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## **The Fourth, Fifth and Sixth Amendments: The Supreme Court's Major Search and Seizure, Interrogation, and Criminal Jury Selection Decisions During the 1990 Term**

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## **The Fourth, Fifth and Sixth Amendments: The Supreme Court's Major Search and Seizure, Interrogation, and Criminal Jury Selection Decisions During the 1990 Term**

*Hon. Leon Lazer:*

Professor Hellerstein, of Brooklyn Law School, will now discuss the Fourth, Fifth and Sixth Amendment issues addressed by the Court last Term. Professor Hellerstein is a graduate of Harvard Law School and has extensive experience in criminal litigation, appellate litigation and Supreme Court arguments. From 1962 to 1964, he served as Staff Counsel to the United States Commission on Human Rights. He also served as Chief Counsel for the Legal Aid Society Criminal Appeals Bureau for seventeen years.

*Professor William E. Hellerstein:*

At last year's Symposium<sup>1</sup> I stated that if one were to describe the United States Supreme Court's major criminal law rulings during the 1989 Term in cinematographic terms, an appropriate title could have been, "Honey, I Shrunk the Fourth [Fifth and Sixth] Amendment[s]" and that "if one were to do the same for the dissenting opinions written, the title could be 'Field of Dreams.'"<sup>2</sup> For the Term just concluded, "Predator" or "Terminator 2" strikes me as appropriate for the majority opinions; "Ghost" will do for the dissents. The 1990 Term of the Supreme Court can easily be considered a banner one for state and local law enforcement interests. Conversely, for those who favor greater protection for individuals in the balance between law enforcement and the Bill of Rights, it was a particularly disheartening Term. Virtually every important criminal case was decided in the government's favor. Moreover, in no other term in recent

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1. Hellerstein, *Fourth, Fifth, and Sixth Amendments, The Supreme Court and Local Government Law, The 1989-1990 Term*, 7 *TOURO L. REV.* 319 (1991).

2. *Id.* at 320.

memory have so many precedents protective of individual rights been overturned or emasculated.

The format for this past Term's hostility to individual rights has been set for quite some time. However, as Ira Mickenberg has pointed out:

Five years ago it would have been inconceivable to suggest that the departure of Thurgood Marshall might have no immediate impact on U.S. Supreme Court rulings in the area of criminal law. Yet if the 1990-'91 term is any indication of trends to come, the replacement of Justice Marshall will only allow the government to win criminal cases by 7-2 and 8-1 majorities, instead of 6-3 and 7-2.<sup>3</sup>

It is apparent, therefore, that the Rehnquist Court's dedication to the task of heavily weighing the balance between law enforcement and the individual in favor of the former is well on course, and there is little indication that there will be any change in the near future. The assessment that must be made, however, remains the same: is the Court jettisoning core values of our Bill of Rights for the sake of expedience in the war against crime? In biblical terms, is our birthright being sold for a mess of pottage?

## SEARCH AND SEIZURE

Two of the Court's decisions dealt with the meaning of "seizure" under the Fourth Amendment. The first, *Florida v. Bostick*,<sup>4</sup> has enormous implications for local law enforcement interests. The second, *California v. Hodari D.*,<sup>5</sup> has considerable significance doctrinally but it is not of the same operational importance as *Bostick*.

In *Bostick*, the Court decided the validity of a practice of the Broward County sheriff's department colloquially referred to as "working the buses." However, it is a practice not at all confined to the warm environs of Broward County and the Court's virtual

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3. Ira Mickenberg, *Criminal Rulings Granted the State Broad New Power*, NAT'L L.J., Aug. 19, 1991, at S10.

4. 111 S. Ct. 2382 (1991).

5. 111 S. Ct. 1547 (1991).

endorsement of it can only inspire its adoption in many other places.

Sheriff's deputies boarded a bus in Fort Lauderdale bound for Atlanta from Miami.<sup>6</sup> Without any particularized suspicion, they approached Bostick who was seated, and asked whether they could search his luggage.<sup>7</sup> The officers wore jackets identifying them as drug enforcement agents and a zipper pouch held by one of the officers visibly contained a pistol.<sup>8</sup> Bostick consented and they found cocaine in his suitcase.<sup>9</sup> The Florida Supreme Court held that the Broward County sheriff's practice of "working the buses" was unconstitutional.<sup>10</sup> The court reasoned that "Bostick had been seized because a reasonable passenger in his situation would not have felt free to leave the bus to avoid questioning by the police."<sup>11</sup>

Unlike the Court's decision of the previous Term in *Michigan Department of State Police v. Sitz*,<sup>12</sup> where the Court upheld a drunk driving roadblock as reasonable,<sup>13</sup> *Bostick* did not squarely produce a ruling on the reasonableness of "working the buses" under the Fourth Amendment.<sup>14</sup> Instead, writing for a six Justice majority, Justice O'Connor construed the opinion below as adopting a *per se* rule that "working the buses" was unconstitutional.<sup>15</sup> She rejected the propriety of such a rule, and remanded the case to the Florida Supreme Court for a factual determination as to whether Bostick reasonably believed that he was not free to decline the officers' request to search his luggage or otherwise terminate the encounter.<sup>16</sup>

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6. *Bostick*, 111 S. Ct. at 2384.

7. *Id.* at 2384-85.

8. *Id.* at 2384.

