of a requirement to tape-record interrogations is especially inappropriate "in view of the ramifications of the rule urged by defendant").

C. Police Rulemaking and the Sound of One Hand Clapping

A quarter-century ago Professor Anthony Amsterdam made a now famous suggestion that, given the realities of modern policing, the Fourth Amendment should be understood to require "all police search and seizure activity to be regulated by legal directives that confine police discretion within reasonable bounds."[137] His argument was simple: "Arbitrary searches and seizure are 'unreasonable' searches and seizures; ruleless searches and seizures practiced at the varying and unguided discretion of thousands of individual peace officers are arbitrary searches and seizures; therefore, ruleless searches and seizures are 'unreasonable' searches and seizures."[138] As Professor Amsterdam explained:

> A paramount purpose of the fourth amendment is to prohibit arbitrary searches and seizures as well as unjustified searches and seizures. The warrant requirement was the framers' chosen instrument to achieve both purposes, and it should continue to be applied to those ends, as the Supreme Court's present fourth amendment doctrines apply it, so far as it can practicably go. However, the warrant requirement obviously fails to assure against arbitrariness in kinds of searches and seizures that are permitted without warrants, or where police discretion controls the decision to apply for a warrant. The emergence of modern professional police forces and our knowledge of the vast discretion that they exercise demonstrate both the need and the capability to provide an effective safeguard against arbitrariness in these kinds of searches and seizures; and the manifestly serviceable instrument to do it is what Kenneth Culp Davis calls "one of the greatest inventions of modern government," unavailable to the framers but perfectly commonplace today: administrative rulemaking.[139]

Professor Amsterdam pointed out that police rulemaking offered a broad range of benefits: enhancing the quality of police decisions,

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[137] Amsterdam, supra note 36, at 416.

[138] Id. at 417

[139] Id. (quoting Kenneth Culp Davis, Discretionary Justice 65 (1969)). Professor Amsterdam had earlier suggested, more provisionally, that due process of law might require the police to "act according to uniform, visible and regular rules of law"—not just when conducting searches and seizures, but also, for example, when interrogating suspects. Amsterdam, supra note 91, at 814.

ensuring fair and equal treatment of citizens, raising the visibility of police policymaking, and maximizing the likelihood of police compliance with constitutional norms.[140] This was not just Professor Amsterdam's view. By the mid-1970s, when he wrote this article, a broad consensus had developed that police departments should guide and constrain the discretion of their officers through the promulgation of formal policies.[141] Some pioneering departments were experimenting with just such an approach.[142] Professor Amsterdam thought, though, that "police rulemaking is unlikely to proceed very far without considerable nudging from the courts."[143] As Professor Amsterdam noted, his pessimism in this regard was shared at the time by Professor Davis.[144]

The ensuing years have proven them correct. There is more police rulemaking today than there was in 1974,[145] and scholarly support

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[140] See Amsterdam, supra note 36, at 423–28.

[141] See id. at 423 & 473 n.568 (citing studies by advisory commissions, professional organizations, and scholars); see also Kenneth Culp Davis, Police Discretion 98–120 (1975) (discussing the need for rules to govern police conduct); Wayne R. LaFave, Arrest 513 (1965) (concluding that "police ought to acknowledge their exercise of discretion and reduce their enforcement policies to writing and subject them to a continuing process of critical re-evaluation"); Debra Livingston, Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing, 97 Colum. L. Rev. 551, 659 (1997) (noting that, "[b]y the 1970s, there was substantial consensus among legal scholars and law reformers that guidelines of one sort or another should be developed to structure discretionary decisionmaking on the street"); Samuel Walker, Controlling the Cops: A Legislative Approach to Police Rulemaking, 63 U. Det. L. Rev. 361, 362 (1986) (noting that "[b]y the mid-1970s police experts reached a consensus that administrative rulemaking was the best hope for police accountability").

[142] See Amsterdam, supra note 36, at 473 n.568; Gerald M. Caplan, The Case for Rulemaking by Law Enforcement Agencies, 36 Law & Contemp. Probs. 500, 502 (1971).

[143] Amsterdam, supra note 36, at 379.

[144] See Kenneth Culp Davis, Discretionary Justice 95 (1969) (concluding that police departments might voluntarily engage in rulemaking "in some instances," but that they were "more likely to resist than to initiate or to support such action in many other instances," and that legislative action to force police rulemaking was unlikely for political reasons, at least in the short term); see also Davis, supra note 141, at 121–38 (noting that legislatures are unwilling to adopt standards for police and advocating a continued judicial role).

[145] See Wayne R. LaFave, Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication, 89 Mich. L. Rev. 442, 446 (1990); Livingston, supra note 141, at 661; Walker, supra note 141, at 368.

for the practice remains high.[146] Unfortunately, most police manuals still "overemphasize trivial matters of internal discipline (such as requiring officers to wear their hats at all times), and ignore most of the critical issues related to the exercise of police authority."[147] Progress toward guidelines for the exercise of police discretion has been sporadic, crisis-driven, and limited: "[M]ost agencies leave most activities ungoverned by rules."[148] Legislatures, "afraid of being viewed as 'anti-police,'" have done little to prod more meaningful rulemaking by the police.[149] As a result, whether a police officer will stop someone for questioning, whether an officer will ticket a motorist or issue a warning, whether an officer will search a car, whether an officer will use probable cause to arrest or will look the other way—all the "'low visibility decisions' that have great effects on the lives and liberties of individual members of the public"[150]—all still generally depend on the officer's "mood and inclinations."[151]

Meanwhile, something remarkable has happened to Professor Amsterdam's notion that the Fourth Amendment should be construed to require police rulemaking. The idea has been killed with kindness. No less an authority than the Supreme Court of the United States has cited Professor Amsterdam's 1974 article with approval, agreeing that "[r]egulations governing the conduct of criminal investigations are generally considered desirable, and may well provide more valuable protection to the public at large than the deterrence flowing from the occasional exclusion of items of

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[146] See, e.g., Luna, supra note 106, at 1142–43 & nn.124–125 (citing sources). Indeed, Professor Luna suggests, "[t]he last few years have seen a revived academic interest in controlling discretion within the criminal justice system," particularly the discretion of police and prosecutors. Id. at 1142–43.

[147] Walker, supra note 141, at 368.

[148] Id.; see also Livingston, supra note 141, at 661–62 (noting that efforts to create guidelines for police have "not been uniform" and tend to be "in response to some crisis").

[149] Livingston, supra note 141, at 662.

[150] Jerome H. Skolnick & James J. Fyfe, Above the Law: Police & The Excessive Use of Force 119 (1993) (quoting Joseph Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice*, 69 Yale L.J. 543 (1960)).

[151] Amsterdam, supra note 36, at 415.

evidence in criminal trials."[152] Some other judges have also found Professor Amsterdam's argument appealing,[153] as have a wide range of scholars.[154] Almost no one has a bad word to say about the proposal,[155] and the article itself has become the subject of nearly universal "adulation."[156]

Nonetheless, the specifics of Professor Amsterdam's proposal have received a cold shoulder. Lower courts, when they have addressed the argument, generally have thought it a matter for the Supreme Court, and the Supreme Court, while professing to share Professor Amsterdam's enthusiasm for police rulemaking, has

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[152] United States v. Caceres, 440 U.S. 741, 755 (1979); see also Illinois v. Gates, 462 U.S. 213, 261 n.15 (1983) (White, J., concurring) (citing Professor Amsterdam's article).

[153] See, e.g., United States v. Martino, 664 F.2d 860, 879 (2d Cir. 1981) (Oakes, J., concurring); United States v. Barbera, 514 F.2d 294, 303 (2d Cir. 1975); State v. Greene, 591 P.2d 1362, 1371 n.13 (Or. 1979) (Linde, J., concurring); State v. Callaway, 317 N.W.2d 428, 442–43 (Wis. 1982) (Abrahamson, J., dissenting).

