2014

Reflections on an Extraordinary Career: Thoughts about Gerald Caplan's Retirement

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I. INTRODUCTION

My colleague and friend Gerald Caplan (Jerry) recently announced his retirement. Not only was I saddened to lose a wonderful colleague, but the legal academy and profession have lost a member of a vanishing breed: a thoughtful, principled conservative. While I am not a conservative, working with Jerry has been an extraordinary experience; his thoughtful approach to the law has provided me with a much deeper understanding of the criminal justice system.

This essay is not simply a profile of Jerry's career. Anyone interested in reviewing his resume can do so.[1] Instead, I want to use this essay to explore

* Distinguished Professor of Law, the University of Pacific, McGeorge School of Law; University of Pennsylvania, J.D., 1974; Swarthmore College, B.A., 1969. I want to extend special thanks to Jerry Caplan for so many things, including his friendship, his leadership as McGeorge's dean for nearly a decade, and for his thoughtful criticism of so many of my articles, including this one. I also want to extend special thanks to former California Appellate Justice Earl Johnson, Professor Joshua Dressler, and former Dean Ned Spurgeon for their thoughtful comments on an earlier draft of this article, and to McGeorge librarian Michele Finerty for unearthing numerous helpful documents. Finally, I want to extend my thanks to my research assistant, Jacquelyn Loyd, for her tireless work in getting this article ready for publication.

examples of Jerry's work as a lawyer to demonstrate how far talk radio pundits and those claiming the conservative mantel have moved away from their claimed predecessors: responsible, public-minded conservatives. Jerry's views are closer to those of classic conservative thinkers like Edmund Burke than to the right wingers who try to claim the title of conservative today.[2]

Part II provides a brief discussion of Jerry's role as a Washington insider. That section focuses on his role in helping to preserve the Legal Services Corporation when it was under attack from the right wing.[3] Afterward, I explore two areas where Jerry's work illustrates his role in advancing the legal dialogue in important ways. Part III discusses Jerry's widely cited and deeply provocative article on *Miranda v. Arizona*.[4] Part IV discusses guidelines that Jerry developed in the early 1970s to govern police practices in the District of Columbia.[5] Those guidelines came at a time when the Burger Court began dismantling the Warren Court's Fourth Amendment jurisprudence.[6] They are instructive: the Burger Court, led by Justice Rehnquist, seldom found a search it did not like.[7] As argued below, that case law has led to a great deal of arbitrary police activity, unconstrained by the Fourth Amendment (including racial profiling).[8] By contrast, Jerry's work demonstrated a balance between support for the police and thoughtful regulation of their conduct.[9] At the core, Jerry's thought emerges: unlike current members of the right, Jerry did not believe that government was the problem.[10] Instead, although he believed in less government than liberal colleagues, he believed in good government and worked to advance that goal.[11]

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1. Resume of Gerald Caplan, Professor of Law, University of the Pacific, McGeorge School of Law, *available at* http://www.mcgeorge.edu/Documents/Faculty/geraldCaplanCV.pdf (on file with the *McGeorge Law Review*).

2. *See generally* JESSE NORMAN, EDMUND BURKE: THE FIRST CONSERVATIVE 282 (2013) (describing Burke as "the first conservative"); John Derbyshire, *How Radio Wrecks the Right*, AM. CONSERVATIVE (Feb. 23, 2009), http://www.theamericanconservative.com/how-radio-wrecks-the-right/ (noting, despite the author's conservative views, "'Reason has been overwhelmed by propaganda, ideas by slogans.' Talk radio has contributed mightily to this development." (quoting E.J. Dionne)).

3. *Infra* Part II.

4. Gerald M. Caplan, *Questioning* Miranda, 38 VAND. L. REV. 1417 (1985); *Infra* Part III.

5. *Infra* Part IV.

6. *Infra* Part IV.C.

7. *See* James J. Tomkovicz, *Rehnquist's Fourth: A Portrait of the Justice as a Law and Order Man*, 82 MISS. L.J. 359, 369 (2013) (identifying 205 Fourth Amendment cases on which Rehnquist voted, 166 of which were pro-law enforcement, roughly 85%).

8. *Infra* Part IV.C.

9. *Infra* Part IV.B.

10. *Infra* Part IV.C.

11. *Infra* Part IV.C.

II. A WASHINGTON INSIDER

Prior to accepting appointment as the Dean of McGeorge School of Law in 1992, Jerry was a Washington insider for most of his career.[12] Before and after a stint as a Professor of Law at Arizona State University,[13] Jerry held various posts in Washington, most often in areas dealing with criminal justice.[14] Of particular interest for this article was his service as general counsel to the District of Columbia Police Department;[15] Director of the Philadelphia Police Performance Study Commission;[16] and consultant to the U.S. Department of Justice to review the use of force by the Los Angeles Police Department.[17] I cite these various appointments not only to demonstrate that Jerry had a distinguished career and was a Washington insider. He surely did have a distinguished career and certainly was a Washington insider, able to move easily from one administrative position to another. As is evident when you walk into his office, he was appointed by Republican Presidents to most of his positions.[18] He worked with many prominent Republican officials throughout his career and viewed many of them with a kind eye, as demonstrated in his essay about former Attorney General John Mitchell.[19] I also cite these examples because, with a bit of research into the work that he did, one becomes aware of his integrity and open-minded approach to the issues at hand.

For example, the President's Crime Commission produced a highly regarded, balanced approach to crime control and evaluation of crime.[20] Jerry's service

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12. *See* Resume of Gerald Caplan, *supra* note 1, at 1.

13. *Id.*

14. *Id.* After serving as an Assistant United States Attorney, Caplan served as a staff attorney for the President's Commission on Law Enforcement and Administration of Justice. *Id.* Subsequent appointments included a staff position with the White House Task Force on Crime, executive assistant to the D.C. Director of Public Safety, and senior researcher at the Urban Institute. *Id.* Notably, he served as the Director of the National Institute of Justice, within the Department of Justice, for four years. *Id.* From 1977 until 1992, he was a Professor of Law at George Washington University's National Law Center. *Id.* During that period, he also served in various roles within the government. *Id.* For example, he served as the Deputy Director of the Bureau of Consumer Protection at the Federal Trade Commission. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 2.

18. *See Profile Page of Gerald Caplan*, UNIV.PACIFIC, MCGEORGE SCH.L., http://www.mcgeorge.edu/Gerald_Caplan.htm?display=FullBio (last visited Mar. 8, 2014) (on file with the *McGeorge Law Review*) (indicating that Gerald Caplan was appointed as the Director of the National Institute of Justice by Attorney General Elliot Richardson in 1973, during the Nixon Presidency); *Mixed Signals at Legal Services*, N.Y. TIMES (Mar. 20, 1982), http://www.nytimes.com/1982/03/20/opinion/mixed-signals-at-legal-services.html (on file with the *McGeorge Law Review*) (noting that the Reagan administration appointed Gerald Caplan as acting president of the Legal Services Corporation).

19. Gerald Caplan, *The Making of the Attorney General: John Mitchell and the Crimes of Watergate Reconsidered*, 41 MCGEORGE L. REV. 311 (2010) (reviewing JAMES ROSEN, THE STRONG MAN (2008)).

20. *See generally* Special Message from Lyndon B. Johnson, President of the United States, to Congress on Law Enforcement and the Administration of Justice (Mar. 8, 1965), *available at* http://www.presidency.

investigating the Philadelphia Police and Los Angeles police forces won him bipartisan praise for his fairness.[21]

The best measure of Jerry's brand of conservatism and commitment to our justice system is the work that he did as Acting Director of the Legal Services Corporation (the Corporation).[22] Although conservative activists had yet to achieve the destructive energy demonstrated by current members of the right, like Tea Party politicians, they were beginning to gain traction in Washington with the election of Ronald Reagan in 1980. The Corporation was in the crosshairs of many activist groups, including the Pacific Legal Foundation[23] and the Heritage Foundation.[24] Howard Phillips and the organization that he created, the National Defeat Legal Services Committee, later called the Legal Services Reform Coalition, were even more ardent in their opposition to the Corporation.[25] While organizations like the Heritage Foundation and the Pacific Legal Foundation had other targets, Phillips and his allies had one primary target: the Corporation and its lawyers.[26]

A brief word of history is in order: while the Corporation was created in 1974 when Richard Nixon was president, its origins date back to Lyndon Johnson's administration.[27] As part of the Economic Opportunity Act of 1964, the Office of Economic Opportunity (OEO) created local legal service programs throughout the United States and funded already existing local legal aid societies, previously dependent on private charity for their support.[28] Those programs were

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ucsb.edu/ws/index.php?pid=26800 (on file with the *McGeorge Law Review*); PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY (Feb. 1967) (on file with the *McGeorge Law Review*); ENCYCLOPEDIA OF RACE AND CRIME (Helen Taylor Greene & Shaun L. Gabbidon eds., 2009).

21. *See* PHILA. POLICE STUDY TASK FORCE, PHILADELPHIA AND ITS POLICE: TOWARD A NEW PARTNERSHIP (Mar. 1987) (on file with the *McGeorge Law Review*); Gerald Caplan, Evaluation Design for Operation Rollout (Mar. 7, 1980) (unpublished evaluation) (on file with the *McGeorge Law Review*); Phil Kerby, *It Wasn't a Good Week for LAPD*, L.A. TIMES, June 26, 1980 (discussing Caplan's report on the L.A. Police Department); Letter from Jerome A. Barron, Dean, George Washington Univ., to Gerald M. Caplan, Professor, George Washington Univ. (July 8, 1980) (on file with the *McGeorge Law Review*) (praising Caplan for his work investigating the L.A.P.D.).

22. *Mixed Signals at Legal Services*, *supra* note 18.

23. *See* Stuart Taylor Jr., *Coast Lawyer Reported as Legal Aid Choice*, N.Y. TIMES (Nov. 8, 1981), http://www.nytimes.com/1981/11/08/us/coast-lawyer-reported-as-legal-aid-choice.html?pagewanted=print (reporting that one of the new appointees to the Corporation board came from the politically opposed Pacific Legal Foundation).

24. *See* KENNETH F. BOEHM & PETER T. FLAHERTY, HERITAGE FOUND., WHY THE LEGAL SERVICES CORPORATION MUST BE ABOLISHED 2 (Oct. 18, 1995), *available at* http://www.heritage.org/research/reports/1995/10/bg1057nbsp-why-the-legal-services-corporation (on file with the *McGeorge Law Review*).

25. *See* EARL JOHNSON JR., TO ESTABLISH JUSTICE FOR ALL: THE PAST AND FUTURE OF CIVIL LEGAL AID IN THE UNITED STATES 506–07, 760 (2014).

26. *Id.*

27. *See id.* at 54 (noting that the Office of Economic Opportunity was formed under Lyndon B. Johnson's leadership).

28. *See id.* at 54–55; Economic Opportunity Act of 1964, S. 2642, 88th Cong., 78 Stat. 508 (1964).

designed to provide legal services for the poor.[29] As the Nixon administration dismantled the OEO, Congress eventually created the Corporation to take over the function of providing counsel to the poor.[30]

The Corporation earned the enmity of the right wing for a number of reasons. Often, community legal service attorneys sued state officials for violations of federal law.[31] Further, local offices often brought class action suits to attack underlying difficulties faced by the poor.[32] Frequently, at least from the perspective of business interests, government-paid lawyers were pursuing overtly political goals.[33] In a recently published three volume history of civil legal aid in the United States, former state appellate Justice Earl Johnson argues that labeling the Corporation's actions as "political" was itself a counter-attack on legal services attorneys who were properly representing their clients.[34]

In a short article on the Corporation, Jerry summed up the animosity: "A full-page photograph from a recent issue of the *Conservative Digest* displays empty offices at the Legal Services Corporation. The offices are vacant as the result of recent budget cuts. The picture is captioned: 'Heart-Warming Photo of the Month (Maybe of the Decade).'"[35]

Even before he became President, Ronald Reagan opposed federal subsidies for indigent legal services.[36] One of his first acts as President was to attempt to kill the Corporation by de-funding it.[37] Later, he replaced all of the Corporation's board members with his own nominees and tried to nominate Ronald Zumbrun, the President of the right-wing Pacific Legal Foundation, as its chair.[38] Reagan was forced to withdraw Zumbrun's nomination, but made a recess appointment of William J. Olson as chair.[39] As part of Reagan's transition team, Olson purportedly recommended the abolition of the Corporation.[40]

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29. *Id.*

30. *Id.* at 451.