9. *Id.*

10. *Id.* at 2385 (citing *Bostick v. State*, 554 So. 2d 1153, 1154 (Fla. 1989).

11. *Id.* (interpreting *Bostick*, 554 So. 2d at 1154.).

12. 496 U.S. 444 (1990).

13. *Id.* at 447.

14. U.S. CONST. amend. IV.

15. *Bostick*, 111 S. Ct. at 2389.

16. *Id.*

The majority held that "working the buses" did not necessarily constitute a seizure,<sup>17</sup> emphasizing that, since *Terry v. Ohio*,<sup>18</sup> the Court's decisions have made it clear that a seizure does not occur every time a police officer approaches and questions a person in public.<sup>19</sup> That the encounter took place in the "cramped confines" of a bus did not render the situation qualitatively different.<sup>20</sup> The error committed by the Florida Supreme Court, according to Justice O'Connor, was its determination that such an encounter was always a seizure because a passenger, whose bus is about to depart and whose luggage is aboard, would not feel free to leave the bus.<sup>21</sup>

Justice O'Connor maintained that a passenger on board a soon-to-depart bus will not feel free to leave regardless of whether the police were present.<sup>22</sup> Therefore, whether or not a person is "free to leave" is the wrong question.<sup>23</sup> Rather, "the appropriate inquiry is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."<sup>24</sup>

Justice O'Connor reasoned that the *Bostick* case was analytically indistinguishable from *Immigration and Naturalization Service v. Delgado*,<sup>25</sup> in which the Court held that factory employees were not "seized" for Fourth Amendment purposes when immigration agents went through a factory questioning workers about their status while other agents stood at the exits.<sup>26</sup> As in *Delgado*, she reasoned, any compunction an individual may have

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17. *Id.* at 2386.

18. 392 U.S. 1 (1968).

19. *Bostick*, 111 S. Ct. at 2386.

20. *Id.*

21. *Id.* at 2387.

22. *Id.*

23. *Id.*

24. *Id.*

25. 466 U.S. 210 (1984).

26. *Id.* at 218. The Court concluded that even though the workers were not free to leave the building without being questioned, the agent's conduct should have given employees "no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer." *Id.*

felt to remain rather than depart was the result of something other than the actions of law enforcement officials.<sup>27</sup>

Justice Marshall, in a dissent joined by Justices Blackmun and Stevens, characterized the practice of “working the buses” as a tactic that “bears all the indicia of coercion and unjustified intrusion associated with the general warrant,”<sup>28</sup> and thus violates the “core values” of the Fourth Amendment.<sup>29</sup> He pointed out that the Broward County practice had become an “increasingly common tactic” throughout the country.<sup>30</sup> He noted further that these were “dragnet” style sweeps which permitted the police “to engage in a tremendously high volume of searches;”<sup>31</sup> but that the “percentage of successful drug interdictions is low.”<sup>32</sup> He referred to lower court cases which showed, in one instance, that a single officer, employing sweep techniques, had searched over three thousand bags in a nine-month period,<sup>33</sup> and in another instance, that a sweep of one hundred buses had resulted in a paltry seven arrests.<sup>34</sup>

Justice Marshall made it clear that he had “no objection to the manner in which the majority frames the test for determining whether a suspicionless bus sweep amounts to a Fourth Amendment ‘seizure.’”<sup>35</sup> Moreover, he agreed “that the appropriate question is whether a passenger who is approached during such a sweep ‘would feel free to decline the officers’ requests or otherwise terminate the encounter.’”<sup>36</sup> However, he ridiculed the majority’s assertion that Bostick was responsible “for his own sensation of constraint,”<sup>37</sup> stating that it “borders on sophism and

27. *Bostick*, 111 S. Ct. at 2387.

28. *Id.* at 2389 (Marshall, J., dissenting).

29. *Id.* (Marshall, J., dissenting).

30. *Id.* at 2390 (Marshall, J., dissenting).

31. *Id.* (Marshall, J., dissenting).

32. *Id.* (Marshall, J., dissenting).

33. *Id.* (Marshall, J., dissenting) (citing to *Florida v. Kerwick*, 512 So. 2d 347 (Fla. App. 1987)).

34. *Id.* (Marshall, J., dissenting) (citing to *United States v. Flowers*, 912 F.2d 707 (9th Cir. 1990)).

35. *Id.* at 2391 (Marshall, J., dissenting).

36. *Id.* (Marshall, J., dissenting).

37. *Id.* (Marshall, J., dissenting).

trivializes the values that underlie the Fourth Amendment.”<sup>38</sup> Furthermore, Justice Marshall stated that:

By consciously deciding to single out persons who have undertaken interstate or intrastate travel, officers who conduct suspicionless, dragnet-style sweeps put passengers to the choice of cooperating or of exiting their buses and possibly being stranded in unfamiliar locations. It is exactly because this ‘choice’ is no ‘choice’ at all that police engage this technique.<sup>39</sup>

Justice Marshall distinguished *Delgado* on several grounds. First, the workers in *Delgado*, unlike bus passengers, were not required to abandon personal belongings and venture into unfamiliar surroundings in order to avoid unwanted questioning.<sup>40</sup> Second, the workers in *Delgado* who did not leave the building remained free to move about the entire factory, a much less confining environment than a bus.<sup>41</sup>

The majority claimed that it was merely rejecting the Florida Supreme Court’s *per se* prohibition of the police practice of “working the buses.”<sup>42</sup> While Bostick was still free, on remand, to establish that he had been unlawfully seized, the Court put its imprimatur on a practice that is a far distance from the exigencies which led the Warren Court<sup>43</sup> to a grudging recognition that the Fourth Amendment’s probable cause requirement had to be adjusted to allow for police investigation of a possible crime occurring in an officer’s presence.<sup>44</sup> For me, “working the buses” is reminiscent, not of prior police activity in our own country, but of those World War II films (with Conrad Veidt, Hans Messemer, or George Colours) in which the Gestapo were always boarding trains and buses in search of Jews and other enemies of the state.