[154] E.g., Amar, supra note 32, at 43–44; Morgan Cloud, Pragmatism, Positivism, and Principles in Fourth Amendment Theory, 41 UCLA L. Rev. 199, 276 n.338 (1993); Livingston, supra note 141, at 658–63; see also Erik Luna, Principled Enforcement of Penal Codes, 4 Buff. Crim. L. Rev. 515, 590–608 (2000) (arguing for rulemaking by police and prosecutors).

[155] Two exceptions are Albert W. Alschuler, Bright Line Fever and the Fourth Amendment, 45 U. Pitt. L. Rev. 227 (1984), and Ronald J. Allen & Ross M. Rosenberg, The Fourth Amendment and the Limits of Theory: Local Versus General Theoretical Knowledge, 72 St. John's L. Rev. 1149 (1998). Professor Alschuler expressed skepticism regarding whether "closer control of police discretion through rulemaking is feasible." Alschuler, supra, at 229. His principal subject, though, was bright-line rules promulgated by the Supreme Court, and his criticism of those rules was entirely consistent with Professor Amsterdam's argument that local police departments are better placed than the Court to develop workable rules of search and seizure. See Amsterdam, supra note 36, at 418–19. Professor Allen and Rosenberg, on the other hand, address Professor Amsterdam's argument head on and find it a failure: "What would give anyone any reason to think that the Court would do better in the guise of a federal agency charged to law enforce in the public interest than it does in its traditional capacity is left to the imagination." Allen & Rosenberg, supra, at 1166–67. This criticism seems to me both to mistake Professor Amsterdam's suggestion and to ignore more than twenty pages of his article. See Amsterdam, supra note 36, at 416-39.

[156] Allen & Rosenberg, supra note 155, at 1165. But cf. Carol S. Steiker, Of Cities, Rainforests, and Frogs: A Response to Allen and Rosenberg, 72 St. John's L. Rev. 1203, 1204 (1998) (judging Professor Amsterdam's article "incredibly eloquent and justly famous," but agreeing with Allen and Rosenberg that the article "is flawed by [Professor Amsterdam's] single-minded focus on the problem of police discretion to the virtual dismissal of the role of text and history in constitutional interpretation").

shown no interest in requiring it.[157] The Court took note of the desirability of police rulemaking to explain its reluctance to extend the exclusionary rule to violations of internal regulations promulgated by law enforcement agencies: "[W]e cannot ignore the possibility that a rigid application of an exclusionary rule to every regulatory violation could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures."[158] What the Court did feel comfortable ignoring—despite citing Professor Amsterdam's article favorably—was the possibility that the formulation of additional standards should not be optional.[159] This sums up the response by the Supreme Court, and indeed by the judiciary generally, to Professor Amsterdam's argument for constitutionally mandatory rulemaking: They have nothing to say about it that is not nice, so they typically say nothing about it at all.

This is not to say that the Supreme Court has done nothing to encourage police rulemaking. In a few limited areas, the Court has indicated that searches and seizures may satisfy the Fourth Amendment in part because they are carried out pursuant to formal regulations.[160] Thus, inventory searches of arrested suspects and impounded vehicles are constitutional if they constitute good

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[157] Outside the area of the Fourth Amendment, the D.C. Circuit did announce in 1971 that henceforth it would impose sanctions on the prosecution for failing to preserve important evidence, "unless the Government can show that it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to preserve *all* discoverable evidence gathered in the course of a criminal investigation." United States v. Bryant, 439 F.2d 642, 652 (D.C. Cir. 1971) (footnote omitted). Citing the work of Professor Davis and an early article by Professor Amsterdam, Judge Wright's opinion for the court explicitly aimed to ensure that "the discretionary authority of investigative agents" was "controlled by regular procedures." Id. The *Bryant* rule, though, was effectively overruled by the Supreme Court's decisions in *Trombetta* and *Youngblood*, and has since been repudiated by the D.C. Circuit. See In re Sealed Case, 99 F.3d 1175, 1178 (D.C. Cir. 1997). *Trombetta* and *Youngblood* are discussed supra in the text accompanying notes 126–134.

[158] United States v. Caceres, 440 U.S. 741, 755–56 (1979).

[159] Professor Amsterdam himself had been "incline[d] to agree" that "if police rulemaking is not compelled by the Constitution or otherwise legally required, courts should be hesitant to apply the exclusionary sanction to violations of police-made regulations," because "[s]uch use of the sanction simply discourages the making of regulations, or of clear regulations." Amsterdam, supra note 36, at 474 n.580. But he noted that "the objection fails if the Constitution does compel rulemaking and if the unclarity of regulations is constitutionally assailable." Id.

[160] See LaFave, supra note 145, at 451–83.

faith applications of "reasonable police regulations."[161] Warrants for administrative inspections may issue upon a showing that "reasonable legislative or administrative standards" call for the inspections.[162] Vehicles may be stopped without individualized suspicion at checkpoints serving "special needs"—for example, detecting drunk drivers, checking for license and registration, or enforcing immigration laws near the border—but not if officers exercise "standardless and unconstrained discretion."[163]

But this is as far as it goes. Outside these narrow doctrinal categories, the Supreme Court has made clear that "reasonableness" under the Fourth Amendment does not depend on either the promulgation or the observance of internal regulations by the police. The message has been delivered most bluntly, perhaps, in cases involving vehicle code violations. Because these codes are so extensive, and many of their terms so widely violated, they allow minimally patient officers to pull over almost anyone they choose. In the wide discretion they grant to the police, traffic laws thus bear a discomforting resemblance to general warrants and writs of assistance, the eighteenth-century instruments generally understood to be the paradigmatic evils against which the Fourth Amendment took aim.[164] If standardized procedures are ever

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[161] Colorado v. Bertine, 479 U.S. 367, 374 (1987); see also Illinois v. Lafayette, 462 U.S. 640, 648 (1983) (holding that "it is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures"); South Dakota v. Opperman, 428 U.S. 364 (1976) (holding that an inventory search conducted after impoundment of the defendant's vehicle did not violate the Fourth Amendment).

[162] Camara v. Municipal Court, 387 U.S. 523, 538 (1967); see also Marshall v. Barlow's, Inc., 436 U.S. 307, 320 (1978) (reiterating that administrative warrants do not require "[p]robable cause in the criminal seuse"). Administrative inspections of "closely regulated" industries may be carried out without a warrant, but only if, among other things, "the regulatory statute . . . limit[s] the discretion of the inspecting officers." New York v. Burger, 482 U.S. 691, 702–03 (1987).

[163] City of Indianapolis v. Edmond, 531 U.S. 32, 39 (2000) (quoting *Delaware v. Prouse*, 440 U.S. 648, 661 (1979)); see also Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (upholding sobriety checkpoints pursuant to fixed guidelines); Brown v. Texas, 443 U.S. 47, 51 (1979) (approving, in dicta, suspicionless seizures "carried out pursuant to a plan embodying explicit, neutral limitations"); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (upholding immigration checkpoint operated pursuant to reasonable, fixed procedures).

[164] See, e.g., Wayne R. LaFave, "Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 Sup. Ct. Rev. 127, 152–53; Barbara C.

needed to make searches and seizures reasonable, perhaps they are needed for traffic enforcement.[165] But the Court has made utterly plain that the police are under no constitutional obligation to develop internal regulations for enforcing vehicle codes, nor to obey any regulations that they do develop. Six years ago, in *Whren v. United States*,[166] the justices took note of the contention that "the use of automobiles is so heavily and minutely regulated that total compliance with traffic and safety rules is nearly impossible," and that therefore "a police officer will almost invariably be able to catch any given motorist in a technical violation."[167] But the Court nonetheless concluded unanimously that a traffic stop is lawful whenever the police have probable cause to believe the law is being broken—even when, as in *Whren*, the stop violates departmental regulations.[168] Subsequently, in *Atwater v. City of Lago Vista*,[169] the Court made clear that the same rule applies to arrests: "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."[170]

Even in the narrow contexts in which the Court *has* encouraged police rulemaking to reasonably constrain officer discretion, the encouragement has been weak. As Professor Wayne LaFave observed more than a decade ago, "[t]he inventory cases . . . are sufficiently imprecise to lend themselves to the interpretation that departmental rules on impoundment and inventory are not really necessary," and that some kind of general practice, however informal, will do just as well.[171] "As for the inspection cases, the sad fact is that the Court has created a hypertrophic exception to the warrant requirement and then made the worst of a bad situation by

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Salken, The General Warrant of the Twentieth Century? A Fourth Amendment Solution to Unchecked Discretion to Arrest for Traffic Offenses, 62 Temp. L. Rev. 221, 254–58 (1989); Sklansky, supra note 135, at 273, 286.