31. *See, e.g.*, *Mixed Signals at Legal Services*, *supra* note 18.

32. *Id.*

33. *See* David Shribman, *Legal Agency Warns It May Cut Local Funds*, N.Y. TIMES (Aug. 24, 1982), http://www.nytimes.com/1982/08/24/us/legal-agency-warns-it-may-cut-local-funds.html (quoting Gerald Caplan, "If the program had not become so highly polarized, this would be seen not as a sinister plot but, rather, just solid fiscal management.").

34. JOHNSON, *supra* note 25, at 509–10 (noting that Reagan had a highly visible dispute with California Rural Legal Assistance in the past).

35. Gerald M. Caplan, *Understanding the Controversy over the Legal Services Corporation*, 28 N.Y.L. SCH. L. REV. 583, 583 (1983).

36. *See* Nicholas D. Kristof, *Scorned Legal Services Corp. on the Rebound*, WASH. POST, July 21, 1982, at A21.

37. *Id.*

38. JOHNSON, *supra* note 25, at 538, 558; Taylor, *supra* note 23; *Mixed Signals at Legal Services*, *supra* note 18.

39. JOHNSON, *supra* note 25, at 536–38.

40. *Id.* at 544, 546.

Over the next year or so, Reagan battled to get his board members confirmed.[41] The Senate did not reject all of his nominees; fifty-two senators wrote the President to tell him that they were ready to confirm six of his eight nominees.[42] They were not ready to confirm two: Olson and William Harvey, the board chair.[43] Reagan responded by withdrawing his nominees, and from 1983 through mid-1985, he made recess appointments to run the organization.[44] During a period of charges and countercharges about the legality of the Corporation's actions and excessive fees charged by Reagan appointees on the board, the Senate rejected the President's nominees, forcing him to make recess appointments for several years.[45]

Appointed as the acting director in March 1982, Jerry took over the Corporation at a politically sensitive time.[46] A short article in the *New York Times* summed up the situation: "President Reagan's war of attrition against the Legal Services Corporation continues apace."[47] It cited Reagan's efforts to defund the Corporation and to appoint "interim directors who have been remarkably noncommittal about their dedication to its work."[48] But, noted the *Times*, "to [board members'] credit, however, they decided recently to appoint a sympathetic veteran of the program—Professor Gerald Caplan of the George Washington University law faculty—as acting president."[49]

Several months into Jerry's tenure, the Washington Post ran a story about the Corporation, captioned *Scorned Legal Services Corp. on the Rebound*.[50] The story quoted Jerry to the effect that, while the Corporation faced continuing funding questions, "they are not life-and-death matters."[51] Less visible from the public record is how Jerry maneuvered within the Corporation to achieve compromise, curtailing some of the discretion exercised by field attorneys, but undercutting some of the bases for criticism of the Corporation.[52] One gets a hint of what went on by reading what Jerry wrote about the Corporation shortly after he stepped down as the acting director.[53]

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41. *Id.* at 558.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 560–64.

46. *Id.* at 539; *see also Caplan Named Acting President*, POVERTY LAW TODAY (Legal Servs. Corp., Wash., D.C.), Spring 1982, at 1.

47. *Mixed Signals at Legal Services*, *supra* note 18.

48. *Id.*

49. *Id.*

50. Kristof, *supra* note 36.

51. *Id.*

52. *See e.g.* Caplan, *supra* note 35, at 588 (tempering the operation of the Corporation by working against extreme views: "Representing poor people in their individual problems is challenge enough.").

53. Gerald M. Caplan, *Shold Reagan Kill Legal Services?*, WALL ST. J., Dec. 9, 1982.

He laid out his position in an op-ed in the December 9, 1982 edition of the *Wall Street Journal*: he cited examples where attorneys working for the Corporation became politicized, opposing the Reagan administration.[54] For instance, he described grassroots efforts to organize the Corporation's clients to support pro-consumer legislation or candidates.[55] Although acknowledging that such causes may be just, Jerry admitted "[such efforts] constitute partisan political action and should not be tax-supported."[56] He cited examples of sloppy oversight within the Corporation, like the lack of attention to whether prospective clients met eligibility requirements.[57] Preventing audits by outsiders left the Corporation open to controversy.[58] He was, in effect, calling out lawyers and administrators within the Corporation for giving their enemies bases for attacking them.

At the same time, he argued forcefully that the examples cited by critics of the Corporation were peripheral to its core function. The case for legal services, he argued, was a strong one: "There *are* poor people, they *do* have legal needs, and to remit them to the volunteer efforts of the bar, private charities or the competition for state funds is to leave them largely unrepresented . . . ."[59] He also observed that some of the criticism of legal services attorneys focused on their use of the legal system to frustrate their opponents through aggressive representation.[60] His response was straightforward: don't blame legal services attorneys for the excesses of our litigation system.[61]

The most striking aspect of his defense of legal services attorneys is worth quoting at length:

> For all their self-proclaimed radicalism, Legal Services attorneys accept the system. They really believe that a day in court is worth having, that the poor can get a fair shake in the legislature, that our laws will not invariably be bent to favor the strong. This is not the stuff of revolution; it is fodder for democracy.
>
> The fact is that over the years, the Legal Services program has moderated the impulses of those who are intolerant or ignorant of democratic processes or who see violence as a means of getting their way. By its nature it binds the poor to strategies of ordered change. It integrates them into the body politic. It provides a taste of democracy.

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54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*

> Perhaps this should be enough to guarantee the continuation of the [C]orporation.[62]

No doubt, sentiments like those expressed in his op-ed suggest why Jerry managed to alienate the political foes of the Corporation. Before I turn to the larger significance that I read into his public statements about the Corporation, examining another publicly reported event during Jerry's tenure as acting director demonstrates his willingness to confront powerful opponents of the Corporation, with little caution about whatever political ambitions he may have had.

During his tenure, Jerry alienated some board members by challenging the bills that they submitted for their time.[63] As reported in the *Washington Post*, Jerry warned board members that their consulting fees and expenses were high and were sure to invite criticism.[64] These were Reagan appointees, the kinds of political allies Jerry might want if he had been less moved by his obligation as a fiduciary than by ambition. Even the story in the *Post*, reporting the response of board members, suggested that Jerry earned political enemies among board members.[65] Although technically Jerry resigned from his position, his resignation came after pressure from the board.[66]

His willingness to expose the Reagan administration continued after he left his position. He continued to challenge efforts to abolish the Corporation and characterized Reagan's efforts to dismantle the Corporation as "a holy war between traditional Republicans and the radical right."[67] He defiantly contradicted White House spokesman Larry Speakes when Speakes denied that the White House was trying to abolish the Corporation.[68]

While Jerry's leadership was not the only reason that the Corporation survived, his role was significant.[69] Working with the board, Jerry helped depoliticize the program, tempering Corporation attorneys' enthusiasm for engaging in political activities. While raising questions about engaging in legislative advocacy and the use of class actions in his writings about the work of the Corporation,[70] Jerry did not end those practices.[71] Jerry helped stop

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62. *Id.*

63. JOHNSON, *supra* note 25, at 540 (describing Jerry's refusal to sign board chair Bill Harvey's travel expense forms).

64. Mary Thornton, *Report Clears Legal Services Board Members*, WASH. POST, Jan. 12, 1983, at A3.

65. *Id.*

66. *See* JOHNSON, *supra* note 25, at 549–51 (noting that Harvey attempted to fire Caplan at one point). Caplan experienced great resistance from board members and the Reagan administration alike. *Id.*

67. Ronald J. Ostrow, *Administration Assailed Over Legal Aid*, L.A. TIMES, Dec. 14, 1982, at I8 (quoting Gerald Caplan).

68. *Id.*

69. JOHNSON, *supra* note 25, at 540–41 (describing Caplan's efforts to reorganize the Corporation's staff and his growing relationship with Lyons, his eventual replacement).

70. *See* Caplan, *supra* note 35, at 586–87 (conceding that class action lawsuits can be good things, but should not be supported by taxpayers).

momentum to defund the Corporation; arguing for a return to a less political mission undercut some of the fury on the right.[72] Importantly, he moderated the board, he restrained its most conservative members, and he educated some critics of the Corporation that the organization was not doing what Reagan had claimed its lawyers were doing.[73]

I draw a number of lessons from Jerry's role as the director of the Corporation. As mentioned above, he acted with integrity by refusing to buckle under pressure from powerful politicians.[74] But I see something more important related to my overall theme: Jerry's stance was that of a principled conservative.

One might argue that his service as director demonstrates that he, in fact, was not a conservative at all, but a centrist or a closet-liberal. Certainly, by comparison to contemporary politicians who attempt to claim the conservative mantel, like prominent Republican Paul Ryan,[75] Jerry looks downright progressive. One can hardly imagine Rush Limbaugh or Paul Ryan rushing to defend the core mission of the Corporation.[76]

To be clear, while I respect Jerry's position that some Corporation attorneys exceeded their authority and engaged in partisan politics, one can defend the actions of those attorneys as a function of their primary obligation to their clients.[77] Further, given the limited resources available to legal service organizations, using those devices expanded the influence of the Corporation in the service of their clients. In effect, the debate between Jerry and liberals would be about the meaning of zealous representation of one's clients.[78] A closely related issue is the complex question about who a legal service lawyer's client is:

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71. Despite Corporation opponents' challenges to class action suits, those survived during Jerry's tenure at the Corporation, and were only ended in 1996. JOHNSON, *supra* note 25, at 758. Led by Newt Gingrich and members of Congress elected under the "Contract with America" banner, Congress enacted a series of restrictions on Corporation lawyers, including a ban on class actions. *Id.*

72. *See id.* at 540. Jerry was not alone in opposing the President's efforts to defund the Corporation—Congress, led by Republican Senator Warren Rudman, fought the President as well. *Id.* at 579–80. While the Corporation's funding was reduced significantly, it survived. *Id.*

73. *Id.* at 540–42; Ostrow, *supra* note 67.

74. Ostrow, *supra* note 67; *see also* JOHNSON, *supra* note 25, at 538–39.

75. *See e.g.* Jeanne Sahadi & Rich Barbieri, *What's in Paul Ryan's Budget*, CNN MONEY (Mar. 12, 2013), http://money.cnn.com/2013/03/12/news/economy/paul-ryan-budget/ (on file with the *McGeorge Law Review*) (noting Ryan's budget fails to account for spending on emergency relief, cuts Medicare expenses, and increases defense spending); Ralph E. Wall, *List of Republican Cuts in Paul Ryan's Plan*, FREE REPUBLIC (Sept. 25, 2012), http://www.freerepublic.com/focus/chat/2936027/posts (on file with the *McGeorge Law Review*) (listing all the various programs one of Ryan's budget proposals planned to cut).

76. *See* Wall, *supra* note 75 (indicating a planned $420 million cut to the Legal Services Corporation in Paul Ryan's 2012 budget proposal).

77. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (outlining a lawyer's obligation to act with diligence regarding his or her client); *see generally id.* R. 1.

78. *See* Paul C. Saunders, *Whatever Happened to 'Zealous Advocacy'?*, N.Y. L.J., Mar. 11, 2011 (discussing the longstanding debate about whether zealous advocacy is mandated by ethical responsibilities or whether it is used as a weapon against opponents).

the poor person who walks in the door of the legal services office or the government that pays for the attorney's services?[79]

Even if liberals might disagree with Jerry's position about whether Corporation lawyers overstepped their bounds, one might still characterize Jerry as a moderate. After all, the position he took in the 1980s would hardly endear him to members of the right wing today.[80] But despite efforts by talk show hosts and members of the radical right to claim the title of conservative, language has fixed meaning.

Serious scholars consider Edmund Burke "The First Conservative."[81] They often invoke his name as an example of conservative thought. But as E.J. Dionne pointed out in a recent editorial in the *Washington Post*, Burke's positions are often glossed over in contemporary discussions.[82] Burke had his critics, like Tom Paine, who "saw Burke as an apologist for the privileged."[83] But Burke's views were far more nuanced than that. Yes, Burke believed in tradition and in the preservation of the social order.[84] Not surprisingly, he was opposed to the French Revolution.[85] Instead, as Burke's supporters argue, he stood for moderation and reform, rather than revolution.[86]

Unlike many on the right today, Burke was not a proponent of small government.[87] Instead, he was a proponent of good government, but thought that one must be cautious about how much politics could accomplish.[88] According to Jesse Norman, Burke's recent biographer, Burke would have rejected the current conservative belief in a society of greed.[89] Norman argues he would have rejected an ideology that "causes people to lose sight of the real social sources of human well-being and to become more selfish and individualistic . . . ."[90] Almost sixty years ago, Arthur Schlesinger, Jr. offered a similar view of Burke, who, according to Schlesinger, believed in a society "where power implies responsibility and where all classes should be united in harmonious union by a

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79. *See* Carl Horowitz, *New Evidence Shows Fraud, Inefficiency Among Legal Services Grantees*, NAT'L LEGAL & POL'Y CTR. (Jul. 23, 2010), http://nlpc.org/stories/2010/07/23/new-evidence-shows-fraud-inefficiency-among-grantees (on file with the *McGeorge Law Review*) (explaining that the Corporation has put other interests over helping the poor).