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38. *Id.* (Marshall, J., dissenting).

39. *Id.* (Marshall, J., dissenting).

40. *Id.* (Marshall, J., dissenting).

41. *Id.* (Marshall, J., dissenting).

42. *See supra* notes 15-16 accompanying text.

43. *See Terry v. Ohio*, 392 U.S. 1 (1968).

44. *Id.* at 30-31.

In *California v. Hodari D.*,<sup>45</sup> the Court again defined police conduct out of the Fourth Amendment by concluding, that in a basic literal sense, no seizure had taken place.<sup>46</sup> In this case, police officers who were patrolling a high crime neighborhood in an unmarked car observed a group of youths who began to run when they saw the car.<sup>47</sup> One officer chased Hodari, who then discarded what appeared to be a small rock of cocaine.<sup>48</sup> The officer then tackled Hodari, who was found with \$130 and a pager.<sup>49</sup> The California Court of Appeal held that the crack and other evidence should have been suppressed because Hodari had been seized without adequate cause when he saw the officer coming after him.<sup>50</sup>

Writing for the majority, Justice Scalia held that Hodari was not seized until the police physically grabbed him.<sup>51</sup> He noted that historically, an arrest -- "the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence"<sup>52</sup> -- was accomplished by grasping or applying physical force to someone.<sup>53</sup> Even the slightest touch was enough.<sup>54</sup> However, since there was no application of physical force to Hodari during the period prior to his abandonment of the cocaine, there was no seizure.<sup>55</sup>

Justice Scalia was willing to concede that the pursuit of Hodari amounted to a "show of authority."<sup>56</sup> But he did not agree that a seizure occurs whenever a law enforcement officer indicates

45. 111 S. Ct. 1547 (1991).

46. *Id.* at 1550.

47. *Id.* at 1549.

48. *Id.*

49. *Id.*

50. In *Re Hodari D.*, 265 Cal. Rptr. 79, 86 (1st Dist. 1989) *review denied*, 1990 Cal. LEXIS 1302 (Cal. 1990). The opinion only appears in the official California Reporter because the California Supreme Court, in denying review, ordered that the opinion not be published.

51. *Hodari*, 111 S. Ct. at 1551.

52. *Id.* at 1550.

53. *Id.*

54. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 41 cmt. h (1965)).

55. *Id.* at 1550.

56. *Id.*



through a show of authority that a person is not free to go.<sup>57</sup> He argued "that the word 'seizure' readily bears the meaning of a laying on of hands or application of physical force to restrain movement, even when it is ultimately unsuccessful."<sup>58</sup> However, "[i]t does not remotely apply . . . to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee. That is no seizure."<sup>59</sup> Instead, "[a]n arrest requires *either* physical force . . . *or*, where that is absent, *submission* to the assertion of authority."<sup>60</sup>

Justice Scalia also contended that it would be unwise policy to extend the Fourth Amendment in such a manner.<sup>61</sup> He stated that "[s]treet pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged."<sup>62</sup> He argued that unlawful commands to halt will not be deterred by using the exclusionary rule to sanction those of them that are ignored: "Since policemen do not command 'Stop!' expecting to be ignored, or give chase hoping to be outrun, it fully suffices to apply the deterrent to their genuine, successful seizures."<sup>63</sup>

According to Justice Scalia, the *United States v. Mendenhall*<sup>64</sup> standard for seizures, "whether a reasonable person believed himself not free to leave,"<sup>65</sup> required no different result.<sup>66</sup> Scalia noted that the *Mendenhall* test "says that a person has been seized

57. *Id.*

58. *Id.*

59. *Id.* at 1550-51.

60. *Id.*

61. *Id.* at 1551.

62. *Id.*

63. *Id.*

64. 446 U.S. 544 (1980).

65. *Id.* at 554. Justice Stewart's opinion in *Mendenhall* articulated that the test to determine the existence of a show of authority is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer's words and actions would have conveyed that to a reasonable person. *Id.* at 554. A plurality of the Court applied the test in *Florida v. Royer*, 460 U.S. 491 (1983), and it was later adopted by the Court in *INS v. Delgado*, 466 U.S. 210 (1984).

66. *Hodari*, 111 S. Ct. at 1551.