[165] See, e.g., LaFave, supra note 164, at 162 (noting that traffic stops are an "area with a high potential for undetectable abuse"); Salken, supra note 164, at 273–75.

[166] 517 U.S. 806 (1996).

[167] Id. at 810.

[168] Id. at 816–18.

[169] 532 U.S. 318 (2001).

[170] Id. at 354.

[171] LaFave, supra note 145, at 503; see also id. at 513–14 (stating that the Supreme Court has been willing to "accept a vague and undocumented representation of the established practices of a particular police agency").

assuming that when no warrant is needed administrative regulations are likewise unnecessary."[172] Checkpoint rules have also been blessed without "any meaningful review" of their reasonableness.[173] Still, Professor LaFave found at least equally troubling "the Court's improvident failure on other occasions to make police rulemaking the focal point of a decision"[174]—and that was before *Whren* and *Atwater*.

None of this is to suggest that Professor Amsterdam's proposal is a panacea, or even that in the final analysis it should be adopted. Perhaps police rulemaking is not such a great thing after all; perhaps any rules specific enough to accomplish anything would be too inflexible to be practical.[175] If the choice is between "pabulum-like generalities which fail to offer real guidance"[176] and "rigid rules" that "tend to ossify individual responsibility"[177] and are incompatible with "the fluid discretionary situations that are the core of police work,"[178] the exercise hardly seems worthwhile. The success over the past two decades of police rulemaking in certain places and for certain problems—notably the use of deadly force—suggests there is indeed a workable middle ground between these two extremes,[179] but perhaps that success may prove difficult to generalize,[180] particularly if the impetus comes not from within police departments but from the courts.

The point, though, is that courts have not even begun to think about these questions. Part of this may be the fault of litigants for not pressing the argument,[181] but litigants, after all, take their sig-

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[172] Id. at 503.

[173] Id. at 504.

[174] Id. at 503.

[175] See Skolnick & Fyfe, supra note 150, at 120–21; Alschuler, supra note 155, at 228; H. Richard Uviller, The Unworthy Victim: Police Discretion in the Credibility Call, 47 Law & Contemp. Probs. 15, 32 (1984).

[176] Alschuler, supra note 155, at 228.

[177] Uviller, supra note 175, at 32.

[178] Skolnick & Fyfe, supra note 150, at 120.

[179] See Walker, supra note 141, at 370–74; see also Livingston, supra note 141, at 661–63 (noting "tentative moves within police departments in the direction of guiding police discretion in quality-of-life tasks"); Luna, supra note 154, at 606–07 (describing police rulemaking regarding uses of force, high-speed pursuits, and eyewitness identifications).

[180] See Walker, supra note 141, at 375–82.

[181] See LaFave, supra note 145, at 506–09.

nals from judges. And the judiciary's lack of enthusiasm for requiring police rulemaking has been hard to miss. Because that lack of enthusiasm has been expressed largely through silence, it is difficult to know what motivates it. Part of it may simply be inertia, or fear of the unknown. But as Professors Amsterdam and Davis pointed out at length, mandatory, court-enforced rulemaking is hardly a novel idea, at least for agencies other than the police, and Professor Amsterdam plausibly hoped that some judges "who would refuse to 'handcuff the police' by substantive rules of their own making" might nonetheless be willing to require the police to set their own rules.[182]

Some of the story here may well be the widespread aversion to anything that tastes of "judicial activism."[183] But, if so, the interesting question is what gives this flavor so strongly to court-mandated rulemaking by the police. I suspect, although I cannot prove, that courts have thought Professor Amsterdam's proposal *outré* partly because it means judges would be requiring the police to *do* something—and something rather time-consuming, at that. It seems, that is to say, like an affirmative right. But it is not. A right to be free from searches or seizures not conducted pursuant to standardized procedures would be a quasi-affirmative right—like the right to a warrant requirement with teeth, like the right to tape recording of interrogations, and like most of constitutional criminal procedure. This hardly means it should be adopted. But it means that it should be rejected, if at all, on the merits—not based on unarticulated and mistaken objections to its underlying structure.

D. Appointed Counsel and the Right to Sleep Under Bridges

No criminal procedure right, perhaps, is more fundamental than the Sixth Amendment right to counsel—supplied, if necessary, at public expense.[184] A criminal defendant needs a lawyer not just to scrutinize the government's case and to present the defendant's side of the story, but also to ensure that all of the defendant's other

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[182] Amsterdam, supra note 91, at 814.

[183] See, e.g., David A. Sklansky, Proposition 187 and the Ghost of James Bradley Thayer, 17 Chicano-Latino L. Rev. 24, 28–29 (1995).

[184] See Gideon v. Wainright, 372 U.S. 335 (1963); Johnson v. Zerbst, 304 U.S. 458 (1938).

rights are honored—including those rights, such as the Fourth Amendment protection against unreasonable search and seizure, that apply before a criminal defendant even *becomes* a defendant.[185] Moreover, because suppression motions brought by criminal defendants are the principal enforcement mechanisms for all criminal procedure rights, even people who are never charged with crimes depend, albeit indirectly, on criminal defense attorneys to keep the police in line. The less criminal defense we have, the less enforcement we have of constitutional criminal procedure.[186]

Not only is the right to counsel fundamental, it is also paradigmatically quasi-affirmative: It requires the government to do something affirmative, but only for people it chooses to charge with crimes. The right to counsel thus helps to demonstrate the centrality of quasi-affirmative rights to constitutional criminal procedure—a point I made earlier in this article.[187] But the contours of the right to counsel also illustrate courts' discomfort with quasi-affirmative rights, even rights widely acknowledged as critical to the fairness and credibility of our system of criminal justice. For although since *Gideon v. Wainwright*[188] the Supreme Court has required the government to hire a lawyer for every felony defendant who cannot afford one, the Court has never said how much the government must pay, and it has imposed only the weakest of demands on the kind of the representation the government purchases. As a result, few people familiar with criminal litigation in the United States—attorneys, judges, or scholars—believe that poor defendants routinely receive adequate legal assistance. And *most* defendants are poor, or poor enough to need appointed counsel.[189]

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[185] The Supreme Court long ago recognized that a defendant "[l]eft without the aid of counsel . . . may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. . . . He requires the guiding hand of counsel at every step in the proceedings against him." Powell v. Alabama, 287 U.S. 45, 69 (1932), quoted with approval in *Gideon*, 372 U.S. at 345.

[186] See William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 12 (1997).

[187] See supra notes 25–35 and accompanying text.

[188] 372 U.S. 335 (1963).

[189] See Stuntz, supra note 186, at 7–8 & n.7; Note, *Gideon's* Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense, 113 Harv. L. Rev. 2062, 2065 (2000).