80. JOHNSON, *supra* note 25, at 538–39.

81. *See generally* NORMAN, *supra* note 2.

82. E.J. Dionne Jr., *Edmund Burke Has a Lot to Teach Today's Conservatives*, WASH. POST (June 30, 2013), http://www.washingtonpost.com/opinions/ej-dionne-edmund-burke-has-a-lot-to-teach-todays-conservatives/2013/06/30/10f8c95c-e1b5-11e2-a11e-c2ea876a8f30_story.html (on file with the *McGeorge Law Review*).

83. *Id.*

84. *Id.*

85. NORMAN, *supra* note 2, at 136.

86. *See id.* at 282–84.

87. Dionne, *supra* note 82.

88. *Id.*

89. *See* NORMAN, *supra* note 2, at 30.

90. *Id.* at 285.

sense of common trust and mutual obligation."[91] Similar to Adam Smith's views, Burke believed in collective responsibility.[92]

Jerry's defense of the Corporation echoed Burke's view. Like Burke, he rejected radical solutions to social problems, but he did not believe that poor people should be left to fend for themselves.[93] Similar to Burke's belief that "power implies responsibility,"[94] Jerry insisted that forcing the poor to resolve their legal problems by means of pro-bono volunteer work or other charities would amount to an absence of representation of the poor.[95] He envisioned a meaningful role for government to help people in need.[96] While he did not expect an organization like the Corporation to solve all the problems of the poor, he demonstrated a concern for the less fortunate and saw a role for the government to aid others.[97]

Also, consistent with Burke's ideology, Jerry viewed the role of the Corporation as advancing slow democratic reform, not revolutionary change. This is reflected in his *Wall Street Journal* op-ed, where he concluded, "the Legal Services program has moderated the impulses of those who are intolerant or ignorant of democratic processes or who see violence as a means of getting their way. By its nature it binds the poor to strategies of ordered change. It integrates them into the body politic."[98] Notice also the similarity between Jerry's position and Schlesinger's reading of Burke's view that we should be united across class lines in "a sense of common trust and mutual obligation."[99]

Some commentators have made similar points about politicians on the right today. Indeed, two respected authors, including Norman J. Orenstein, a resident scholar at the Heritage Foundation, have placed much of the blame for the current state of dysfunction in Washington on extremists in the Republican Party like Ann Coulter, who have ratcheted up rhetoric and misinformation.[100] No doubt, we would benefit from having more individuals of Jerry's stature serving in government, representing traditional values.

Jerry's retirement from McGeorge also means that we are losing a reasoned, intelligent conservative voice in the legal academy. Some commentators claim that the legal academy suffers from liberal bias.[101] While those authors were

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91. Dionne, *supra* note 82 (quoting Arthur Schlesinger Jr.).

92. NORMAN, *supra* note 2, at 285.

93. Caplan, *supra* note 35, at 584.

94. Dionne, *supra* note 82.

95. Caplan, *supra* note 35, at 584.

96. *Id.*

97. *See id.*

98. Caplan, *supra* note 53.

99. Dionne, *supra* note 82.

100. THOMAS E. MANN & NORMAN J. ORNSTEIN, IT'S EVEN WORSE THAN IT LOOKS 62–63, 102–03 (2012).

101. Three scholars published a study supporting that conclusion.

modest about the implications of their study, others have been less measured in their response. For example, author Walter Olson accuses "law schools [of being] . . . incubator[s] of liberal politics."[102] While John McGinnis, one of co-authors of the study that concluded that there is a liberal bias in the legal academy, was temperate in his article; he endorsed Olson's conclusion in a book review:

> To meet the need for intellectual respectability, Mr. Olson implies, professors became engineers of reform.
>
> . . . .
>
> Mr. Olson superbly describes the rise of legal clinics, the law-school component ostensibly designed to give students hands-on training. He notes that the charitable foundations that first funded these clinics were more concerned with creating turbines of social change than with educating students. These days, many more clinics engage in public-interest litigation (defined by a rather predictable liberal agenda) than devote themselves to matters like the legal ordeals of small businesses . . . .[103]

McGinnis also supports Olson's observation that such public interest organizations receive substantial funding. He quotes Olson's observation that the liberal "Brennan Center at New York University . . . comes to roughly 80% of that of the Federalist Society, the national organization of legal conservatives that is routinely vilified by Democratic politicians for its inordinate—and, of course, pernicious—effect on our legal culture."[104]

Not only does McGinnis' tone suggest a difference from Jerry's approach to serious intellectual topics, but it suggests a different view of the role of law and the commitment to the less able. Why, for example, would McGinnis favor help for small businesses that have access to considerable assistance from the Small Business Administration and have powerful support among wealthy organizations like the Chamber of Commerce?[105] More importantly, McGinnis

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102. Scott H. Greenfield, *Shake it Up: Schools For Misrule*, SIMPLE JUSTICE (Mar. 6, 2011), http://blog.simplejustice.us/2011/03/06/shake-it-up-schools-for-misrule/ (on file with the *McGeorge Law Review*).

103. John O. McGinnis, *The Law Is a Class*, WALL ST. J. (Mar. 21, 2011), http://online.wsj.com/news/articles/SB10001424052748704261504576205431659088782 (on file with the *McGeorge Law Review*).

104. *Id.* McGinnis makes no reference in his review to funding provided by other right wing organizations like the substantial funding provided by the Olin Foundation to advance libertarian causes. *See* John J. Miller, *John Olin*, PHILANTHROPY ROUNDTABLE, http://www.philanthropyroundtable.org/almanac/hall_of_fame/john_m._olin (last visited Mar. 10, 2014) (on file with the *McGeorge Law Review*).

105. *See Local Assistance*, U.S. SMALL BUS. ADMIN., http://www.sba.gov/tools/local-assistance/districtoffices (last visited Nov. 22, 2014) (on file with the *McGeorge Law Review*) (showing all the offices small businesses can go to for assistance); Matt Stoller, *U.S. Chamber of Commerce: The Right Wing's Right*

and Olson's view that there is something illegitimate about law schools funding clinics for the poor is not consistent with traditional values reflected in Burke's work and so thoughtfully defended in Jerry's writing.[106]

For many of us, former President George W. Bush made the concept of "compassionate conservatism" an oxymoron.[107] But thinkers like Burke reflect that tradition, one that Jerry adopted and one that we will miss in the legal academy.

III. *MIRANDA*

Miranda v. Arizona[108] remains one of the most famous cases in the Supreme Court's history and was, in its time, one of the most controversial.[109] So unpopular with many Americans, it contributed to the election of Richard Nixon in 1968.[110] Scholars have recognized Jerry's article taking issue with *Miranda* as a major contribution to the debate surrounding that case.[111] For purposes of my theme, it also demonstrates an extraordinary example of how different Jerry's brand of conservatism is from more strident critics.

This section provides a brief review of the road to *Miranda* and the controversy surrounding the decision.[112] It then turns to Jerry's objections to the Court's holding.[113] Finally, it explores Jerry's nuanced discussion of alternatives to *Miranda*, which are arguably both more principled than *Miranda* and more protective of suspects than current *Miranda* doctrine.[114]

A. *The Road to* Miranda

Miranda's critics often ignore the Court's legitimate concerns that gave rise to the case. Starting with the remarkable decision in *Brown v. Mississippi*, the Supreme Court reviewed many cases involving aggressive police practices in

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Hand in D.C., ALTERNET (Dec. 13, 2006), http://www.alternet.org/story/45493/u.s._chamber_of_ commerce%3A_the_right_wing%27s_right_hand_in_d.c. (on file with the *McGeorge Law Review*).

106. *See supra* notes 98–99 and accompanying text.

107. *See, e.g.*, *A Compassionate Conservative?*, IRREGULAR TIMES, http://irregulartimes.com/compassionate.html (last visited Mar. 17, 2014) (on file with the *McGeorge Law Review*).

108. 384 U.S. 436 (1966).

109. JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE 435 (6th ed. 2013).

110. *See generally* John A. MacKerron III, *Miranda: Crime, Law and Politics, by Liva Baker*, 35 HASTINGS L.J. 551, 560–561 (1984) (book note) (describing a major campaign position of Nixon, the candidate, that he would fill Court vacancies with justices opposed to *Miranda*).

111. *See* Yale Kamisar, *On the Fortieth Anniversary of the* Miranda *Case: Why We Needed It, How We Got It—And What Happened to It*, 5 OHIO ST. J. CRIM. L. 163, 169 (2007) (recognizing Gerald Caplan as "one of the nation's most eloquent and forceful critics of that landmark case").

112. *Infra* Part III.A.

113. *Infra* Part III.B.

114. *Infra* Part III.C.

death penalty cases.[115] Many of those cases involved racial injustice in the south, where defendants were often coerced to confess under threat of physical force.[116] At times, fear of lynching was close to the surface.[117] Over a 30-year period between *Brown* and *Miranda*, the Court decided more than a case a year.[118]

Not only were the cases fraught with concern about racial injustice, but the cases did not lend themselves to clear rules.[119] As one commentator famously stated, under the Court's test "[a]lmost everything was relevant, but almost nothing was decisive."[120] The Court gave little deference to lower court findings that could have immunized the trial court's findings from appellate review.[121] The lack of deference expanded the Court's role in reviewing the lower court's holdings.[122]

In 1964, the Court decided two cases that suggested that the Court was about to hold that the Sixth Amendment right to counsel attached pre-indictment and extended to the interrogation room.[123] *Escobedo v. Illinois's* reasoning seemed to apply broadly but its holding was narrowly framed to describe the unique facts of the case.[124]

As a result, not surprisingly, lower courts struggled to understand the scope of the Court's holding in *Escobedo*.[125] Two years later, the Court granted certiorari in several cases to resolve the conflict among lower courts.[126]

Chief Justice Warren's *Miranda* opinion spoke in sweeping terms, unlike *Escobedo*.[127] Importantly, the narrow majority found that the Fifth Amendment right to be free from compelled testimony extended to the stationhouse.[128] Leaving it open to criticism that the holding read more like legislation than a

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115. 297 U.S. 278 (1936).

116. *See, e.g.*, Ashcraft v. Tennessee, 322 U.S. 143, 144–48 (1944); Lisenba v. California, 314 U.S. 219, 229–30 (1941).

117. Michael J. Klarman, *The Racial Origins of Modern Criminal Procedure*, 99 MICH. L. REV. 48, 52 (2000).

118. JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES. POLICIES AND PERSPECTIVES (5th ed. 2013).

119. Klarman, *supra* note 117, at 76–77.

120. Yale Kamisar, Gates, *"Probable Cause," "Good Faith" and Beyond*, 69 IOWA L. REV. 551, 570 (1984).

121. Klarman, *supra* note 117, at 76–77; Haynes v. Washington, 373 U.S. 503, 515 (1963) (establishing that lower court factual determinations do not preclude the Supreme Court from determining otherwise based on the record).

122. *Id.*

123. *See* Massiah v. United States, 377 U.S. 201 (1964); Escobedo v. Illinois, 378 U.S. 478 (1964).

124. *See* DRESSLER & MICHAELS, *supra* note 109, at 439 (observing the conflicted views of the decision and the Court's later renunciation of the reasoning).

125. Caplan, *supra* note 4, at 1440–41 (posing several unresolved questions that remained after the Court's holding in *Escobedo*).

126. *Id.* at 1444 n.138.

127. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

128. Caplan, *supra* note 4, at 1447–48.

judicial opinion,[129] the Court established a set of procedural rules designed to protect the underlying right that the Court had just expanded to the stationhouse.[130]

More recent commentary has demonstrated that the Court's holding was a compromise and that some justices could have gone further, requiring consultation with counsel before interrogation could be conducted.[131] But at the time, the right argued that *Miranda* was a major and unwarranted departure from precedent and from the Constitution.[132] For example, despite the Chief Justice's reassurances that *Miranda* would enhance fact-finding reliability,[133] the dissent[134] and critics[135] argued that confessions, a necessary and legitimate law enforcement tool, would dry up. Critics argued that the Court lacked support in the Fifth Amendment for its holding, both as a matter of history and precedent.[136] Not only did the Fifth Amendment not apply in the stationhouse, but the procedures announced were not constitutional.[137]

The Chief Justice's opinion invited some of the criticism. For example, he acknowledged that under the Court's voluntariness case law, the defendants' statements would have been admissible,[138] raising the question of the Court's constitutional authority to render such statements inadmissible: if the police did not coerce the statement, and the underlying right was to be free from being compelled to be a witness against oneself, how could the Court justify excluding the statement?[139] Also leaving the Court open to criticism was the Chief Justice's statement that states and Congress could come up with alternatives to the

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129. *See* Stephen J. Schulhofer, *Reconsidering Miranda*, 54 U. CHI. L. REV. 435, 435 (1987) (explaining that some commentators believe *Miranda* should be overruled as an unconstitutional use of judicial power).

130. *See Miranda*, 384 U.S. at 444–45.

131. *See* Charles J. Ogletree, *Are Confessions Really Good For the Soul?: A Proposal to Mirandize* Miranda, 100 HARV. L. REV. 1826, 1830 (1987).

132. *See Miranda*, 384 U.S. at 505 (Harlan, J., dissenting).

133. *Id.* at 478–79 (majority opinion). The majority may have had in mind cases like *Spano v. New York,* a case where the facts suggested that the young offender may have had a partial defense to the murder charge, but the police interrogators sealed his fate by, in effect, confessing to facts demonstrating premeditation. 360 U.S. 315, 320 (1959). Another point of some contention is whether the Chief Justice assumed that once counsel became involved, interrogation would take place in the presence of counsel. *Miranda*, 384 U.S. at 466. Some of the language in the opinion suggests as much. *Id.* Some commentators have argued that such a system would be better than the one we now have in place. *See* Albert W. Alschuler, *Constraint and Confession*, 74 DENV. U. L. REV. 957, 974 (1997) (arguing that counsel should be present when defendants speak with police, especially when they are being offered deals).

134. *Miranda*, 384 U.S. at 500 (Harlan, J., dissenting).

135. *See, e.g.*, Caplan, *supra* note 4, at 1451.

136. *Miranda*, 384 U.S. at 526 (White, J., dissenting).

137. Caplan, *supra* note 4, at 1451.

138. *Miranda*, 384 U.S. at 478.

139. *Id.* at 526 (White, J., dissenting).

Miranda warnings.[140] That is, if the warnings are not mandated by the Constitution, how can those procedures be applied to the states?[141]

As indicated, Richard Nixon made law and order an issue in his 1968 presidential campaign.[142] In rapid succession, Nixon was able to make four appointments to the Court in his first two years in office.[143] Chief Justice Warren and Justices Black and Fortas, three of the five justices in the *Miranda* majority, left the Court and were replaced by the new Chief, Warren Burger, and Justices Blackmun and Powell.[144] Only Justice Rehnquist replaced a dissenting justice in *Miranda*, Justice Harlan.[145] Although not without fits and starts, the post-Warren Court era has been marked by efforts to cabin and narrow *Miranda,*[146] culminating with an unsuccessful effort to overrule it in *Dickerson v. United States*.[147]

Ironically, by 2000 when the Court decided *Dickerson*, some early critics and supporters had switched sides: some liberals expressed dissatisfaction with *Miranda*, or at least the post-Warren Court narrow version of *Miranda*.[148] Many critics of *Miranda*, including some representatives of the police and Chief Justice Rehnquist, made their peace with the decision, no doubt because the police learned to live with the decision.[149] Especially in light of post-*Miranda* case law narrowing its application, the police have been able to secure confessions in significant numbers of cases.[150]

B. Questioning Miranda

Many scholars recognize Jerry's article *Questioning Miranda* as one of the best articles on the topic and the best conservative critique of the case.[151] While he shared the reservations of other conservatives about the decision, his critique

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140. *Id.* at 467 (majority opinion).

141. *Id.* at 526–528 (White, J., dissenting).

142. MacKerron*, supra* note 110, at 560.

143. *Members of the Supreme Court of the United States*, SUPREME COURT OF THE UNITED STATES, http://www.supremecourt.gov/about/members.aspx (last visited Feb. 27, 2015) (on file with the *McGeorge Law Review*).

144. *See id.*

145. Miranda v. Arizona, 384 U.S. 436 (1966) (Justices White, Harlan and Stewart dissented. Justice Clark dissented in part).

146. *See* Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter-Century Retrospective*, 31 TULSA L.J. 1, 13, 15–16 (1995).

147. 530 U.S. 428 (2000).

148. *See* Irene Merker Rosenberg & Yale L. Rosenberg, *A Modest Proposal for the Abolition of Custodial Confessions,* 68 N.C. L. REV. 69, 73 (1989); Paul Marcus, *A Return to the "Bright Line Rule" of* Miranda, 35 WM. & MARY L. REV. 93, 109–10 (1993).

149. *See* Marvin Zalman & Brad W. Smith, *The Attitudes of Police Executives Toward* Miranda *and Interrogation Policies*, 97 J. CRIM. L. & CRIMINOLOGY 873, 904–05 (2007).

150. *See, e.g.*, Berkemer v. McCarty, 468 U.S. 420, 433, n.20 (1984).

151. Kamisar, *supra* note 111, at 169.

is far more nuanced. Indeed, as developed below, were the Court to take his proposed alternatives to *Miranda* seriously, defendants might end up with more vigorous protections than they have now under the modern narrow view of *Miranda.*[152]

This section initially discusses *Miranda's* most visible critic, law professor and former United States District Court Judge Paul Cassell. It then explores Jerry's compelling article on *Miranda* and suggests that Jerry's views are more consonant with traditional conservative principles than more modern scholars who claim the conservative mantel.

Professor Cassell, then a professor of law at the University of Utah, was the intellectual leader of the efforts to overrule *Miranda*.[153] A member of the Reagan Justice Department and early member of the Federalist Society, he has been an outspoken supporter of the death penalty and doubts that the United States has executed innocent people.[154] Appearing on national television, he stated that the idea that innocent people have been put to death is an "urban legend."[155]

Cassell demonstrated a similar bulldog approach to *Miranda.* In a prominently placed law review article, he argued that *Miranda* has resulted in dismissal of charges against large numbers of felons.[156] For example, "in 1993, *Miranda* produced roughly 28,000 lost cases against suspects for index violent crimes and 79,000 lost cases against suspects for index property crimes."[157] He argued that more than 500,000 non-index crimes were lost in a single calendar year because of *Miranda.*[158] A number of serious scholars have rebutted this data, including then University of Chicago Law Professor Stephen Schulhofer and University of Stanford Law Professor and economist John Donohue.[159]

An advocate-scholar,[160] Cassell urged the government to invigorate 18 U.S.C. § 3501,[161] a statute enacted by Congress two years after *Miranda* that would have returned the law to the pre-*Miranda* totality-of-the-circumstances voluntariness

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152. *Infra* Part IV.C.

153. *See* Paul G. Cassell, Miranda*'s Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 390 (1996).

154. *See* Edward Cohn, *Paul Cassell and the Goblet of Fire*, AM. PROSPECT (Dec. 19, 2001), http://prospect.org/article/paul-cassell-and-goblet-fire (on file with the *McGeorge Law Review*).

155. *Id.* I have included Professor Cassell's views on the death penalty, largely repudiated by other scholars, to suggest a kind of extremism in his views.

156. Cassell, *supra* note 153, at 440.

157. *Id.*

158. *Id.*

159. Stephen J. Schulhofer, Miranda*'s Practical Effect: Substantial Benefits and Vanishingly Small Social Costs*, 90 NW. U. L. REV. 500, 547 (1996); John J. Donohue III, *Did* Miranda *Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147 (1998).

160. I have no objection to professor-scholars who write about subjects while they also engage in advocacy. Their readers may need to be extra cautious in examining their assertions, given the bias that advocates may bring to a topic where they are publically advocating for a particular position.

161. 18 U.S.C. § 3501.

test.[162] Congress enacted the provision in reaction to Chief Justice Warren's statement in *Miranda* that indicated that Congress and states could enact alternative protections to those established in *Miranda*.[163] Between 1968 and the late 1990s, federal prosecutors had ignored section 3501 on the belief that it was unconstitutional.[164]

Working with the conservative Washington Legal Foundation, Cassell looked for cases around the country that might be suitable vehicles in which to argue for the application of section 3501 as a substitute for *Miranda.*[165] Cassell filed amicus curiae briefs in a number of cases, but his arguments did not find a favorable audience.[166] After Justice Scalia referred favorably to section 3501 in *Davis v. United States,* Cassell's cause found more support.[167] Cassell finally found the case he needed: *United States v. Dickerson.*[168] Because neither the Justice Department nor Dickerson's attorney was willing to defend the application of section 3501, Cassell presented the issue to the Supreme Court.[169] In effect, his brief argued that section 3501 controlled and that *Miranda* should be overruled.[170]

As indicated above, the Supreme Court rejected that position, and it did so by a 7–2 vote.[171] No one can call Chief Justice Rehnquist's majority opinion a resounding endorsement of *Miranda.*[172] From early in his career, Rehnquist was an ardent foe of *Miranda*, seemingly ready to overrule it in a number of cases.[173] In *Dickerson*, he argued in a somewhat backwards manner that *Miranda* was constitutionally based.[174] A few years later, he went back to calling it a prophylactic decision, the argument that led many to believe that *Miranda* lacked a constitutional basis.[175] But the Chief Justice's opinion was a reflection of how established *Miranda* had become: now "embedded in routine police practice," the warnings are "part of our national culture."[176]

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162. Dickerson v. United States, 530 U.S. 428, 436 (2000).

163. *Id.* at 436–37.

164. Paul G. Cassell, *The Statute That Time Forgot: 18 U.S.C § 3501 and the Overhauling of* Miranda, 85 IOWA L. REV. 175, 178 (1999).

165. Cohn, *supra* note 154.

166. *Id.*

167. *Id.*

168. 530 U.S. 428 (2000).

169. Cohn, *supra* note 154; Cassell, *supra* note 164, at 178 n.12.

170. *See* Cassell, *supra* note 164, at 178–79.

171. *Dickerson*, 530 U.S. at 430.

172. *See* DRESSLER & MICHAELS, *supra* note 109 at 454–55.

173. *See* Brewer v. Williams, 430 U.S. 387 (1977) (Rehnquist, J., dissenting); Colten v. Kentucky, 407 U.S. 104 (1972); Michigan v. Payne, 412 U.S. 47 (1973).

174. *Dickerson*, 530 U.S. at 438.

175. *See* United States v. Patane, 542 U.S. 630, 636 (2004) (Rehnquist joined the majority in holding that Miranda was a set of prophylactic rules rather than a Constitutional mandate).

176. *Dickerson*, 530 U.S. at 443.

Even after *Dickerson*, Cassell continued to write critically about *Miranda.* In an article published in the Michigan Law Review, he repeated much of his critique with special criticism aimed at the Court's decision in *Dickerson.*[177] He did argue that the Court should be open to alternatives to the warnings, notably to requiring police to video confessions.[178] In such a case, the suppression court could make independent factual findings.[179]

In contrast to some of *Miranda*'s critics, Jerry's *Questioning* Miranda is more balanced, respectful of other points of view, and more scholarly. His nuanced approach is more consonant with the kind of conservatism found in Edmund Burke's writings than are the writings of modern scholars on the right.

No doubt, some of *Miranda's* critics have relied on some of Jerry's arguments.[180] But most miss the nuance of his position. Making that point requires an examination of the major points in his Vanderbilt article, *Questioning* Miranda.[181]

Questioning Miranda was grounded in several principles and called for reconsideration of that decision. Unlike many foes of *Miranda*, however, Jerry's article recommended a number of robust alternatives to *Miranda* warnings.[182]

His article starts with a review of the pre-*Miranda* perspective, the role of government in safeguarding its citizenry, and the need for questioning a suspect.[183] Further, confession was "viewed as the turning point in a criminal's life," when accompanied by remorse, "it marked the beginning of rehabilitation."[184] Confession recognizes the moral order and the importance of honesty.[185]

Recognizing the need for interrogation, the law imposed relatively few restraints on interrogation, but provided some limitations. While some pressuring of a suspect was proper, the voluntariness test protected against abuse.[186] The test did not create a special duty to inform a suspect of his right to refuse to incriminate himself, but the awareness of the right to resist participation was relevant to a finding of voluntariness.[187] Tolerance of police practices that imposed some pressure on a suspect "prevailed at a time when the police enjoyed greater public confidence," when suspects "were more likely to be imagined as a

177. Paul G. Cassell, *The Paths Not Taken: The Supreme Court's Failures in* Dickerson, 99 MICH. L. REV. 898 (2001).

178. *Id.* at 938–39.