'only if,' not that he has been seized 'whenever'; it states a *necessary*, but not a *sufficient* condition for seizure -- or, more precisely, for seizure effected through a 'show of authority.'<sup>67</sup> Thus, reasoned Scalia, the holding in *Michigan v. Chesternut*,<sup>68</sup> that following a pedestrian slowly in a police cruiser was not a seizure,<sup>69</sup> was simply based on the conclusion that *Mendenhall*'s objective test was not met.<sup>70</sup> Of greater relevance, said Scalia, was *Brower v. County of Inyo*,<sup>71</sup> in which the Court did not even entertain the notion that the police officers' high-speed vehicular pursuit of a driver, prior to a fatal crash into a police blockade, was a "seizure."<sup>72</sup> Justice Stevens, joined only by Justice Marshall, dissented.<sup>73</sup> He criticized the majority's overly constricted interpretation of "seizure".<sup>74</sup> He viewed it as being at odds with a long line of cases, particularly *Katz v. United States*<sup>75</sup> and *Terry v. Ohio*,<sup>76</sup> and he believed that *Mendenhall* had indeed constituted a comprehensive statement of the test for a seizure by a show of authority.<sup>77</sup> Thus, wrote Justice Stevens,

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67. *Id.*

68. 486 U.S. 567 (1988).

69. *Id.* at 575-76. In *Chesternut*, the Court concluded that the police conduct of slowly following the defendant in their patrol car did not amount to a seizure, for it would not have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business. *Id.*

70. *Hodari*, 111 S. Ct. at 1551-52.

71. 489 U.S. 593 (1989). In *Brower*, police cars with flashing lights chased the decedent for 20 miles, surely an adequate "show of authority," but defendant did not stop until his fatal crash into a police-erected blockade. *Id.* at 596. The issue was whether his death could be held to be the consequence of an unreasonable seizure in violation of the Fourth Amendment. *Id.* The Court did not even consider the possibility that a seizure could have occurred during the course of the chase because that "show of authority" did not produce his stop. *Id.*

72. *Hodari*, 111 S. Ct. at 1552.

73. *Id.* (Stevens, J., dissenting).

74. *Id.* (Stevens, J., dissenting).

75. 389 U.S. 347 (1967) (where the Court broadened Fourth Amendment protection to encompass electronic surveillance conducted "without any trespass and without the seizure of any material object").

76. 392 U.S. 1 (1968) (where the Court held that a stop of a person on less than probable cause nonetheless constituted a seizure).

77. *Hodari*, 111 S. Ct. at 1552-57 (Stevens, J., dissenting).

"[e]ven though momentary, a seizure occurs whenever an objective evaluation of a police officer's show of force conveys the message that the citizen is not entirely free to leave, in other words, that his or her liberty is being restrained in a significant way."<sup>78</sup> Hodari, he concluded, was not free to leave, since the officer's show of force in chasing Hodari adequately communicated that Hodari was objectively under restraint.<sup>79</sup>

Stevens observed further that the question of when a seizure takes place may arise when an officer commands a suspect to "freeze," fires a warning shot, or sounds a siren in a police car.<sup>80</sup> He argued that the majority erred in focusing on a person's reaction to an officer's conduct rather than on the officer's conduct itself.<sup>81</sup> He asked whether an officer, who has flashed his lights to stop a car without adequate cause, can claim that observations made before the car comes to a complete stop are not fruits of a seizure, and whether a drug enforcement agent may approach a group of passengers in a airport with a drawn gun, announce a baggage search, and rely on the passengers' reaction to justify a subsequent investigative stop.<sup>82</sup>

Justice Stevens concluded that "it [wa]s anomalous, at best,"<sup>83</sup> to establish different rules for seizures effected by touching and those effected by a show of force.<sup>84</sup> He argued that it was important for an officer to know in advance whether certain conduct would constitute a seizure, and that the majority's test made this impossible when the officer is using a non-physical show of force.<sup>85</sup>

Commentators have picked up on the possible confusion the *Hodari* decision has raised. Professor Stephen Saltzburg has noted that:

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78. *Id.* at 1558 (Stevens, J., dissenting).

79. *Id.* at 1559 (Stevens, J., dissenting).

80. *Id.* (Stevens, J., dissenting).

81. *Id.* at 1559-60 (Stevens, J., dissenting).

82. *Id.* at 1561 (Stevens, J., dissenting).

83. *Id.* at 1560 (Stevens, J., dissenting).

84. *Id.* (Stevens, J., dissenting).

85. *Id.* (Stevens, J., dissenting).

*Hodari* raises as many questions as it purports to resolve. What if an officer fires a warning shot in the air and the fleeing suspect stops suddenly and a package falls from his pocket as a result of this sudden stop? Is the package the fruit of a seizure? Is there a danger that the police will seek to engage in displays of unlawful force short of actual touchings in order to frighten suspects into making statements, disgorging evidence, or engaging in acts that would justify arrest or detention?<sup>86</sup>

With regard to causing acts that would justify arrest or detention, consider the open question of whether flight itself constitutes justifiable suspicion warranting a detention and what Justice Scalia, in his opinion, had to say about the subject.<sup>87</sup> Although the prosecution in *Hodari* conceded that the police had no justification to chase a person about whom they had no information, Justice Scalia noted that he might be willing, in a future case, to rule otherwise.<sup>88</sup> Citing Proverbs 28:1 “The wicked flee when no man pursueth” -- he observed that:

California conceded below that Officer Pertoso did not have the ‘reasonable suspicion’ required to justify stopping *Hodari*. That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense. We do not decide that point here, but rely entirely upon the State’s concession.<sup>89</sup>

As Professor Saltzburg pointed out, there is another approach that could possibly avoid the analytical conundrum caused by the majority’s opinion:

A person who discards evidence before being searched should not be able to later complain that the evidence was obtained unlawfully merely because he or she was illegally stopped; since the police might have decided to refrain from searching, the act

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86. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 190 (4th ed. 1992).