The drastic underfunding of indigent defense systems, and the toll it takes on the quality of representation provided to many defendants, have long been among the criminal justice system's worst-kept secrets. In the nearly four decades since *Gideon*, many researchers have examined indigent defense systems in the United States. With rare exceptions, the findings have been drearily repetitive. Public defender offices are chronically understaffed and cannot pay enough to retain experienced attorneys. Lawyers appointed from private practice are paid far below market rates and often face unrealistically low fee caps. Consequently, poor defendants represented under either system often receive substandard representation: Attorneys lack the time and resources to mount the kind of defense any informed, paying client would expect.[190] The situation is worst for poor defendants with the most at stake, those charged with capital murder,[191] and it has been getting progressively worse for all poor defendants.[192]

All of this is widely known, both by judges and by lawyers,[193] but the courts have had remarkably little to say about it. The Supreme Court has assessed the constitutional adequacy of appointed counsel solely under the two-part test of *Strickland v. Washington*,[194] which governs post-conviction challenges to adequacy of any criminal counsel, whether appointed or privately retained. Under

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[190] For summaries, see Donald A. Dripps, Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard, 88 J. Crim. L. & Criminology 242, 245–51 (1997), and Richard Klein, The Constitutionalization of *Ine*ffective Assistance of Counsel, 58 Md. L. Rev. 1433, 1435–45 (1999).

[191] See Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835 (1994).

[192] See Stuntz, supra note 186, at 9–10 (noting that "spending on indigent defendants in constant dollars per case appears to have declined significantly between the late 1970s and the early 1990s"); Margaret H. Lemos, Note, Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense, 75 N.Y.U. L. Rev. 1808, 1810–11 (2000) (noting that "as state and local governments seek to limit the cost of defending the indigent accused," an increasing number of jurisdictions contract out indigent defense to the lowest bidding member of the local bar).

[193] See, e.g., Peter W. Tague, Ensuring Able Representation for Publicly-Funded Criminal Defendants: Lessons from England, 69 U. Cin. L. Rev. 273, 273 (2000) (describing the problem of "deplorable" representation provided to indigent defendants as "well known and pervasive," and noting that "defenders' efforts have been savaged by judges and by fellow lawyers"); Note, supra note 189, at 2064 (observing that "it has become trite to lament the sometimes shockingly incompetent quality of indigent defense counsel in America today").

[194] 466 U.S. 668 (1984).

Strickland, a conviction will be set aside on grounds of ineffective assistance of counsel only if the lawyer's performance fell below "prevailing professional norms" and the defendant establishes "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[195] These requirements have proven almost impossible to meet. All kinds of mistakes and omissions by defense counsel are excused as "strategic decisions" or "isolated" errors—or not even addressed, because the reviewing court finds the evidence of guilt so strong that there is no "reasonable probability" that any deficiencies in the defendant's representation affected the verdict.[196] The hazards are obvious in reaching this latter finding based on the record made by the very lawyer whose competence is under attack: As Justice Marshall noted in dissent from the ruling in *Strickland*, "evidence of injury to the defendant may be missing from the record precisely because of the incompetence of defense counsel."[197] The practical result, as Professor Marc Miller has put it, is that under *Strickland* "a lawyer with a pulse will be deemed effective"; the lawyer "need not be awake, sober, prepared, knowledgeable, or sensible, at least in the large number of cases where courts find no prejudice."[198]

Nothing has stopped lower courts from supplementing the *Strickland* test with some sort of requirement for minimum funding of appointed counsel. Many observers have long found the rationale for such a requirement "obvious" and "natural": Since lawyers cannot do their jobs without some basic level of financial support, "*Gideon* requires some budgetary floors if it is to fulfill its promise."[199] And, at least in principle, the promise extended by *Gideon*—the promise that every defendant charged with a serious offense will receive the benefits of legal representation—appears

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[195] Id. at 688, 694.

[196] See, e.g., Klein, supra note 190, at 1459–68.

[197] *Strickland*, 466 U.S. at 710 (Marshall, J., dissenting). For elaboration of this point, see, for example, Klein, supra note 190, at 1467 and Lemos, supra note 192, at 1820–21.

[198] Marc L. Miller, Wise Masters, 51 Stan. L. Rev. 1751, 1786–87 (1999) (reviewing Malcom M. Feeley & Edward L. Rubin, Judicial Policy Making and the Modern State: How the Courts Reformed America's Prisons (1998)).

[199] Stuntz, supra note 186, at 70, 72; see also, e.g., Miller, supra note 198, at 1786 (contending that *Gideon* created a standard for quality of representation and level of support).

to enjoy broad, deep-seated approval among both the bar and the judiciary.[200]

So it is unsurprising that some local funding schemes for appointed counsel have been found constitutionally inadequate. What is noteworthy is how rarely this has happened, how long it took to happen even rarely, and how limited the decisions have been. For two decades after *Gideon*, American courts took virtually no steps to address the problem, already notorious, of grossly deficient funding of indigent defense. Things have changed since then, but only barely. In 1984, the Arizona Supreme Court concluded that payments to appointed counsel in Mohave County were so low, and so inflexible, that "there will be an inference that the adequacy of representation is adversely affected by the system."[201] The Louisiana Supreme Court followed suit in 1993, concluding that one sector of the state's indigent defense system was "so lacking" that "a rebuttable presumption arises that indigents . . . are receiving assistance of counsel not sufficiently effective to meet constitutionally required standards."[202] These decisions have been faulted for their caution: Professor Donald Dripps, for example, argues that a rebuttal presumption serves only as a "tie-breaker," of little help to defendants whose convictions appear inevitable in retrospect—even if competent counsel might well have created a reasonable doubt as to their guilt.[203] But they appear to have spurred genuine if limited reform of indigent defense financing in both Arizona and Louisiana.[204] What they have not done is create any kind of trend. Despite how "ripe for judicial reform" indigent defense systems seem across the country,[205] the Arizona and Louisiana decisions have not been emulated in other

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[200] See, e.g., Miller, supra note 198, at 1788.

[201] State v. Smith, 681 P.2d 1374, 1381 (Ariz. 1984).

[202] State v. Peart, 621 So. 2d 780, 791 (La. 1993).

[203] Dripps, supra note 190, at 263.

[204] See Lee Hargrave, Ruminations: Mandates in the Louisiana Constitution of 1974; How did They Fare?, 58 La. L. Rev. 389, 398 n.45 (1998); Miller, supra note 198, at 1795; John A. Stookey & Larry A. Hammond, Rethinking Arizona's System of Indigent Representation, Ariz. Att'y, Oct. 1996, at 29.

[205] Miller, supra note 198, at 1789.

states. For the most part they have simply been ignored;[206] when not ignored, their reasoning has been rejected.[207]

Some courts have questioned the link between adequate funding and effective assistance of counsel,[208] but the larger problem seems to be "judicial reluctance to compel appropriations."[209] In the words of one court, financing of indigent defense is "a legislative matter rather than a judicial matter."[210] The general aversion courts feel toward affirmative rights may be especially pronounced in this context because courts would not just be ordering states to do things that cost money, but would be directly compelling expenditures.[211] Financing of indigent defense does not *require* spending money, it *is* spending money. And "[t]he only way to set funding floors is to set them—to say, states must spend this much on criminal defense, but need not spend more. There is no analytic structure that allows one to specify the right dollar amount."[212] The right to minimum funding for indigent defense thus is not simply a quasi-affirmative right. It a quasi-affirmative right that makes explicit the typically implicit difficulties associated with all quasi-affirmative rights.

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[206] See id. at 1801.

[207] See Boyd v. State, 746 So. 2d 364, 403 (Ala. Crim. App. 1999); Platt v. State, 664 N.E.2d 357, 363 (Ind. Ct. App. 1996); Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996); Wilson v. State, 574 So. 2d 1338 (Miss. 1990). But cf. Jane Fritsch, Pataki Rethinks His Promise of a Raise for Lawyers to the Indigent, N.Y. Times, Dec. 24, 2001, at F1 (reporting U. S. District Judge Jack Weinstein's recent ruling, stayed pending appeal, finding fees for court-appointed lawyers in New York City Family Court unconstitutionally low, and ordering the city to pay the lawyers $90 an hour). A few state courts have struck down unreasonably low fees paid for appointed counsel on the ground that they violate the rights of *attorneys*—either the right to just compensation for property taken by the state or state statutory rights to adequate compensation. See, e.g., Recorder's Court Bar Assoc. v. Wayne Circuit Court, 503 N.W.2d 885 (Mich. 1993); State v. Lynch, 796 P.2d 1150 (Okla. 1990). Typically, these courts provide no relief to defendants represented by the attorneys whose rights have been violated.