179. *Id.* at 939.

180. *See, e.g.*, *id.*; Caplan, *supra* note 4, at 1467.

181. Caplan, *supra* note 4.

182. *Id.* at 1473–75.

183. *Id.* at 1420.

184. *Id.*

185. *Id.*

186. *Id.* at 1427.

187. *Id.* at 1435.

species apart," and when confession was seen as "naturally born of remorse."[188] The idea that defense counsel had a role during the interrogation process was rejected out of hand: "[A]ny lawyer worth his salt" would tell his client not to cooperate.[189]

By the time the Court decided *Miranda*, attitudes towards police and suspects had changed radically.[190] Because a person who confesses does so contrary to self-interest, the extraction of a confession must be the product of a will overborne by the police.[191] The new explanation for why someone might confess was that confessions must be the product of unfair practices by the police.[192] Further, society's view of suspects transformed as well: they were not seen as lower moral beings and procedures that treated suspects as such demeaned suspects' dignity.[193]

Questioning Miranda recognized how this change of view came about. Starting with cases like *Brown v. Mississippi*, Jerry traced the Court's involvement in trying to mitigate the effect of racial prejudice and the use of the third degree.[194] But the Supreme Court's case law continued to evolve, even in cases where suspects were not subjected to physical violence and where their confessions were not likely unreliable.[195] The Court focused not only on reliability but also on police conduct, with the suggestion that some practices were simply unfair.[196]

Unlike most commentators, Jerry found the voluntariness test worthy of some praise.[197] Critics have found that the test "made '[a]lmost everything . . . relevant, but almost nothing . . . decisive.'"[198] Jerry argued that police recognized some conduct, like "prolonged detention, relay questioning, threats or other intimidation, promises of benefit, [or] denial of food or sleep," would lead to suppression of a suspect's confession.[199] Jerry concluded that the voluntariness test represented a form of "shrewd and responsible pragmatism."[200] That was so at a time when participants in the system could not agree on principles that should be applied.[201] Importantly, he argued by the 1960s, the extreme practices used by

188. *Id.* at 1424.
189. *Id.* (quoting *Miranda*) (alteration in original).
190. *Id.* at 1443–44.
191. *Id.* at 1425.
192. *Id.* at 1424–25.
193. *Id.* at 1425.
194. *Id.* at 1427.
195. *Id.* at 1428–30.
196. *Id.* at 1430.
197. *Id.* at 1433–34.
198. *Id.* at 1432 (alteration in original).
199. *Id.*
200. *Id.* at 1434.
201. *Id.*

police in earlier cases were used less frequently and that "the police were operating with far greater sensitivity to constitutional requirements."[202]

Questioning Miranda also reviewed the short history of the role of counsel in the stationhouse and argued that the idea had little historical or legal authority.[203] At the same time, consistent with changing views of criminals (with greater sympathy and recognition of the role of poverty and environment), the Court began to change its view of the need for counsel in that setting.[204] Cases decided prior to *Miranda*, most notably *Escobedo*, as Jerry noted, suggested a long-standing right to counsel:

> Responding to the charge that the presence of counsel would eliminate all interrogation, the Court countered: "[I]f the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement, then there is something very wrong with that system." This statement is misleading because the right that the Court was defending, far from being of long standing, was newly discovered, indeed created, in this very opinion.[205]

Not only was the right newly created, it was also ill-defined. What would the role of counsel be during interrogation?[206] It might have been to sit with the accused during interrogation, although Jerry doubted that.[207] Instead, he concluded that counsel would bring the interrogation to a close.[208] Jerry saw that result as creating more crime as a result of fewer confessions.[209] Given his doubts about *Escobedo,* his unfavorable views about *Miranda* were not surprising.

He found *Miranda*'s reliance on the Fifth Amendment largely unwarranted.[210] Apart from questions about the basis of the right to counsel during interrogation, he raised questions about the breadth of the right to remain silent.[211] Specifically, he questioned whether a defendant asked merely one question without warnings (e.g., "Where were you last night?") was coerced.[212] He located in *Miranda* a new view of the custodial interrogation process: "[T]he very fact of custodial questioning [was] a grave threat to 'rational judgment' that induced the

202. *Id.* at 1433.
203. *Id.* at 1438.
204. *Id.*
205. *Id.* at 1440.
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.* at 1441.
210. *Id.* at 1446.
211. *Id.* at 1450.
212. *Id.* at 1461.

'abdication of the constitutional privilege.'"[213] This view was a new understanding of the balance between "the autonomy of the individual and concern for the protection of the general public," a radical position adopted for the first time in *Miranda*.[214] Further, Jerry noted that the Court was unclear on the role of counsel, but he expected the newly created right to counsel to dry up confessions.[215]

One major contribution of *Questioning* Miranda is its analysis of the concerns that underpin *Miranda*: notably, it was grounded in the notion of the sporting theory of justice and principles of equality.[216] Jerry argued that the new rules were too generous to the suspect: What is wrong, he asked, with asking a suspect to answer truthfully?[217] Even if a suspect may have reasons not to respond candidly, the government has a justified reason to ask.[218] And outside the context of criminal justice, society routinely expects people to provide explanations of their behavior, even to their detriment.[219] Jerry found the sporting theory of justice too generous to the suspect.[220]

Jerry also identified and questioned the Court's concerns about equality that seem to undergird *Miranda.* In effect, the Court believed that "[s]uspects who do not know their rights, or do not assert them, as a consequence of some handicap—poverty, lack of education, emotional instability—should not . . . fare worse than more accomplished suspects who know and have the capacity to assert their rights."[221] But if the concern is equality of treatment, he doubted that the solution for inequality was to make it easier for less capable suspects to escape punishment.[222] The alternative would be to find ways to bring the hardier suspects to bar: identifying the guilty would benefit society.[223]

The focus on equality also ignored a basic principle: "[G]uilt is personal."[224] Because a similarly situated offender got away with murder does not make a suspect less guilty of murder.[225] In effect, the Court chose the wrong remedy based on the wrong right.[226]

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213. *Id.* at 1447.
214. *Id.*
215. *Id.* at 1448.
216. *Id.* at 1441–42.
217. *Id.* at 1450–51.
218. *Id.*
219. *Id.* at 1451–53.
220. *Id.* at 1450.
221. *Id.* at 1456.
222. *Id.* at 1457–58.
223. *Id.* at 1457.
224. *Id.*
225. *Id.*
226. *Id.* at 1457–58.

His final criticisms about *Miranda* were pragmatic: he argued that by 1966, police practices had improved and were less likely to produce false confessions.[227] He saw *Miranda* "as an exaggerated response to the times . . . . *Miranda* was a child of the racially troubled 1960's and our tragic legacy of slavery."[228] At the time, many viewed the government as the cause of racism and poverty, and saw criminals, not as free will actors, but as the product of poverty or race or both.[229]

He also reviewed empirical studies conducted post-*Miranda*. He raised concerns about the cost to society of lost convictions.[230]

The cost was too great: the Court's decisions like *Escobedo* and *Miranda* imposed "a serious handicap on the government" beyond the need to curb police abuses.[231] The decisions were too distrustful of the police. They also ignored the importance of confessions, which "implicate[] social values, the existence of an integrated, shared network of values . . . ."[232] Jerry placed the decisions within historical context: our nation was living through a period of "a decline of confidence in public purposes." [233]

As developed below, when I first read Jerry's article, what I found most notable was his discussion of the "[l]ess potent medicine . . . at hand":[234] other options that would have properly balanced the competing interests at stake in the interrogation process. His suggestions strike me as having real teeth. He suggested that the Court might have required that the state prove voluntariness beyond a reasonable doubt, and that it could have "added teeth" to the test by creating some per se rules, which would have forbidden specified practices.[235] He included two notable suggestions of practices that might have been forbidden, including an outer time limit for questioning suspects and the presence of a neutral observer from the community.[236] After all, at least for the federal system, the Court had crafted a remedy when federal agents failed to take a suspect before a magistrate for a prompt arraignment: statements taken during a period of unnecessary delay were suppressed.[237] He also observed that videotaping interrogations was then within the capacity of the police and would allow

227. *Id.* at 1458.
228. *Id.* at 1470.
229. *Id.* at 1450.
230. *Id.* at 1462–64.
231. *Id.* at 1471.
232. *Id.* at 1472.
233. *Id.* at 1473 (quoting Francis Allen).
234. *Id.*
235. *Id.* at 1474.
236. *Id.*
237. *Id.*

creation of an adequate record from which to determine the voluntariness of a defendant's confession.[238]

Jerry did not want to give the government the power to extract confessions "forcibly and indecently," but he believed in the need for the government's obligation to segregate dangerous people from the rest of society.[239]

I draw a number of lessons from *Questioning* Miranda. The lack of stridency in Jerry's work makes it eminently readable, increasing its chances of persuading readers. Beyond that, though, several important principles animate the article. No doubt, Jerry did not burn his draft card and did not believe in the radical critique of American values and economy. Instead, *Questioning* Miranda demonstrates concern about the community and a belief in the American system.[240] But unlike some on the right, Jerry did not believe that criminals were incapable of rehabilitation, or that they were a species apart from "normal" members of society.[241] Instead, he saw confession as part of the process toward reform and the reentry into society. As he stated, confessions implicate "social values, the existence of an integrated, shared network of values . . . ."[242] While *Questioning* Miranda does not discuss how to reform inequities caused by poverty and racism, Jerry's work with Legal Services Corporation suggests concern for the indigent members of society.[243] He argues that letting violent criminals free in the name of equality, because wealthier, more informed individuals could go free too, is the wrong way to reform inequality.[244]

In addition to his view that confessions represent an important part of rehabilitation, Jerry argued that *Miranda* ignored the social necessity of protecting society from violent dangerous offenders in favor of protecting the constitutional rights of criminal suspects.[245] The Constitution did not dictate the result in *Miranda* and, in fact, the decision was a radical departure from the Constitution and case law governing confessions.[246]

Unlike some supporters of the police, however, Jerry argued for meaningful limits on the police. By comparison, when one canvasses the views of, for example, Chief Justice Rehnquist, one is hard-pressed to find instances in which he voted to limit police conduct.[247] Other right-leaning justices, like Justice

238. *Id.* at 1474–75.

239. *Id.* at 1475–76.

240. *Id.* at 1471.

241. *Id.* at 1424, 1426.

242. *Id.* at 1472.

243. *Supra* Part II.

244. Caplan, *supra* note 4, at 1456–58.

245. *Id.* at 1467.

246. *Id.* at 1470.

247. Craig M. Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?*, 62 IND. L. J. 273, 278 (1987).

Scalia, may be less predictable in always finding against criminal defendants.[248] But Justice Scalia, like Chief Justice Rehnquist, almost always reads the Fifth Amendment, *Miranda*, voluntariness, and the Sixth Amendment narrowly.[249] Right-leaning scholars like Cassell show relatively little interest in limiting police practices.[250]

As developed in more detail in the next section,[251] Jerry understood the inside workings of the police. Appointed to review police practices in a number of high-visibility situations, Jerry earned the enmity of some pro-police advocates.[252] *Questioning* Miranda demonstrates a similar sense of balance: his inside information made him aware of the realities of police practices.

His insider's view of police practices is evident in a couple of instances in *Questioning* Miranda. Initially, he argued that at the time of *Miranda*, police had already abandoned some of the most egregious methods of interrogation.[253] But he was no knee-jerk defender of the police: the remedies that he proposed had teeth. He was not merely urging that the Court return to the pre-Warren Court voluntariness standard. Further, he went far beyond merely recommending that interrogations be tape-recorded.[254] In addition to recommending videotaping, he argued in favor of some per se practices that would be disallowed.