87. *Hodari*, 111 S. Ct. at 1550-51.

88. *Id.* at 1549 n.1.

89. *Id.* at 1549 n.4 (citations omitted).

of discarding evidence is not a necessary result (thus not a fruit) of an improper seizure of the person.<sup>90</sup>

Had such an argument been accepted, Saltzburg concluded, "the result would be to condemn arbitrary and unjustified attempts by police to seize individuals, but to treat flight or actions undertaken by the individuals prior to actually being forced by police to submit to a search as independent of the seizure."<sup>91</sup> He suggests, therefore, that this argument may recognize "the interests which both the majority and the dissenters in *Hodari* believed were important."<sup>92</sup>

Having expanded police authority to deal with people on buses and on the street, could similar treatment for people in their cars be far behind? Not at all. In *California v. Acevedo*,<sup>93</sup> the Court held that under the automobile exception to the warrant requirement, the police do not need a warrant to open a container in a moveable vehicle simply because they do not have probable cause to search the entire car.<sup>94</sup> And, in *Florida v. Jimeno*,<sup>95</sup> the Court held that a person's general consent to a search of the interior of an automobile justifies a search of any closed container found inside the car that might reasonably hold the object of the search.<sup>96</sup>

The outcome in *Acevedo* was inevitable because two separate lines of decision were on a collision course, that between the automobile exception first announced in *Carroll v. United States*<sup>97</sup> and extended to closed containers located within vehicles by *United States v. Ross*,<sup>98</sup> and the doctrine of *United States v.*

90. SALTZBURG, *supra* note 56.

91. *Id.*

92. *Id.*

93. 111 S. Ct. 1982 (1991).

94. *Id.* at 1988.

95. 111 S. Ct. 1801 (1991).

96. *Id.* at 1803.

97. 267 U.S. 132 (1925). In *Carroll*, the Court established an exception to the warrant requirement for moving vehicles. *Id.* at 159. The Court held that a warrantless search of an automobile based upon probable cause to believe that the vehicle contained evidence of a crime was permissible in the light of an exigency arising out of the vehicle's mobility. *Id.* at 158-59.

98. 456 U.S. 798 (1982). In *Ross*, the police had probable cause to believe that drugs were stored in the trunk of a particular car. *Id.* at 800. Inside the

*Chadwick*<sup>99</sup> and *Arkansas v. Sanders*<sup>100</sup> that prohibited the warrantless search of a closed container within a car where probable cause focused solely on the container itself and not the entire vehicle. The Court had three options: overrule *Carroll*, reaffirm *Ross*, or overrule *Chadwick-Sanders*. Given this Court's Fourth Amendment proclivities, it chose to overrule *Chadwick-Sanders*.<sup>101</sup>

In *Acevedo*, a federal drug enforcement agent in Hawaii seized a package containing marijuana and arranged to send the package to a California police officer rather than to the Federal Express office to which it would have been delivered.<sup>102</sup> The police officer received the package, verified its contents, and took it to the Federal Express office.<sup>103</sup> A man picked up the package while being observed by the police and took the package to his apartment.<sup>104</sup> Forty-five minutes later, *Acevedo* arrived at the apart-

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trunk they found a paper bag and a zippered leather pouch, and opened both. *Id.* The Court concluded that where police officers have probable cause to search an entire vehicle, they may conduct a warrantless search of every part of the vehicle and its contents, including all containers and packages that may conceal the object of the search. *Id.* at 821-22.

99. 433 U.S. 1 (1976). In *Chadwick*, the Court held that police could seize moveable luggage or other closed containers but could not open them without a warrant, since, *inter alia*, a person has a heightened privacy expectation in such containers. *Id.* at 11-16.

100. 442 U.S. 753 (1979). In *Sanders*, the Court extended *Chadwick's* rule to apply to a suitcase actually being transported in the trunk of a car. *Id.* at 766. The Court determined that the police had probable cause to believe a suitcase contained marijuana. *Id.* at 761. They watched as the defendant placed the suitcase in the trunk of a taxi. *Id.* The police pursued the taxi for several blocks, stopped it, found the suitcase in the trunk, and searched it. *Id.* at 761-62. Although the Court applied the *Carroll* doctrine to searches of integral parts of the automobile itself, it did not extend the doctrine to the warrantless search of personal luggage merely because it was located in an automobile lawfully stopped by the police. *Id.* at 762-63. The Court concluded that the presence of luggage in an automobile did not diminish the owner's expectation of privacy in his personal items. *Id.* at 763-64.

101. See *California v. Acevedo*, 111 S. Ct. 1982, 1991 (1991).

102. *Id.* at 1984.