[208] See, e.g., *Kennedy*, 544 N.W.2d at 8.

[209] Dripps, supra note 190, at 262; see also Miller, supra note 198, at 1779–1803 (suggesting that courts have hesitated to engage in "policy making" in this area).

[210] *Wilson*, 574 So. 2d at 1339–40.

[211] See Dripps, supra note 190, at 262.

[212] Stuntz, supra note 186, at 73. There is, though, an obvious benchmark: parity with compensation for local prosecutors. See Dripps, supra note 190, at 291–99; Stuntz, supra note 186, at 70 n.245.

E. Quasi-Affirmative Rights, Systemic Reform, and What Makes Criminal Procedure Special

We cannot know for certain why the judiciary has overlooked the widespread failure to make full use of telephonic warrants, has continued to tolerate unrecorded interrogations, has done so little to require police rulemaking, and has refused to insist on adequate funding of indigent defense. The courts have not *said* that they find these doctrinal paths unattractive for placing affirmative obligations on the government. And, taken in isolation, each of these choices by the judiciary can be explained in other ways. The utility of warrants is widely questioned. There may be too much confidence in *Miranda.* Formal rulemaking has its critics. And *Strickland* may have obscured the need for other guarantees of effective representation.

Taken together, though, the four judicial failures I have described seem to follow a pattern. In each case, the courts have shied away from a relatively straightforward doctrinal path that appears to have much to recommend it. In each case, the path seems to involve a quasi-affirmative right.[213] In each case, the courts have said remarkably little about their reasons. And in each case, the little that the courts *have* said suggests that the proposed rule seems unattractive to them because it requires the government to do something affirmative. In particular, one hears again and again that these are matters for legislatures, not for courts.

These suggestions that the judiciary is the wrong branch are consistent with two alternative explanations worth considering. The first is that all I have described are instances of courts seeking to avoid "judicial activism," and understanding that vice to inhere in the recognition of new rights *of any kind.* There certainly is much said, both on and off the bench, about the virtue of "judicial restraint,"[214] and the creation of new rights—any new rights—does seem close to the core of what many people think judges should be

[213] In the case of electronic warrants, however, it is not clear that the path would involve the creation of a *new* quasi-affirmative right, as opposed to simply honoring the old right to have the government, whenever possible, seek a warrant before conducting a search or seizure. So it is difficult to understand the behavior of the courts in this instance as simply manifesting a reluctance to give criminal defendants new rights.

[214] See, e.g., Sklansky, supra note 183, at 28–29.

restraining themselves from. Moreover, judges may be particularly reluctant to craft new protections for criminal defendants—never the most popular of litigants. But the doctrinal failures on which I have focused cannot be fully explained either by a broad aversion to judicial activism, nor by a somewhat more specific aversion to judicial activism on behalf of criminal defendants. For on those relatively uncommon occasions when criminal defendants assert purely negative rights, the courts seem at least somewhat more receptive. Defendants in these cases do not always win (although even that happens surprisingly often[215]), but their claims at least tend to get serious attention.[216] In contrast, criminal procedure rights that seem to require something affirmative of the government do not just tend to be rejected; they tend to be rejected out of hand.

Perhaps, though, the courts are shying away not from quasi-affirmative rights as such, but rather from *systemic* rights—rights, that is, to systemic reform. It is not that judges refuse to impose affirmative obligations on the government, but rather that they decline to meddle in the overall operation of the criminal justice system. *That* is for legislatures.

There is a something to be said for this last explanation. Much of what I have faulted the courts for not demanding is indeed systemic reform: better systems for issuing warrants, meaningful rulemaking by the police, more funding for indigent defense. And courts sometimes seem reluctant to require systemic reform even when the rights in question appear purely negative. To take a particularly notorious example: In *McCleskey v. Kemp*[217] the right asserted was the right of a criminal defendant not to be sentenced to death by a system showing a pattern of racial bias against defendants like him, but not shown specifically to have exercised that

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[215] See, e.g., Wilson v. Layne, 526 U.S. 603 (1999) (finding that the Fourth Amendment prohibits police officers from inviting reporters to accompany them when executing arrest warrants in private homes); United States v. Bajakajian, 524 U.S. 321 (1998) (striking down forfeiture of smuggled currency as an excessive fine under the Eighth Amendment); cf. Kyllo v. United States, 533 U.S. 27 (2001) (finding thermal imaging of a home to be a "search" within the Fourth Amendment, and therefore unconstitutional without a warrant, but stressing the sanctity of homes, not the importance of warrants).

[216] See supra note 135 and accompanying text.

[217] 481 U.S. 279 (1987).

bias in the defendant's particular case.[218] This does not seem like an affirmative right, or even a quasi-affirmative right. Nonetheless, the Supreme Court refused to recognize it—in large measure, no doubt, because such a right would have necessitated "a wholesale restructuring of the system."[219]

On closer inspection, though, it is less clear that the right asserted in *McCleskey* was purely negative—precisely because of the restructuring it would have required. The Supreme Court appeared to view McCleskey's claim as tantamount to a demand either for sizable restrictions on the discretion exercised by prosecutors and juries in Georgia's criminal justice system, or for procedures that would allow criminal defendants to force jurors and prosecutors to defend their decisions after the fact.[220] As *McCleskey* suggests, it is often difficult to untangle concerns about affirmative rights from concerns about systemic rights. Both kinds of rights typically have budgetary implications, and both therefore give rise to questions regarding the institutional competence of the courts.

Moreover, the two categories of rights tend to merge. Rights to systemic reform are, of course, a form of affirmative right, because requiring the government to engage in systemic reform requires it to do something affirmative. Conversely, honoring affirmative rights—even more than honoring rights against discrimination of the kind at issue in *McCleskey*—often requires some kind of systemic reform. Defendants who argue their unrecorded confessions should be inadmissible are not asking, on the face of it, for systemic reform; they simply claim that *their* interrogations should have been recorded. But it does not escape the courts that upholding such a claim would, effectively, require the government to set up systems for the routine taping of interrogations more broadly. Honoring negative rights may also require systemic reform, as in *McCleskey*. In general, though, *refraining* from doing something

[218] McCleskey was black and his victim was white. He introduced statistical evidence that Georgia's death penalty system was slightly biased against black defendants and overwhelmingly biased against defendants whose victims were white. See id. at 286–90.

[219] Robert A. Burt, Disorder in the Court: The Death Penalty and the Constitution, 85 Mich. L. Rev. 1741, 1797–98 (1987); see also, e.g., Robert D. Goldstein, *Blyew*: Variations on a Jurisprudential Theme, 41 Stan. L. Rev. 469, 555–63 (1989) (disussing *McCleskey*).

[220] See *McCleskey*, 481 U.S. at 296–97.

across the board seems less likely to require significant systemic reform than *doing* something across the board.

To the extent that concerns about rights to systemic reform can be disentangled from concerns about affirmative (or quasi-affirmative) rights, the latter seem more basic than the former to the set of doctrinal failures I have described. Rights to police rulemaking or to better systems for issuing warrants are inherently systemic: There is no way to honor these rights in particular cases without honoring them across the board. But the same cannot be said for a criminal defendant's right to have the government record any custodial interrogation subsequently used against the defendant at trial. At bottom, the violation alleged in the cases that assert this right is individual, not systemic: the failure to tape-record the questioning of a particular defendant. Similarly, the adequacy of funding for indigent defense could be assessed in individual cases; the right asserted is not inherently systemic—although the *implications* of recognizing any of these rights would be systemic as well as individual.

Ultimately, however, it may not matter much whether it is concerns about rights that seem affirmative in nature, or rather concerns about rights raising systemic implications, that have preoccupied the courts in these cases. Not only do the two sets of concerns tend to merge, but neither are as weighty in the context of constitutional criminal procedure as the courts appear to have supposed, because courts tend to overlook several distinctive features of constitutional criminal procedure.