One example is particularly telling. *Questioning* Miranda argued that the Court could have made its holdings in cases arising under the Federal Rules of Criminal Procedure the constitutional norm.[255] In two earlier cases, the Court held that the police must take a suspect before a magistrate (where he would be appointed counsel) without unnecessary delay.[256] In the second of those two cases, the Court presumed that a delay of more than six hours between arrest and

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248. For example, Justice Scalia's Fourth Amendment views seemingly swing between pro-police and pro-defendant positions. *See* Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friends of Criminal Defendants?*, 94 GEO. L.J. 183, 184 (2005); *see also* David G. Savage, *Criminal Defendants Find an Unlikely Friend in Justice Scalia*, L.A. TIMES (Nov. 24, 2011), http://articles.latimes.com/2011/nov/24/nation/la-na-court-scalia-20111125. (on file with the *McGeorge Law Review*).

249. *See* Evan H. Caminker, Miranda *and Some Puzzles of "Prophylactic" Rules*, 70 U. CIN. L. REV. 1, 5–7 (2001).

250. Cassell, *supra* note 177, at 912.

251. *Infra* Part IV.

252. *See* PHILA. POLICE STUDY TASKFORCE, *supra* note 21; Evaluation Design for Operation Rollout, *supra* note 21; *see also* Letter from Jerome A. Barron to Gerald M. Caplan, *supra* note 21.

253. Caplan, *supra* note 4, at 1444.

254. By contrast, that is, basically, Professor Cassell's only alternative to *Miranda*. *See* Cassell, *supra* note 164, at 258. No doubt, taping provides significant protection to both police and suspects. It does not solve the entire problem. As demonstrated elsewhere, one's observations of the same facts does not always lead to the same conclusions. Depending on the level of review on appeal, a trial court's determination that a confession is voluntary may be determinative.

255. Caplan, *supra* note 4, at 1474.

256. McNabb v. United States, 318 U.S. 332, 349 (1943); Mallory v. United States, 354 U.S. 449, 455 (1957).

court appearance was per se an unnecessary delay, which should result in suppression of a statement taken during that period of time.[257] Interestingly, some liberal commentators who criticized *Miranda* as not going far enough argued that the *McNabb-Mallory* rule provided the suspect greater protection than did *Miranda*.[258] Jerry did not foresee all of the Burger and Rehnquist Courts' efforts to limit *Miranda*, but surely when he wrote *Questioning* Miranda he was aware of many of those new rules. Despite that, he urged vigorous alternatives. I read him as legitimately concerned about limiting police practices, not just giving the police a carte blanche to secure confessions.

As with my earlier discussion of Jerry's work as interim director of the Legal Services Corporation,[259] perhaps all I have proven is that Jerry is a moderate or closet liberal. Here again, a comparison to traditional conservative values that were in evidence before the modern era of talk radio and radical right extremism is worthwhile.

There is an odd contradiction in the writings of some contemporary right-leaning commentators, who seem to flirt with libertarian thought when it comes to economic liberty, but who want to give a great deal of power to the police.[260] That is not classic conservative thought. Remember that Burke, according to his recent biographer Jesse Norman, would have rejected a selfish society as one that "causes people to lose sight of the real social sources of human well-being and to become more selfish and individualistic . . . ."[261] As Arthur Schlesinger, Jr., argued, Burke believed in a society "where power implies responsibility and where all classes should be united in harmonious union by a sense of common trust and mutual obligation."[262]

Questioning Miranda reflects those values. Jerry's belief in democratic institutions is reflected in his article. He believes that those institutions advance the public good.[263] He believes in the role of the police; but he also believes that any institution, including the police, needs restraints.[264] Because the police are granted significant power, the courts have an obligation to limit the abuse of that power, but not to erode it beyond recognition.[265] As developed below,[266] Jerry's

257. *See Mallory*, 354 U.S. at 450–451 (describing the timeline of the questioning).

258. *See* Ogletree, *supra* note 131, at 1830.

259. *Supra* Part II.

260. *See* Kim Hendrickson, *The Conservative Case for Civilian Review*, AM. ENTERPRISE INST. (Oct. 15, 2013), http://www.american.com/archive/2013/october/the-conservative-case-for-civilian-review (on file with the *McGeorge Law Review*) (describing the tension between conservative views to give police greater power and those that mandate a smaller government).

261. *See* NORMAN, *supra* note 2, at 285.

262. Dionne, *supra* note 82.

263. Caplan, *supra* note 4, at 1419.

264. *Id.* at 1460–61.

265. *Id.*

266. *Infra* Part IV.

view of the Fourth Amendment underscored this view of the role of government. In effect, *Questioning* Miranda demonstrated a belief in good government, one capable of protecting the public within meaningful constraints.

IV. THE FOURTH AMENDMENT

Throughout Jerry's career, he moved in and out of positions dealing with the criminal justice system. For example, he served as an Assistant United States Attorney; he was staff attorney for the President's Commission on Law Enforcement and Criminal Justice; he was a consultant to the Police Foundation and the President's Commission on Organized Crime; he was the General Counsel to the Law Enforcement Assistance Administration; he served as the Director of the Philadelphia Police Study Task Force; and he was a consultant to the United States Department of Justice while it was evaluating the use of deadly force by the police in Los Angeles County.[267] And these are only a few examples of his work in criminal justice.[268]

I want to focus on one other position that he held that has special significance for this article. During the early 1970s, Jerry was General Counsel to the Metropolitan Police Department of the District of Columbia.[269] In that role, he developed guidelines for the Metropolitan Police Department.[270] Jerry's motivation for that kind of activity and the rules that he promulgated make an important point about criminal justice and also demonstrate his conservative views about social order.[271] Despite differences with some of his conclusions, I find much to respect in those views.

This part reviews Jerry's views of the President's Commission on Law Enforcement and Criminal Justice and his views on rulemaking.[272] It then turns to some of the specific rules that he promulgated for the Metropolitan Police Department.[273] In discussing those rules, I focus on his disagreement with the exclusionary rule and his insider's view of police practices.[274] The article then turns to two Supreme Court cases that led to expanded police power: one arising out of the District of Columbia where the rules that he helped craft were in place, and one from Florida where no similar constraints were in place.[275] I finish by

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267. Resume of Gerald Caplan, *supra* note 1.

268. *Id.*

269. *Id.*

270. *Id.*

271. *Infra* Part IV.B.

272. *See e.g.* Gerald Caplan, *Reflections on the Nationalization of Crime, 1964–1968*, 1973 LAW & SOC. ORDER 583 (1973).

273. *Infra* Part IV.A.

274. *Infra* Part IV.B.

275. *Infra* Part IV.C.

exploring some of the advantages of his approach to administrative rulemaking, rather than Court-dictated mandates for police practices.[276]

A. The Commission on Law Enforcement and Criminal Justice

As a young professor at Arizona State, Jerry wrote a detailed insider's account of the President's Commission on Law Enforcement and Criminal Justice.[277] His article traced the nationalization of crime, largely the result of rising crime rates during the 1960s and, ironically, of efforts by Presidential candidate Barry Goldwater to make crime a campaign issue in the 1964 presidential election.[278] Despite doubts about an expanded federal role, President Johnson created the Commission on Law Enforcement and Administration of Justice to counter Senator Goldwater's challenge on the crime issue.[279]

The President's response included the creation of the National Crime Commission (the Commission) and the Law Enforcement Assistance Act, which funneled federal money to local law enforcement.[280] At the time, few on the right objected to the expanded role of the federal government.[281] The Commission was more controversial.

The Commission's report, *The Challenge of Crime in a Free Society,* was the major legacy of the Commission.[282] It included more than 200 recommendations.[283] Despite his work on the Commission, Jerry's support for the report was lukewarm, at best. The Commission's recommendations were "surprisingly liberal."[284] "Almost without exception, the Commission avoided the 'get tough' proposals routinely featured in the media, and included only a few measures sought by law enforcement officials."[285] Jerry implicitly chided the Commission because it "shied away from taking a position."[286] Notably, it "skirted the hottest issue of all: the impact of Supreme Court decisions on the police. Many citizens wondered whether the Court was in fact handcuffing the

276. *Infra* Part IV.C.

277. Caplan, *supra* note 272, at 583.

278. *Id.* at 585–86. As Jerry observed, "it is ironic that the man who championed the issue that was ultimately to result in the creation of a new federal agency with an annual budget of nearly 900 million dollars was a strict constitutionalist with a long record of opposition to expanding federal power." *Id.* at 586.

279. *Id.* at 591.

280. *Id.* at 591–93.

281. *Id.* at 593.

282. *Id.* at 596.

283. *Id.*

284. *Id.* at 599 (internal quotation marks omitted).

285. *Id.* at 599–600. The only proposal that seemed to address the concerns of the public was the commission's cautiously worded endorsement of the "stop-and-frisk" procedure. *Id.* at 600.

286. *Id.* at 600.

cops,"[287] but the majority of the Commission members disagreed and did not take on the issue.[288]

Many of the Commission's recommendations reflected liberal assumptions about the crime problem. For example, several of its recommendations focused on crime prevention and support for institutions other than criminal justice institutions to address underlying social conditions that lead to crime.[289] The Commission demonstrated a belief that the war on poverty, inadequate housing, and unemployment was a war on crime.[290]

Although Jerry had a different philosophical view of crime and criminals that emphasized personal responsibility,[291] his criticism of the report was, in large part, pragmatic: at a time when many Americans were afraid to walk the streets, failing to recommend at least some get-tough-on-crime proposals "was an indefensible strategy."[292] Its failure "was also a dangerous strategy" because many of the Commission's proposals were costly and, arguably, too rosy.[293] The result being that the Commission's recommendations would be ignored.[294]

Jerry identified other pragmatic problems with implementation of the proposals. Notably, the Commission lacked the knowledge of who would implement the proposals.[295] Jerry suggested that the proposals lacked an understanding of political power[296] and that there was no way to weed out "unrealistic or utopian notions."[297] Among the problems Jerry identified was that the Commission did not consider how to "stimulate . . . to action" groups like law enforcement officials, who were likely to be unreceptive to many of the recommendations.[298]

Jerry also reviewed a second initiative that was part of President Johnson's response to crime in the streets.[299] The Law Enforcement Assistance Act created the Office of Law Enforcement Assistance (which eventually became the Law

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287. *Id.*

288. *Id.*

289. *Id.* at 601.

290. *Id.*

291. *Supra* Part III.

292. Caplan, *supra* note 272, at 602.

293. *Id.*

294. *Id.* at 605.

295. *Id.*

296. *Id.*

297. *Id.*

298. *Id.* at 606–07. Jerry further discussed the consequences of the resignation of Nicholas Katzenbach as Attorney General. *Id.* at 610–11. His replacement, Ramsey Clark, "surrounded himself with controversy," and indicated that street crime was not a serious problem. *Id.* Clark lacked Katzenbach's skills in dealing with Congress, thereby further impeding chances of implementing the Commission's proposals. *Id.*

299. OFF. OF JUST. PROGRAMS, U.S. DEPT. OF JUST., LEAA/OJP RETROSPECTIVE 2 (1996), *available at* https://www.ncjrs.gov/pdffiles1/nij/164509.pdf (on file with the *McGeorge Law Review*).

Enforcement Assistance Administration (LEAA)).[300] He argued that the LEAA was more responsive to public concerns about street crime.[301] His article reviewed grants made by the agency and gave a candid and balanced assessment, arguing in some instances that the funded projects were successful.[302] But ultimately, he argued that the Office of Law Enforcement Assistance faced a dilemma: the agencies most in need of change, including the police, were the least likely to seek financial assistance.[303] That was, in part, because few police chiefs were part of the legislative process, preventing them from buying into the goals of reform.[304] However, the Law Enforcement Assistance Administration replaced the Office of Law Enforcement Assistance. By the time of that change, "the rising flow of public concern over crime" changed the politics of federal assistance.[305] Police chiefs became more receptive to federal funding and came to recognize that their departments really are part of the criminal justice system.[306]

I have included a somewhat detailed summary of Jerry's views for a reason. It reflects his conservative views about criminal justice. He saw the police as others have called them, the Thin Blue Line,[307] between criminals and innocent members of the public. His insider's view demonstrated a pragmatic understanding of how to implement change, but also enthusiasm and support for the police. Those views were certainly at odds with liberals, who distrusted police and saw them as a threat to civil liberties.[308] But as developed below,[309] Jerry's views about the police were more nuanced than many, more gung-ho proponents of the police. No doubt, because Jerry lived inside the system, he appreciated its flaws, but understood how to improve that system.

B. Administrative Remedies as a Means of Limiting the Police: Jerry's Theoretical Argument

Like many conservatives of his era (and today), Jerry disagreed with the Court's decision in *Mapp v. Ohio*,[310] which held that the exclusionary rule applied to the states to the same extent as it did to federal authorities.[311] Its critics often

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300. Caplan, *supra* note 272, at 612. As indicated, Jerry served as General Counsel to the LEAA from 1968–69. Resume of Gerald Caplan, *supra* note 1.