103. *Id.*

104. *Id.*

ment and left with a brown paper bag that appeared full.<sup>105</sup> The bag appeared to the officers to be the size of one of the bags of marijuana in the Federal Express package.<sup>106</sup> Officers stopped Acevedo's car as he started to drive away, opened the trunk where he had placed the bag, and found marijuana in the bag.<sup>107</sup> The lower court suppressed the evidence under *Sanders* because while the officers had probable cause to believe that the bag contained drugs, they had no probable cause to believe the car contained drugs independently of the bag.<sup>108</sup>

Justice Blackmun, who dissented in both *Chadwick*<sup>109</sup> and *Sanders*,<sup>110</sup> wrote for the majority that the time had come to put an end to the distinction between a container for which the police are specifically searching and one that they happen to come across while searching a vehicle.<sup>111</sup> He asserted that "a container found after a general search of the automobile and a container found in a car after a limited search for the container are equally easy for the police to store and for the suspect to hide or destroy."<sup>112</sup> Justice Blackmun contended that there was no principled distinction between the paper bag in *Ross* and the paper bag in this case;<sup>113</sup> that because of *Sanders*, officers may be tempted to search more extensively beyond the container "in order to establish the general probable cause required by *Ross*."<sup>114</sup> He also noted that *Sanders* provides minimal privacy protection since a warrant to search a container would be routinely issued anyway, and since the police often will be able to search containers without a warrant at any rate as a search incident to arrest.<sup>115</sup> Moreover, Justice Blackmun maintained that the *Chadwick-Sanders*

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105. *Id.*

106. *Id.*

107. *Id.* at 1985.

108. *People v. Acevedo*, 265 Cal. Rptr. 23, 27 (4th Dist. 1989).

109. 433 U.S. 1, 17 (1976) (Blackmun, J., dissenting).

110. 442 U.S. 753, 768 (1979) (Blackmun, J., dissenting).

111. *Acevedo*, 111 S. Ct. at 1985.

112. *Id.* at 1988.

113. *Id.*

114. *Id.*

115. *Id.* at 1989.

rule has both confused and hampered law enforcement.<sup>116</sup> According to Blackmun, the rule “has devolved into an anomaly such that the more likely the police are to discover drugs in a container, the less authority they have to search it.”<sup>117</sup> Thus, he argued, “by attempting to distinguish between a container for which the police are specifically searching and a container which they come across in a car, we have provided only minimal protection for privacy and have impeded effective law enforcement.”<sup>118</sup> Justice Blackmun concluded:

Until today, this Court has drawn a curious line between the search of an automobile that coincidentally turns up a container, and the search of a container that coincidentally turns up in an automobile. The protections of the Fourth Amendment must not turn on such coincidences. We therefore interpret *Carroll* as providing one rule to govern all automobile searches. The police may search an automobile and the containers within it where they have probable cause to believe contraband or evidence is contained.<sup>119</sup>

Offering a glimpse of what he would do in the future (if he could collect a majority), Justice Scalia announced his view that there is no general “warrant requirement” in the Fourth Amendment,<sup>120</sup> that the Court’s jurisprudence with respect to the warrant requirement “lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone,”<sup>121</sup> and that “[e]ven before today’s decision, the ‘warrant requirement’ had become so riddled with exceptions that it was basically unrecognizable.”<sup>122</sup> For him, “the path out of this confusion should be sought by returning to the first principle that the

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116. *Id.*

117. *Id.* at 1990.

118. *Id.* at 1988.

119. *Id.* at 1991. Justice Blackmun recognized, however, that if probable cause was specifically limited to a container in a car, then a search of the vehicle beyond the container would be unreasonable as lacking probable cause. *Id.*

120. *Id.* at 1992 (Scalia, J., concurring).

121. *Id.* (Scalia, J., concurring).

122. *Id.* (Scalia, J., concurring).



'reasonableness' requirement of the Fourth Amendment affords the protection that the common law afforded."<sup>123</sup> While he acknowledged that the reasonableness requirement might require a warrant where one was not required at common law, he rejected the supposed general rule that a warrant is required.<sup>124</sup> Justice Scalia's theory received its best treatment many years ago from Telford Taylor in his book *Two Studies in Constitutional Interpretation*.<sup>125</sup> However, it has been rejected repeatedly by the Court.

Scalia also again displayed his penchant for taking shots at issues that were not squarely presented in the case. Although the Court overruled *Sanders*, it did not eradicate all aspects of *Chadwick*, since the *Chadwick* facts were not similar to those in *Acevedo*. Nonetheless, Scalia argued that what remained of *Chadwick* constituted an anomaly: "[I]f a known drug dealer is carrying a briefcase containing contraband, he can be arrested, and the briefcase may be searched either incident to arrest or as part of an inventory search."<sup>126</sup> However, under *Chadwick*, the police may not, on the basis of the same probable cause, take the less intrusive step of stopping the dealer and searching his briefcase.<sup>127</sup> This distinction, said Justice Scalia, "makes no sense *a priori*, and in the absence of any common law tradition supporting such a distinction, I see no reason to continue it."<sup>128</sup> Thus, he wrote:

I would reverse the judgment in the present case, not because a closed container carried inside a car becomes subject to the 'automobile' exception to the general warrant requirement, but because the search of a closed container, outside a privately owned building, with probable cause to believe that the container contains contraband, and when it in fact does contain contra-

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123. *Id.* at 1993 (Scalia, J., concurring).

124. *Id.* (Scalia, J., concurring).

125. TELFORD TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 38-44 (1969).

126. *Acevedo*, 111 S. Ct. at 1993 (Scalia, J., concurring).

127. *Id.* at 1993-94 (Scalia, J., concurring).

128. *Id.* at 1994 (Scalia, J., concurring).

band, is not one of those searches whose Fourth Amendment reasonableness depends upon a warrant.<sup>129</sup>

By stating “when it in fact does contain contraband,” does Justice Scalia mean to tell us that the “proof of the pudding test” satisfies Fourth Amendment requirements so that any search that produces contraband or evidence of crime is reasonable *per se*?