The first of these features is the one I have tried to establish throughout this Article: the ubiquity in constitutional criminal procedure of rights that are not purely affirmative, nor purely negative, but rather quasi-affirmative. The general structure of rights in constitutional criminal procedure is the same as the general structure of the rights defendants have unsuccessfully asserted to reasonably prompt processing of warrant applications, to electronic recording of custodial interrogations, to police rulemaking regarding searches and seizures, and to minimally adequate funding of indigent defense. In each case, an affirmative obligation is imposed on the government, but only when the government chooses to take certain other affirmative steps against individuals: searches and seizures, interrogations, or criminal prosecutions.

As I have already suggested, the structure of these rights is important for two reasons. The first is that, given their ubiquity, it does not make sense to shy away from new quasi-affirmative rights in constitutional criminal procedure on the unarticulated ground that they are not the *kind* of rights established by the Constitution. The second is that quasi-affirmative rights, by their nature, raise only in a qualified manner the concerns that surface when the judiciary contemplates enforcing truly affirmative rights—rights, for example, to food and shelter. Rights of this latter sort have historically made courts and commentators uncomfortable both because they seem in tension with our libertarian tradition, and because they seem to intrude on the budgetary authority that our system of self-government necessarily entrusts to the political branches. Both of these concerns are also raised by the quasi-affirmative rights found throughout constitutional criminal procedure, because although the obligations that these rights impose are conditional, as a realistic matter they often cannot be avoided. But precisely because the obligations are conditional, they raise these concerns to a lesser extent than do truly affirmative rights. The political branches retain an appreciable degree of control regarding the *degree* to which the obligations will be imposed, even if they cannot avoid the obligations entirely. Some suspects need to be searched or interrogated, and some defendants need to be prosecuted, but in many cases, investigation or prosecution can safely be foregone. Similarly, because quasi-affirmative rights are triggered only when the state wishes to intrude on an individual's negative liberty, they are more congenial than purely affirmative rights to libertarian theories of government.

Quasi-affirmative rights, therefore, should be less threatening than affirmative rights wherever they are encountered, in criminal procedure or elsewhere. But criminal procedure has two other distinctive features, beyond the quasi-affirmative nature of most of the rights it bestows, that make a general aversion to new quasi-affirmative rights in this field even less justified. There is, to begin with, the special severity of the burdens and penalties the government imposes through the criminal justice system. If, as I have suggested, quasi-affirmative rights are less objectionable from a libertarian perspective than purely affirmative rights because quasi-affirmative rights are triggered only when the state chooses

to intrude on an individual's negative liberty, the case for recognizing such rights should be strongest, all other things being equal, when the triggering intrusion is greatest. Few government intrusions are as severe as the routine tools of the criminal justice system—searches of homes, arrests, custodial interrogations, and criminal trials—not to mention incarceration and, in some cases, execution.

Not only are the intrusions authorized by criminal procedure especially severe, but, as I have noted earlier, the individuals on whom those intrusions are visited are peculiarly powerless to protect themselves through the normal processes of majoritarian democracy.[221] Part of the problem is that criminal defendants tend to be poor. Part of the problem is that even wealthy criminal defendants tend to be, by virtue of being criminal defendants, highly unpopular. And, part of the problem is that people who become criminal suspects or criminal defendants typically do not worry about the possibility of this happening before it does. For all of these reasons, the political process does a notoriously bad job protecting the rights of criminal defendants. Accordingly, the presumption is weaker here than elsewhere that judges should defer to legislative allocations of public resources.

Criminal procedure is special in one final way, perhaps more important for present purposes than any of those yet mentioned. This has to do with its characteristic remedy: the exclusionary rule.[222] The rights granted by constitutional criminal procedure typically are enforced through suppression motions brought by criminal defendants. The grounds for exclusion differ, depending upon which right is invoked. Where the Fifth Amendment is concerned, the introduction of compelled testimony at trial is understood to *be* the violation;[223] the Fourth Amendment exclusionary rule, by contrast, has been justified primarily as a means of *deterring* violations, or

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[221] See supra notes 81–82 and accompanying text.

[222] For instructive reflections on the general significance of "[c]riminal adjudication's distinctive remedial scheme," see Pamela S. Karlan, Race, Rights, and Remedies in Criminal Adjudication, 96 Mich. L. Rev. 2001, 2029 (1998). For a thoughtful argument that, contrary to the position advanced here, civil litigation offers a more promising vehicle than suppression motions for vindicating systemic rights in criminal procedure, see Lemos, supra note 192.

[223] See, e.g., United States v. Balsys, 524 U.S. 666, 691–93 & nn.12–14 (1998).

avoiding judicial acquiescence in violations;[224] whether the Sixth Amendment is more like the Fourth or the Fifth in this respect remains unclear[225]—as does the status, in this regard, of the *Miranda* doctrine.[226] But while the underlying rationales may differ, the general remedial structure of criminal procedure is uniform and distinctive: Rights are enforced by suppressing evidence offered by the government in criminal prosecutions.

In at least two different ways, this scheme makes judicial enforcement of quasi-affirmative and systemic rights less troubling than it might otherwise be. First, it minimizes concerns about the judiciary intruding itself into questions properly reserved for the political branches. When the government seeks to introduce evidence in a criminal prosecution, the participation of the courts is unavoidable: The very nature of a criminal prosecution requires the active involvement of the judiciary. Many things might plausibly be said to be none of the courts' business—but whether evidence should be admissible in a criminal prosecution is not one of them. Second, the distinctive remedial structure of constitutional criminal procedure eliminates the need for oversight mechanisms that might themselves be thought overly intrusive, predictably ineffective, or both—wholly aside from whether the right being vindicated pertains to matters appropriately addressed by the judiciary. Concerns about the feasibility and political acceptability of enforcement mechanisms are an important part of the general case against affirmative rights.[227] But when the courts announce a criminal procedure right, even one impossible to honor without systemic reform, they do not need to appoint a special master, require ongoing reports, or craft a structural injunction in order to monitor compliance. The government needs to come back to the courts every time it brings a criminal case, and the exclusionary rule means that every criminal case provides occasion for judicial examination of the actions of police and prosecutors. The steady stream of criminal cases and the normal processes of criminal ad-

[224] See, e.g., United States v. Leon, 468 U.S. 897, 906 (1984).

[225] See, e.g., David A. Sklansky, The Private Police, 46 UCLA L. Rev. 1165, 1264 n.553 (1999).

[226] See supra note 34.

[227] See supra notes 3–7 and accompanying text.

judication themselves provide the vehicle for enforcing the rights granted to criminal suspects and criminal defendants.

The exclusionary rule is often blamed for making criminal procedure rights unattractive and under-enforced. "Judges do not like excluding bloody knives," the argument goes, "so they distort doctrine, claiming that the Fourth Amendment was not really violated."[228] If judges do act this way, their behavior is especially ironic. For although the exclusionary rule may appear in particular cases to make enforcement of Fourth, Fifth and Sixth Amendment rights exceptionally costly, in the long run the rule—together with other defining features of criminal procedure—should make quasi-affirmative and systemic rights less troubling in criminal procedure than in other fields of constitutional law.

IV. LIVING WITH QUASI-AFFIRMATIVE RIGHTS

Quasi-affirmative rights and systemic rights are unavoidable in criminal procedure. Most criminal procedure rights are in fact quasi-affirmative, and many have systemic implications. The fact that these rights are quasi-affirmative rather than purely affirmative should make them more palatable; so should several other distinguishing characteristics of criminal procedure. But quasi-affirmative rights and systemic rights, even in criminal procedure, *do* present special problems of judicial manageability—the same problems presented more strongly by purely affirmative rights. In particular, they necessarily involve budgeting questions: questions regarding the proper allocation of public resources in the face of competing demands. These are matters that many observers think courts are peculiarly ill-suited to resolve.[229]

These general concerns do not provide reason for courts to eschew quasi-affirmative rights in criminal procedure—that would mean eschewing nearly all of criminal procedure. But they do provide reason for courts to search for ways to develop quasi-

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[228] Amar, supra note 32, at 30; see also, e.g., John Kaplan, The Limits of the Exclusionary Rule, 26 Stan. L. Rev. 1027, 1036–37 (1974) (observing that "the courts have shown a remarkable ability in the most serious cases to stretch legal doctrine to hold doubtful searches and seizures legal," thereby avoiding applications of the exclusionary rule that "would offend their own sense of proportionality or reach beyond their view of what the public would tolerate").