301. Caplan, *supra* note 272, at 612.

302. *Id.* at 616–17.

303. *Id.* at 629.

304. *Id.* at 633.

305. *Id.* at 635.

306. *Id.*

307. THE THIN BLUE LINE (MGM 1988).

308. *See, e.g.*, LAWRENCE W. SHERMAN, TRUST AND CONFIDENCE IN CRIMINAL JUSTICE 1 (2001).

309. *Infra* Part IV.B–C.

310. 367 U.S. 643 (1961).

311. *See* Gerald M. Caplan, *The Case for Rulemaking by Law Enforcement Agencies*, 36 LAW &

focused on several major arguments. *Mapp* was decided by a razor thin majority,[312] suggesting how radical a departure it was from the views of the Court in the recent past.[313] Its critics claimed that *Mapp* was unwarranted as a matter of constitutional history.[314] They doubted that it could effectively deter police misconduct, given that officers often made mistakes in good faith.[315] Even if it could deter misconduct, the rule's costs were too great and disproportionate: the release of dangerous criminals, even in cases where "the constable has blundered."[316] Further, the rule protects the guilty, not the innocent.[317] Releasing the obviously guilty also produced cynicism among the police and the public.[318]

Less clear is what *Mapp's* critics would have substituted for the exclusionary rule. For example, in rejecting the application of the exclusionary rule only twelve years earlier, the Court in *Wolf v. Colorado* spoke in general terms about equally effective alternatives.[319] In rejecting the need to enforce the Fourth Amendment through the use of the exclusionary rule, Justice Frankfurter concluded:

> We cannot, therefore, regard it as a departure from basic standards to remand such persons, together with those who emerge scatheless from a search, to the remedies of private action and such protection as the internal discipline of the police, under the eyes of an alert public opinion, may afford.[320]

But his discussion of state practice did not offer much support for the view that any of these remedies was particularly effective.[321]

Even the dissenters in *Mapp* did not offer a strong argument that effective alternative remedies were in place. The dissent focused primarily on judicial

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CONTEMP. PROBS. 500, 510 (1971) ("To the extent that the exclusionary rule is grounded on the principle of deterrence, it may be that this goal can be achieved through internal discipline while allowing the trial to become a more straightforward search for truth."). Some liberals shared the concern that appellate courts have a limited ability to regulate police conduct. *See also* Anthony G. Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 795 (1970).

312. *See Mapp*, 367 U.S. at 661 (Black, J., concurring).

313. *See* Wolf v. Colorado, 338 U.S. 25 (1949).

314. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785–86 (1994).

315. *See* William C. Heffernan & Richard W. Lovely, *Evaluating the Fourth Amendment Exclusionary Rule: The Problem of Police Compliance with the Law*, 24 U. MICH. J. L. REFORM 311, 332–45 (1991).

316. People v. Defore, 150 N.E. 585, 587 (N.Y. 1926).

317. AKHIL REED AMAR, AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY 18, 521 n.23 (2012).

318. WILLIAM T. PIZZI, TRIALS WITHOUT TRUTH: WHY OUR SYSTEM OF CRIMINAL TRIALS HAS BECOME AN EXPENSIVE FAILURE AND WHAT WE NEED TO DO TO REBUILD IT 38–39 (1999).

319. 338 U.S. 25 (1949).

320. *Id.* at 31.

321. *Id.* at 31–32.

restraint[322] and federalism concerns,[323] with little focus on remedies in place in the states.[324]

Warren Burger, Chief Justice Warren's replacement, was appointed in part because he was a strident critic of *Mapp*.[325] Despite his criticisms of *Mapp*, when the Court addressed whether the Fourth Amendment created a federal tort when federal officials violated the Fourth Amendment, Chief Justice Burger dissented from the Court's holding that the Fourth Amendment did so.[326] His criticism of the exclusionary rule and his lack of support for one plausible alternative remedy—tort damages—suggest that Burger did not see much need for an effective remedy for Fourth Amendment violations.[327] One suspects that many of *Mapp's* critics were content to give police wide berth in fighting crime with few meaningful checks on their power.

As observed, Jerry disagreed with *Mapp's* holding. He objected on a number of grounds. Unlike some critics who saw *Mapp* as unwarranted as a matter of constitutional law, Jerry focused primarily on pragmatic grounds.[328] He saw "judicial activism" as a reaction to the lack of effective action on the part of the executive branch.[329] But appellate courts are not well-situated to make law and can have been seen as serving a "'backstopping role.'"[330] Day-to-day, police officers face a wide variety of situations that the appellate courts cannot anticipate.[331]

Beyond the limited capacity for lawmaking, appellate courts often produced rules that police resented. Police often saw cases like *Mapp* as making the street officer's job unnecessarily difficult.[332] Resenting the uninformed intrusion by the courts, officers sometimes felt justified in subverting the rules.[333] For example, after *Mapp*, apparently many police officers, now constrained in searching

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322. Mapp v. Ohio, 367 U.S. 643, 672 (1961) (Harlan, J., dissenting).

323. *Id.* at 678–680 (discussing why the Fourth Amendment should not apply through the Fourteenth Amendment to the States).

324. *Id.* at 681–682.

325. *See* Warren E. Burger, *Who Will Watch the Watchmen?*, 14 AM. U. L. REV. 1 (1964); *see also* Jesse H. Choper, *The Burger Court: Misperceptions Regarding Judicial Restraint and Insensitivity to Individual Rights*, 30 SYRACUSE L. REV. 767, 767 (1979) (explaining that Nixon chose Burger to replace Warren in an effort to promote judicial restraint).

326. Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 411 (1971) (Burger, J., dissenting).

327. *Id.* at 422.

328. *See* Caplan, *supra* note 311, at 500–501 (explaining some disenchantment with the exclusionary rule).

329. *Id.* at 505.

330. *Id.* (citing Amsterdam, *supra* note 311, at 790).

331. *Id.* at 506.

332. *Id.* at 502 (noting that department rules are easier for officers to follow than court decisions and statutes).

333. *Id.* at 503 (observing that with rules in place, the court no longer finds against the officer personally, but against his department, thus offering the officer more individual protection).

suspicious individuals, testify that, upon approaching suspects, the suspects abandon drugs.[334]

Having judges imposing rules on the police worked against more sensible regulation of police conduct. As Jerry argued, "[h]istorically, law enforcement agencies have been neither bold nor vigorous in the development of policy."[335] That is so because the police "have responded to the dictates of others, most notably the judiciary, rather than acting as initiators of policies."[336] In instances where police have developed policies, for example, in reaction to a judicial decision, the resulting policies have often been loose and vague.[337] But Jerry made a significant contribution, both in writing about rulemaking for law enforcement agencies and in doing it at the ground level.

In *The Case for Rulemaking By Law Enforcement Agencies,* Jerry argued that "some notable exceptions . . . demonstrate that rulemaking is a feasible approach to upgrading the quality of criminal investigation."[338] He cited the specific orders promulgated for the Metropolitan Police Department of the District of Columbia as such an example.[339] And, of course, he played a major role in drafting those guidelines.[340]

The argument in favor of agency rulemaking has some similarities with the arguments in favor of bright line rules,[341] with some key differences. Importantly, rulemaking should be done by police departments, not by the courts, as in the case of many bright line rules worked out in Supreme Court opinions.[342] The result is that, unlike judicial decisions that are not likely to offer clear guidance or to be based on day-to-day experiences of the police, the rules would be "formulated in categories meaningful to a policeman."[343] Reliance on rulemaking places the focus on the top officials as long as the police officer followed the departmental rules.[344]

Rulemaking can anticipate cases that may arise in the courts. Without rulemaking, police act consistent with their general sense of the law, with the possibility that a court will determine later that the police erred.[345] By contrast,

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334. Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 FORDHAM URB. L.J. 315, 324 (2005).

335. Caplan, *supra* note 311, at 501.

336. *Id.*

337. *Id.* at 502.

338. *Id.*

339. *Id.*

340. *See* Resume of Gerald Caplan, *supra* note 1 (indicating he worked as counsel for the Commission).

341. *Compare* Caplan, *supra* note 311, at 500, *with* Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 227 (1984).

342. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).

343. Caplan, *supra* note 311, at 502.

344. *Id.* at 503. The incentive to follow departmental rules, even if voided by the courts, is that it would provide the officers from immunity from suit. *Id.*

345. *Id.* at 502–03.

because police officials are familiar with issues that arise on a day-to-day basis, they can anticipate the need for rules governing police conduct before the matter is adjudicated.[346]

Jerry cited one instance of effective rulemaking that influenced a United States court of appeals. The rule in place in the District of Columbia restricted "'on-and near-the-scene identification confrontations to suspects arrested within 60 minutes after the alleged offense and in close proximity to the scene.'"[347] Commending the regulation as "a careful and commendable administrative effort to balance" competing interests, the D.C. Circuit concluded that, "[w]e see no need for interposing at this time any more rigid time standard by judicial declaration."[348]

While police officials typically created rules because of judicial decisions, Jerry argued that the trend might reverse: effective rulemaking may, he opined, lead to more sympathetic treatment by the courts.[349] Further, rulemaking should "serve to reduce the uneven enforcement that now characterizes so much of street policing."[350]

Jerry also argued for a diminished role for the exclusionary rule. The court would apply the exclusionary rule only if a court were to find that the policy was deficient.[351] Further, effective internal disciplinary policies "might be a basis for discarding the principle of excluding evidence altogether."[352]

Many participants in the criminal justice system, especially liberals, may question Jerry's optimistic assessment that police departments would follow through with effective rulemaking.[353] No doubt, at times, Jerry must have questioned whether he was too supportive of the police. For example, his investigations of the Philadelphia and Los Angeles police departments pulled no punches.[354] He found plenty to criticize in both departments.[355]

Apart from whether Jerry may be too supportive of police, I want to explore in more detail one of the rules that Jerry helped promulgate for the District of Columbia police and its interesting history in the Supreme Court.

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346. *Id.* at 505, 507.

347. *Id.* at 504 (quoting *United States v. Perry*, 449 F.2d 1026, 1037 (D.C. Cir. 1971)).

348. *Id.* at 504 (quoting *Perry*, 449 F.2d at 1037).

349. *Id.*

350. *Id.*

351. *Id.* at 510.

352. *Id.*

353. Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

354. *See* PHILA. POLICE STUDY TASKFORCE, *supra* note 21, at 16 ("Our other observation is that there is considerable room for improvement in the kind and quality of policing provided to Philadelphia. To us, the Philadelphia Police Department's development as an effective, modern department seems arrested."); Evaluation Design for Operation Rollout, *supra* note 21.

355. *See* PHILA. POLICE STUDY TASKFORCE, *supra* note 21, at 16; Evaluation Design for Operation Rollout, *supra* note 21.

C. Administrative Remedies as a Means of Limiting the Police: In Practice

I have always thought that *United States v. Robinson*[356] was a bad decision. Although the trend began a year earlier in *Chambers v. Maroney*,[357]*Robinson* ushered in the era of "bright line" fever.[358] In a series of cases, the Warren Court had effectively limited the term "reasonable" within the Fourth Amendment. According to the Court, the basic premise was that police needed probable cause and a search warrant, unless a case came within a narrow exception.[359] Further, in defining "reasonable" exceptions or in assessing the reasonableness of police conduct, the Warren Court limited the scope of police conduct by tying their conduct to the underlying circumstances.[360] Hence, in a case like *Chimel v. California*,[361] a search incident to a lawful arrest was confined to the immediate area around the arrestee. That was so because a search incident to a lawful arrest was justified by the need to protect the arresting officers and to protect against a suspect trying to destroy evidence.[362]

That approach started to change with *Robinson*. There, an officer arrested the defendant for operating his vehicle with a suspended license.[363] The officer testified that he did not fear for his safety.[364] Further, the officer had no need to protect against destruction of evidence of the offense of arrest: the suspect would not have evidence on his person that he was driving on a suspended license.[365] Even further, when the officer searched the defendant, he found a crumpled up cigarette packet and instead of searching it, he could easily have placed it beyond the defendant's reach. Instead, opening the packet, he discovered gelatin capsules of heroin.[366]

Relying on the approach taken during the Warren Court, the lower court found that the search exceeded the scope of a proper search incident to a lawful arrest.[367] The Supreme Court reversed. At root, the Court found a need for a clear rule: although the Court made a weak effort to tie its holding to precedent, which

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356. 414 U.S. 218 (1973).