Justice Stevens, joined by Justice Marshall, dissented.<sup>130</sup> Justice White filed a one sentence dissent in which he stated that he agreed with most of Stevens’ dissent.<sup>131</sup> Justice Stevens rehearsed the Court’s *Chadwick* and *Sanders* reasoning and noted that “the Court recognizes that the police did not have probable cause to search respondent’s vehicle and that a search of anything but the paper bag . . . would have been unconstitutional.”<sup>132</sup> Furthermore, “[t]he Court does not attempt to identify any exigent circumstances that would justify its refusal to apply the general rule against warrantless searches.”<sup>133</sup> He maintained that there is no evidence that the *Ross* principle is confusing<sup>134</sup> and that the Court’s decision will result in a significant loss of privacy because “[e]very citizen clearly has an interest in the privacy of the contents of his or her luggage, briefcase, handbag or any other container that conceals private papers and effects from public scrutiny.”<sup>135</sup> Stevens further maintained that the burden on law enforcement identified by the Court was unsupported and insufficient to justify a new exception to the warrant requirement.<sup>136</sup> Justice Stevens argued:

To the extent that there was any ‘anomaly’ in our prior jurisprudence, the Court has ‘cured’ it at the expense of creating a more serious paradox. For, surely it is anomalous to prohibit a search of a briefcase while the owner is carrying it exposed on a public

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129. *Id.* (Scalia, J., concurring).

130. *Id.* (Stevens, J., dissenting).

131. *Id.* (White, J., dissenting).

132. *Id.* at 1998 (Stevens, J., dissenting).

133. *Id.* (Stevens, J., dissenting).

134. *Id.* at 1998-99 (Stevens, J., dissenting).

135. *Id.* at 2001 (Stevens, J., dissenting).

136. *Id.* at 2001-02 (Stevens, J., dissenting).

street yet to permit a search once the owner has placed the briefcase in the locked trunk of his car.<sup>137</sup>

In *Florida v. Jimeno*,<sup>138</sup> the Court did not tarry long over whether a person's consent to search should be narrowly construed. Chief Justice Rehnquist, writing for a 7-2 majority, held that an officer could reasonably conclude that when a suspect gave general consent to a search of his car, he also consented to a search of a paper bag lying on the floor of the car.<sup>139</sup> The officer told Jimeno that he was looking for narcotics in the car, and obtained his consent to search the car.<sup>140</sup> Jimeno did not explicitly limit the scope of the search.<sup>141</sup> Rehnquist reasoned that the general consent to search the car included consent to search containers in the car that might contain drugs.<sup>142</sup> He stated that "the scope of a search is generally defined by its expressed object,"<sup>143</sup> and that "a reasonable person may be expected to know that narcotics are generally carried in some form of container."<sup>144</sup> He distinguished the case from one in which an officer, given consent to search the trunk of a car, pried open a locked briefcase found inside the trunk, explaining that "[i]t is very likely unreasonable to think that a suspect, by consenting to a search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag."<sup>145</sup> Thus, Chief Justice Rehnquist rejected Jimeno's argument that the police should be required to separately request permission to search each container found in a car, stating that he "saw no basis for adding this sort of superstructure to the Fourth Amendment's basic test of objective reasonableness."<sup>146</sup> He fur-

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137. *Id.* at 2000-01 (Stevens, J., dissenting).

138. 111 S. Ct. 1801 (1991).

139. *Id.* at 1804.

140. *Id.* at 1803.

141. *Id.* at 1804.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

ther noted that the community had an interest in encouraging consent searches.<sup>147</sup>

Justice Marshall, joined by Justice Stevens, dissented.<sup>148</sup> He argued that a person has distinct privacy expectations in a car and in containers which might be found in it.<sup>149</sup> Thus, consent to relinquish some privacy is not consent to relinquish all.<sup>150</sup> At best, Justice Marshall noted, general consent is ambiguous, and police can avoid ambiguity by asking at the outset for permission to search a car and its contents, or by asking for additional permission to search a container when it is found in a car.<sup>151</sup> Marshall also challenged the majority's conclusion that the community was best served by the encouragement of consent searches:

[T]he majority's real concern is that if the police were required to ask for additional consent to search a closed container, . . . an individual who did not mean to authorize such additional searching would have an opportunity to say no. In essence, then, the majority is claiming that 'the community has a real interest' not in encouraging citizens to *consent* to investigatory efforts of their law enforcement agents, but rather in encouraging individuals to be *duped* by them. [That] is not the community that the Fourth Amendment contemplates.<sup>152</sup>

As is apparent, the above statement is really a reprise of Justice Marshall's dissent in *Schneckloth v. Bustamonte*.<sup>153</sup> For it was in *Schneckloth* that the Court made the crucial judgment that unlike rights under the Fifth<sup>154</sup> and Sixth Amendments,<sup>155</sup> the police were under no obligation to inform persons that they were not re-

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147. *Id.*

148. *Id.* (Marshall, J., dissenting).

149. *Id.* at 1805 (Marshall, J., dissenting).

150. *Id.* (Marshall, J., dissenting).

151. *Id.* (Marshall, J., dissenting).

152. *Id.* at 1806 (Marshall, J., dissenting).

153. 412 U.S. 218 (1973) (where the Court held that an individual could validly "consent" to a search, or, in other words, waive his right to be free from an otherwise unlawful search, without being told that he had the right to withhold his consent).