[229] See supra notes 3–7 and accompanying text.

affirmative rights in ways that minimize the dangers of intruding into decisions normally left to the political branches. In fact, courts already have developed a variety of such strategies. Cataloging and assessing them in detail is a task for other articles, some of which have already been written.[230] Here I will venture only a broad overview, along with some tentative thoughts regarding the implications of these judicial strategies for the development of quasi-affirmative rights in criminal procedure.

The shared characteristic of all these strategies is that they seek to involve the political branches in an ongoing process of interbranch decisionmaking, rather than simply substituting judicial commands for political judgments. There are at least two basic ways to do this. One is for the courts to announce a substantive rule that can be overridden in some way by the political branches. The other is for the courts to impose, at least initially, only a procedural requirement, typically but not necessarily some kind of "hard look" regarding the manner in which the political branches select the substantive outcome.[231] Each of these methods allows courts to protect fundamental values without entirely displacing democratic decisionmaking, and each takes advantage of the strengths of legislatures in reconciling conflicting priorities.[232] Each,

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[230] For two recent and helpful treatments of aspects of this problem, see Dan T. Coenen, A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue, 42 Wm. & Mary L. Rev. 1575 (2001), and Susan R. Klein, Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure, 99 Mich. L. Rev. 1030 (2001).

[231] Dividing things up like this may be artificial. Professor Coenen plausibly characterizes the first strategy, and some uses of the second strategy, as involving a kind of "judicial 'remand'" to political decisionmakers, allowing them "to overturn the judicially effected result by putting back in place a program that is actually or functionally identical to the program the Court has provisionally rejected"—but "only if the policymaking process complies with judicially stipulated structural mandates." Coenen, supra note 230, at 1587–88. But the division, even if crude, will be useful for purposes of the discussion to follow.

[232] See, e.g., id. at 1636–37; Klein, supra note 230, at 1052–59. For a more extended discussion of the benefits of "genuine dialogue and joint responsibility between courts and legislatures with respect to fundamental rights," see Stephen Gardbaum, The New Commonwealth Model of Constitutionalism, 49 Am. J. Comp. L. 707, 710, 742–56 (2001). Professor Gardbaum points out that the United Kingdom, Canada, and New Zealand all have recently adopted charters of judicially enforceable rights that nonetheless give "legislatures the power to have the final word on what the law is," id. at 746, and that collectively provide a new, "hybrid" model of constitutionalism, with

moreover, has both promise and precedent as a means of developing and protecting quasi-affirmative rights in criminal procedure.[233]

The first of these two judicial strategies—announcing a rule that is in some manner "reversible" by the political branches—has sometimes been described as "constitutional common law," because it "invite[s] political-branch reevaluation of judicially propounded 'constitutional' doctrines."[234] Such rules are attractive vehicles for protecting quasi-affirmative and systemic rights, because, at least in theory, they can "shift the burden of inertia to legislative bodies, focus the mind of those bodies on constitutional concerns, and push along an interbranch dialogue about the proper reification of constitutional rights."[235]

Not surprisingly, the most prominent examples of such doctrines are found in the field of criminal procedure. Perhaps the best known is the set of interrogation rules announced in *Miranda v. Arizona*,[236] rules the Supreme Court took pains to make clear could be replaced by legislatively crafted safeguards equally effective in protecting against coerced confession.[237] The Court has sometimes suggested that the Fourth Amendment exclusionary rule has the

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singular strengths for reconciling judicial review with democratic self-governance. See id. at 742–56. Accordingly, although "[t]his new model was custom-built to permit greater legal protection of rights within political cultures in which there is substantial attachment to parliamentary sovereignty," he suggests "it merits close observation and consideration by both new converts to, and founding members of, the American model." Id. at 760.

[233] Professor Erik Luna recently has explored the role that can be played in criminal procedure by another technique of interbranch dialog: judicial suggestion of possible replacements for measures struck down as unconstitutional. See Erik Luna, Constitutional Road Maps, 90 J. Crim. L. & Criminology 1125 (2000). As he points out, though, this technique does little to preserve democratic self-rule: "Conversation is not guaranteed, only judicial instructions and legislative acceptance. In this sense, road maps amount to commands, not conversation, akin to parent-child interaction rather than dialogue between co-equal partners." Id. at 1194.

[234] Coenen, supra note 230, at 1755. There are, of course, other aspects of common law decisionmaking that are much more widely reflected in constitutional jurisprudence. See, e.g., David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877 (1996). What Professor Coenen and others have called "constitutional common law" should not be confused with the much broader practice that I have elsewhere termed "common law constitutionalism," nor with the separate, less common practice that I have called "constitutionalized common law." See Sklansky, supra note 72, at 1807–13.

[235] Coenen, supra note 230, at 1755.

[236] 384 U.S. 436 (1966).

[237] Id. at 490; see supra note 113 and accompanying text.

same status: It is provisionally required unless and until superseded by legislative or administrative remedies.[238] And, of course, rules imposed under a court's supervisory jurisdiction—like the Minnesota Supreme Court's requirement that custodial interrogations be electronically recorded[239]—have precisely this status.[240] These rules, too, are particularly common in criminal procedure.[241]

Admittedly, neither *Miranda*, nor the Fourth Amendment exclusionary rule, nor the Minnesota Supreme Court's recording requirement, has been visibly effective in fostering interbranch dialog.[242] They even may have slowed legislative innovation by a kind of informal preemption, occupying the field and providing a single, pre-approved solution.[243] But other uses of this same judicial tool may have been more successful. Professor Susan Klein points, for example, to the Supreme Court's decision in *United States v. Wade*[244] that criminal defendants have a right to counsel at post-indictment lineups, at least in the absence of "[l]egislative or other regulations" that "eliminate the risks of abuse and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial."[245] Professor Klein describes the aftermath:

> The resulting initial dialogue between the Court and Congress might be labeled a failure in light of the immediate congressional attempt to overrule *Wade* without eliminating the potential for suggestive lineups, though the federal executive branch has steadfastly refused to utilize that statute. On the state and local levels, however, there were early attempts to institute substitute procedures, some effectively removing the need for counsel during those lineups. More recently, there is success at the federal level as well. Former Attorney General Janet Reno commissioned the Technical Working Group for Eyewitness Evidence to develop the 1999 guide for effective procedures for witness identifications. Though no federal court

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[238] See Coenen, supra note 230, at 1745–56.
[239] See supra note 118 and accompanying text.
[240] See Coenen, supra note 230, at 1737–38
[241] See id. at 1737 & n.661.
[242] See, e.g., Klein, supra note 230, at 1056–58.
[243] See supra note 112 and accompanying text.
[244] 388 U.S. 218 (1967).
[245] Id. at 239.

> has yet opined as to whether these recommended procedures effectively replace the need for counsel at lineups, at least one jurisdiction has already implemented them.[246]

Explicit judicial requirements of reasoned decisionmaking by the political branches are harder to identify in criminal procedure than this kind of provisional "constitutional common law." The "hard look" doctrine is a creature of administrative law, not of constitutional law.[247] But constitutional criminal procedure may often achieve the same result less directly. Much of Fourth Amendment law, for example, now proceeds through an open-ended assessment of the "reasonableness" of a legislative or administrative inspection scheme.[248] Like "rational basis" review carried out under the Equal Protection Clause of the Fourteenth Amendment, the appraisal of Fourth Amendment "reasonableness" can include consideration of rationales never articulated by the political branches when the measure is adopted, or even when the measure is challenged in court. As a practical matter, though, courts typically rely on justifications articulated by the decisionmakers and then reiterated by government counsel in court. Moreover, otherwise defensible measures can be invalidated as "unreasonable" under the Fourth Amendment if they appear, based on the statements of decisionmakers, to have the wrong aims.[249] Therefore, "reasonableness" review under the Fourth Amendment may well encourage the political branches to think harder about, and to articulate, the grounds for the search and seizure policies they adopt.