357. 399 U.S. 42 (1970).

358. *See, e.g.*, Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 360 (1982).

359. *See* Katz v. United States, 389 U.S. 347, 357 (1967); *see also* Arizona v. Hicks, 480 U.S. 321, 326 (1987).

360. Terry v. Ohio. 392 U.S. 1, 19 (1968).

361. 395 U.S. 752 (1969).

362. *Id.* at 763; *see also* Arizona v. Gant, 566 U.S. 332, 337 (2009); United States v. Gomez, 807 F. Supp. 2d 1134, 1136 (S.D. Fla. 2011).

363. United States v. Robinson, 414 U.S. 218, 220–21 (1973).

364. *Id.* at 236.

365. *Id.* at 252. (Marshall, J., dissenting).

366. *See id.* at 223.

367. *Id.* at 220.

it conceded was "sketchy,"[368] it rejected the need for "case-by-case adjudication."[369] The fact of an arrest, without more, determined the right to conduct a full search of the arrestee.[370] Untying the meaning of "reasonableness" from the underlying rationale for the rule has led to a significant expansion of police power.[371]

Having taught *Robinson* for years, I realized only in more recent years that *Robinson* could have been constrained and that *Gustafson v. Florida*,[372]and not *Robinson*, was the more troubling case. Few case books use *Gustafson*, and some may not even cite the decision in a discussion of *Robinson*.[373] *Gustafson* seems at first blush to follow logically from the Court's fuller discussion of the issue in *Robinson.*[374]

Robinson arose in the District of Columbia. In effect at the time were the regulations that Jerry had helped promulgate.[375] Notably, if an officer made a full custodial arrest, "standard operating procedures" required the officer to perform "a full 'field type search.'"[376] By comparison, the officer in *Gustafson* was not so constrained.[377]

The *Robinson* majority made a point of the existence of the regulations.[378] That made the Court's decision more palatable: in *Robinson*, the officer was acting entirely reasonably because he was doing what he was trained to do and so, the Court might have been suggesting, finding that the officer exceeded his authority would be unreasonable. The officer was doing his job. Or one could paraphrase Detective Friday: "Just the rules, ma'am."[379]

No one reading *Robinson* misses the subtext: the suspect, driving a Cadillac in the District of Columbia, was black; the officer was probably white.[380] As became more apparent during the 1990s, black motorists believe with good

368. *Id.* at 232.

369. *Id*. at 235.

370. *Id.*

371. *See generally id.*; *Gustafson v. Florida*, 414 U.S. 260 (1973).

372. 414 U.S. 260 (1973).

373. *See* JAMES J. TOMKOVICZ & WELSH S. WHITE, CRIMINAL PROCEDURE: CONSTITUTIONAL CONSTRAINTS UPON INVESTIGATION AND PROOF 189–90 (7th ed. 2012) (using *Gustafson* only in a short note accompanying *Robinson*); DRESSLER & THOMAS, *supra* note 118, at 237 (describing *Gustafson* in a note accompanying *Robinson*).

374. *Gustafson*, 414 U.S. at 263–64 (citing and strictly applying the Court's rule from *Robinson*).

375. *Robinson*, 414 U.S. at 221 n.2.

376. *Id.*

377. 414 U.S. at 261–62.

378. *Id.* at 221 n.2.

379. Dragnet (NBC television broadcast January 1952–August 1959).

380. *See* Ronald Weitzer, *White, Black, or Blue Cops? Race and Citizen Assessments of Police Officers*, 28 J. CRIM. JUST. 313, 313 (2000) (indicating that the Kerner Commission urged the recruitment of more black police officers in 1968, the same year Robinson was arrested).

reason that they are singled out for arbitrary treatment by the police.[381] One virtue of the regulation in place in the District of Columbia was that it limited an officer's discretion. He had to do a full search when he was arresting a person without regard to race.[382] While the search might have exceeded the underlying justification if narrowly construed, the regulation was a step toward limiting arbitrariness by the police.

But the Court did not choose that route. Instead, as indicated above, it moved seamlessly from *Robinson* to *Gustafson*, treating the two cases as indistinguishable, even though the officer in *Gustafson* was not constrained by similar regulations.[383] Distinguishing the two cases would have given incentive to police to develop guidelines with effective internal consequences for their violation along the lines that Jerry suggested. As discussed above, that would have provided some limits on what is "reasonable."[384] Observers of the Burger, Rehnquist, and Roberts' Courts have noticed that instead, "reasonableness" seems to have evolved into a green light for the police.[385]

Racial profiling is an area where Jerry's rulemaking approach has proven to be an effective alternative to Court action. Over a couple of decades, the Court seemed to suggest that an officer's motive in conducting a search was relevant to the legality of the officer's conduct. In *Chimel*, for example, the Court seemed troubled by the fact that officers timed their arrest of the defendant so that they could conduct a full search of his home as a search incident to his arrest.[386] Elsewhere, the Court had stated, for example, that "an inventory search must not be used as a ruse for a general rummaging in order to discover incriminatory evidence."[387] In other cases, the Court upheld police conduct because the record did not demonstrate bad faith[388] or that the police conduct did not seem to be a pretext to avoid the strictures of the Fourth Amendment.[389]

The Court squarely addressed the issue of racial profiling in *Whren v. United States*.[390] There, the record spoke strongly of an improper use of traffic laws to stop a black male, whom the officer suspected of drug activity.[391] But a

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381. *See* Jeffrey Goldberg, *The Color of Suspicion*, N.Y. TIMES MAG., June 20, 1999, *available at* http://www.nytimes.com/1999/06/20/magazine/the-color-of-suspicion.html?module=Search&mabReward=relbias%3Ar (on file with the *McGeorge Law Review*); *see also* Hope Viner Samborn, *Profiled and Pulled Over*, 85 A.B.A.J., 18 (Oct. 1999); DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM 34–35 (1999).

382. *Robinson*, 414 U.S. at 221 n.2.

383. *Gustafson*, 414 U.S. at 263–64.

384. *Supra* Part IV.C.

385. Kamisar, *supra*, note 146, at 5; *see also* United States v. Rabinowitz, 339 U.S. 56, 66 (1950).

386. 395 U.S. 752, 767 (1969).

387. Florida v. Wells, 495 U.S. 1, 4 (1990).

388. Colorado v. Bertine, 479 U.S. 367, 372 (1987).

389. New York v. Burger, 482 U.S. 691, 716–17 & n.27 (1987).

390. 517 U.S. 806, 808 (1996).

391. *Id.* at 810.

unanimous Court held that the motive of the officer in making the stop was irrelevant.[392] The Court judged the police conduct from an objective standard: Did the suspect violate the traffic law, allowing the lawful stop?[393]

Anyone familiar with the wide range of traffic offenses and the ease with which an officer can stop virtually any motorist based on a violation recognizes the power acceded to the police.[394] But cases like *Whren* allow police to stop whomever they choose with virtually no Fourth Amendment protection.[395] The Fourth Amendment does not check an officer's discretion, allowing conduct that is entirely discriminatory and, therefore, unreasonable.

In part because civil rights groups have raised the issue, some local and state governments have addressed concerns about racial profiling.[396] Whether police officials would have acted on their own without those efforts is unclear. But in response to pressure from the public, some police departments have developed regulations limiting racial profiling.[397]

My views differ from Jerry's. As do many liberals, I have less faith in the willingness of the police to self-regulate. I doubt that many current reforms would be in place without the exclusionary rule.[398] But the point of this article is not to explore my differences with Jerry's positions. Instead, this article focuses on Jerry's conservative views. Once again, in the area of the Fourth Amendment, he parted company with liberals, who were especially active in his early career.[399] His views were, however, consistent with several traditional conservative principles.[400]

Today, many on the right cite President Reagan's statement that government is not the answer; instead it is the problem.[401] That is not traditional conservatism.

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392. *Id.* at 812.

393. *Id.* at 819.

394. *See* Atwater v. City of Lago Vista, 532 U.S. 318, 324 (2001); *see also* State v. Ladson, 138 Wash. 2d 343, 346 (1999).

395. 517 U.S. at 819.

396. *See, e.g.*, 2009 N.J. REG. TEXT 170662 (NS); 2009 WI REG. TEXT 197250 (NS).

397. *See, e.g.*, ERIC J. FRITSCH & CHAD R. TRULSON, DUNCANVILLE POLICE DEPT. RACIAL PROFILING ANALYSIS (2012) (noting that the police department has a regulation, 5.41, that prohibits racial profiling of any sort).

398. *See* Michael Vitiello, Herring v. United States: Mapp*'s "Artless" Overruling?*, 10 NEV. L.J. 164 (2009); Michael Vitiello & Jane C. Burger, Mapp*'s Exclusionary Rule: Is the Court Crying Wolf?*, 86 DICKERSON L. REV. 15 (1981).

399. The period of time between *Mapp* and *Duncan v. Louisiana*, 391 U.S. 145 (1968), was a liberal heyday. Beginning with *Mapp* and ending with *Duncan*, the Court held virtually all of the protections in the Bill of Rights applicable to the states. *See, e.g.*, TOMKOVICZ & WHITE, *supra* note 373, at xiv–xv.

400. *Supra* Part I.

401. Ronald Reagan, President of the United States, Inaugural Address (Jan. 20, 1981); *see also* Isaiah J. Poole, *Paul Ryan Misses Top Reason We Haven't 'Won' the War on Poverty*, CAMPAIGN FOR AM.'S FUTURE (Mar. 4, 2014), http://ourfuture.org/20140304/paul-ryan-misses-top-reason-we-havent-won-the-war-on-poverty (on file with the *McGeorge Law Review*) (comparing Paul Ryan to Reagan and the "government is the problem" mentality).

While traditional conservatives favor smaller government, they favor good government and see the need for governmental institutions.[402] Consistent with those principles, Jerry favored vigorous police departments as necessary to protect the public.[403] His work in the criminal justice system led him to appreciate the efforts of the police and to see many of them as hardworking honorable men and women. But his insider's view also taught him the need to regulate police conduct. Excluding reliable evidence at trial seemed to extract too high a cost.[404] At the same time, his remedy of internal police regulations may work effectively to guide police discretion and to protect the public from arbitrary police power.[405]

V. CONCLUDING THOUGHTS

A quick look at the author's note in a number of my articles reflects my debt to Jerry.[406] He has generously reviewed drafts of my articles and offered extremely helpful comments. Most often, he has offered important insights from a thoughtful conservative prospective. He has deepened my understanding of police practices. At the same time, he has not been a hard-edged zealot. Had President George W. Bush not co-opted the title, I might be tempted to call Jerry a compassionate conservative.

Again, despite evidence that President Bush was an extremist in many areas,[407] Jerry's views were much more consonant with traditional conservatism. As his work with the Corporation demonstrated, he believed in the positive role of government in helping those in need and in restraining the power of government.[408] He did not believe in letting the less fortunate individuals make it on their own.[409] He believed in the shared sense of responsibility and saw value in integrating all members into the larger community.[410]

In areas of criminal justice, he understood and sympathized with the police.[411] He worked closely with police agencies. He saw the day-to-day efforts of the

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402. NORMAN, *supra* note 2.

403. *Supra* Part IV.

404. *Supra* Part III.

405. *Supra* Part IV.

406. *See* Michael Vitiello, *Personal Reflections on* Connick v. Thompson, 11 OHIO ST. CRIM. L.J. 217 (2013); Michael Vitiello, *Addressing the Special Problems of Mentally Ill Prisoners*, 88 DENV. L. REV. 57 (2010).

407. *See, e.g.*, Amy Gutmann, *The Lure & Dangers of Extremist Rhetoric*, J. AM. ACAD. ARTS & SCI. (2007), *available at* http://www.upenn.edu/president/meet-president/extremist-rhetoric (on file with the *McGeorge Law Review*).

408. *Supra* Part II.

409. *Supra* Part II.

410. *Supra* Part II.

411. *Supra* Part IV.

police to protect society from dangerous felons. But he was no blind advocate for uncontrolled police power.[412]

Anyone who listens to talk radio or reads about the dysfunction of government recognizes how far the right wing has departed from traditional conservative values.[413] Having more Jerry Caplan's working in the public sector would be a great addition to the tone and intelligence of public discourse. And even more importantly from my perspective, his retirement leaves the legal academy a less congenial place. Jerry, I salute you.

412. *Supra* Part IV.

413. MANN & ORNSTEIN, *supra* note 100.