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[246] Klein, supra note 230, at 1055 (footnotes omitted). The attempted congressional repeal of *Wade*, an attempt now codified in 18 U.S.C. § 3502, was part of the Omnibus Crime Control and Safe Streets Act of 1968. Pub. L. No. 90-351, Title II, § 701(a), 82 Stat. 211 (1968). This same legislation enacted 18 U.S.C. § 3501, which purported to repeal *Miranda* and was judged invalid by the Supreme Court in *United States v. Dickerson*, 530 U.S. 428 (2000).

[247] See Citizens to Pres. Overton Park v. Volpe, 401 U.S. 402, 415–17 (1971).

[248] See, e.g., Chandler v. Miller, 520 U.S. 305 (1997) (drug testing); Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990) (sobriety checkpoints); Griffin v. Wisconsin, 483 U.S. 868 (1987) (probation searches); New York v. Burger, 482 U.S. 691 (1987) (administrative searches); United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (border searches).

[249] See, e.g., City of Indianapolis v. Edmond, 531 U.S. 32, 44 (2000) (invalidating a highway checkpoint program because its "primary purpose," drug interdiction, was "ultimately indistinguishable from the general interest in crime control").

That process of applying a general rule of criminal procedure—like the "reasonableness" requirement of the Fourth Amendment—may lead, in time, to more specific judicial commands informed by experience applying the general rule. Thus, for example, the Supreme Court adopted the Fourth Amendment exclusionary rule after trying, unsuccessfully, to apply the Fourth Amendment without requiring this specific remedy.[250] A similar process, on a smaller scale, eventually transformed the general requirement of a "prompt" post-arrest hearing on the question of probable cause to the more specific presumption that such a hearing must be held within forty-eight hours of arrest.[251]

The evolution of the forty-eight-hour rule illustrates how an ongoing dialog between courts and the political branches can provide a practical way for the judiciary to approach budgetary questions, confronting them head-on but acknowledging the special difficulties they present. *Gerstein v. Pugh*[252] started such a dialog by requiring "prompt" determinations of probable cause following a warrantless arrest.[253] The subsequent "flurry of systemic challenges,"[254] despite their messiness, forced local governments to justify the delays in their procedures, and doubtless spurred many jurisdictions to reconsider those procedures. Gradually the litigation also gave the courts a good deal of information about pre-arraignment procedures throughout the country—information on which the Court could rely when it set a presumptive time limit in *County of Riverside v. McLaughlin*.[255] Indeed, one of the dissenters in *McLaughlin* expressly relied on these accumulated findings in concluding that delays of more than twenty-four hours between an arrest and a probable-cause hearing were presumptively unreasonable.[256]

In pegging constitutional reasonableness in part on existing nationwide practices, of course, the dissenters were following a well-

[250] See Mapp v. Ohio, 367 U.S. 643, 651–53 (1961); People v. Cahan, 282 P.2d 905, 911 (Cal. 1955).

[251] See supra text accompanying notes 38–43.

[252] 420 U.S. 103 (1975).

[253] Id. at 125.

[254] County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).

[255] 500 U.S. 44 (1991).

[256] Id. at 67–70 (Scalia, J., dissenting).

worn path.[257] Such an approach always risks stifling innovation by blessing conformity and penalizing "mere novelty,"[258] and both *Gerstein* and *McLaughlin* reiterated the Court's oft-stated consideration for "flexibility and experimentation by the States."[259] But courts may be able to leave room for innovation, while still taking account of practices across the country in assessing the reasonableness of a particular set of procedures and the feasibility of suggested alternatives.

McLaughlin also offers another lesson. Any assessment under the Fourth Amendment of the reasonableness of a particular set of budgetary decisions must include an examination of the purposes underlying those decisions. This was common ground between the majority and dissenters in *McLaughlin.* Although the two sides differed regarding whether one particular purpose—the administrative convenience of combining a probable cause hearing with other procedures—should count as legitimate, they agreed that certain other motivations were clearly off-limits. Thus the majority noted that "[e]xamples of unreasonable delays are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake."[260]

McLaughlin thus may suggest one possible way for courts to address, for example, the under-use of telephonic warrants, through a long-term dialog with political officials. Courts could begin the dialog by requiring claims of exigent circumstances to be supported not only with proof that there was no time to seek a warrant under existing procedures, but also by some showing that those procedures were not unreasonably cumbersome or time-consuming. Such a requirement might well encourage a "flurry of systemic challenges" from criminal defendants, and lower courts would struggle in giving the vague standard of reasonableness more content. But the litigation would force local governments, including prosecutors and local court officials, to defend their procedures for

[257] See., e.g., Chandler v. Miller, 520 U.S. 305, 323–24 (1997) (Rehnquist, C.J., dissenting); Tennessee v. Garner, 471 U.S. 1, 15–18 (1985); Payton v. New York, 445 U.S. 573, 575 (1980); United States v. Watson, 423 U.S. 411, 421–22 (1976).

[258] *Chandler*, 520 U.S. at 324 (Rehnquist, C.J., dissenting).

[259] *McLaughlin*, 500 U.S. at 53; *Gerstein*, 420 U.S. at 123.

[260] *McLaughlin*, 500 U.S. at 56.

issuing warrants, and in some cases to rethink those procedures. Courts might well decide that some explanations for failing to make telephonic warrants easier to obtain should carry no weight—for example, the desire to cut down on warrant applications in order to spare magistrates from additional work, or the desire to ensure that police officers say nothing that might be used later to impeach them at trial. (Similarly, courts might well decide that a failure to tape-record interrogations cannot be justified by concern regarding what juries will think about the tactics used by the police. Among the most important functions of judicial review is flushing out illegitimate motives.[261]) And over time courts would develop a body of information about what procedures have proven feasible and what delays serve legitimate purposes, information that could be used to refine and make more specific the vague prohibition against procedures that are unreasonably cumbersome or time-consuming.

A process of this kind would carry with it familiar risks. On the one hand, there is the danger that courts will undermine their actual and perceived legitimacy by baldly second-guessing the necessarily political decisions inherent in the design of a system for issuing warrants. On the other hand, there is danger that courts will simply rubber-stamp those decisions, accepting at face value any argument that the decisions are reasonable in light of competing priorities. To a great extent these risks reflect the risks inherent in any review of the reasonableness of a search or seizure. In particular, they mirror the risks in the warrant process itself, a process that requires judges and magistrates to steer a middle course between wholesale second-guessing of the police and purely formal review without any real bite.

CONCLUSION

Nothing I have said here may shed much light on the question of whether, in general, we have a Constitution "of negative rather than positive liberties."[262] My goals have been more modest. I have

[261] See Ely, supra note 79, at 146.

[262] DeShaney v. Winnebago County Dep't of Soc. Servs., 812 F.2d 298, 301 (7th Cir. 1987) (Posner, J.), aff'd, 489 U.S. 189 (1989); Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983) (Posner, J.).

tried to show that, even conceding the general salience of the distinction between negative and affirmative rights, there is an important middle ground, and rights falling within this middle ground are found throughout constitutional criminal procedure. I have further contended that courts have failed to recognize the special, intermediate nature of criminal procedure rights, and as a consequence may have left constitutional criminal procedure underdeveloped. These claims of course run counter to the common suggestion that constitutional criminal procedure is, if anything, overgrown. But that suggestion, too, may reflect a vague discomfort with the differences between criminal procedure rights and other constitutional rights, and at least some of those differences, I have tried to show, are less troubling than they may seem.