154. U.S. CONST. amend. V.

155. U.S. CONST. amend. VI.

quired to consent to a search of their person or their property.<sup>156</sup> Having sanctioned police exploitation of a person's ignorance of his Fourth Amendment rights,<sup>157</sup> the *Jimeno* ruling was a foregone conclusion.

In 1975, the Court, in *Gerstein v. Pugh*,<sup>158</sup> held that a person who has been arrested without a warrant is entitled, under the Fourth Amendment, to a "prompt" judicial determination of the issue of probable cause.<sup>159</sup> In *County of Riverside v. McLaughlin*,<sup>160</sup> by a 5-4 vote, the Court held that prompt does not mean "immediate," and that 48 hours is generally soon enough, at least if the probable cause hearing is combined with arraignment.<sup>161</sup> If more than 48 hours, including weekends, elapses before the probable cause determination is made, the state bears the burden of showing that the delay is reasonable.<sup>162</sup>

Justice O'Connor's majority opinion held that *Gerstein* "gave proper deference to the demands of federalism"<sup>163</sup> in recognizing that state systems differ greatly and permitting states some flexibility in fitting the required Fourth Amendment hearing into their procedural frameworks.<sup>164</sup> She rejected Justice Scalia's argument for the four dissenters that the Fourth Amendment requires a judicial determination of probable cause immediately upon the completion of the administrative steps incident to ar-

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156. *Schneckloth*, 412 U.S. at 248-49.

157. *Id.*

158. 420 U.S. 103 (1975). In *Gerstein*, Pugh and Henderson were arrested and charged with several offenses under a prosecutor's information. *Id.* at 105. Pugh was denied bail because one of the charges against him carried a potential life sentence. *Id.* In Florida, only capital offenses require indictments. *Id.* Prosecutors may charge all other crimes by information, without a prior preliminary hearing. *Id.* Pugh and Henderson filed a class action claiming a constitutional right to a judicial hearing on the issue of probable cause. *Id.* at 106-07. The Court held that the Fourth Amendment required a timely judicial determination of probable cause as a prerequisite to continued detention. *Id.* at 126.

159. *Id.* at 126.

160. 111 S. Ct. 1661 (1991).

161. *Id.* at 1670-71.

162. *Id.* at 1670.

163. *Id.* at 1668.

164. *Id.*

rest,<sup>165</sup> and concluded that *Gerstein* permitted states to combine probable cause hearings with other proceedings “so long as they do so promptly.”<sup>166</sup> She reasoned that “[g]iven that *Gerstein* permits jurisdictions to incorporate probable cause determinations into other pretrial procedures, some delays are inevitable[,]”<sup>167</sup> but that “flexibility has its limits; *Gerstein* is not a blank check.”<sup>168</sup>

Justice Scalia took exceptionally strong and lengthy issue.<sup>169</sup> He argued that the Fourth Amendment “preserves for our citizens the traditional protections against unlawful arrest afforded by the common law.”<sup>170</sup> He identified a common law principle that a police officer “arresting a suspect without a warrant must deliver the arrestee to a magistrate as soon as he reasonably can.”<sup>171</sup> He asserted that the only factors pertinent to reasonable delay were “completion of the administrative steps incident to arrest and arranging for a magistrate’s probable cause determination.”<sup>172</sup> Justice Scalia took issue with the majority’s claim that the state’s interest in combining the probable cause determination with other proceedings justifies a delay, since he could find no such justification in the common law.<sup>173</sup> He read *Gerstein* as permitting a state to have flexibility in determining the nature of its hearing, for example, whether or not to combine a probable cause determination with other matters, but not in the timing of the hearing.<sup>174</sup> After observing that most federal courts have considered 24 hours as adequate to complete arrest procedures and conduct a probable cause determination,<sup>175</sup> he concluded that “it is an ‘un-

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165. See *infra* notes 174-75 and accompanying text.

166. *County of Riverside*, 111 S. Ct. at 1671.

167. *Id.* at 1669.

168. *Id.*

169. *Id.* at 1671 (Scalia, J., dissenting).

170. *Id.* at 1672 (Scalia, J., dissenting).

171. *Id.* (Scalia, J., dissenting).

172. *Id.* at 1675 (Scalia, J., dissenting).

173. *Id.* (Scalia, J., dissenting).

174. *Id.* (Scalia, J., dissenting).

175. See, e.g., *Bernard v. Palo Alto*, 699 F.2d 1023, 1025 (9th Cir. 1983); *McGill v. Parsons*, 532 F.2d 484, 485 (5th Cir. 1976); *Sanders v. Houston*,

reasonable seizure' . . . for the police, having arrested a suspect without a warrant, to delay a determination of probable-cause for the arrest either (1) for reasons unrelated to arrangement of the probable cause determination or completion of the steps incident to arrest, or (2) beyond 24 hours after the arrest."<sup>176</sup> The 24 hour limit would operate as a presumption which the police could seek to rebut by demonstrating "unforeseeable circumstances justifying additional delay."<sup>177</sup> Justice Scalia bemoaned the fact that "[w]hile in recent years we have invented novel applications of the Fourth Amendment to release the unquestionably guilty, we today repudiate one of its core applications so that the presumptively innocent may be left in jail."<sup>178</sup> His conclusion was particularly poignant:

Hereafter a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to two days--never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made. In my view, this is the image of a system of justice that has lost its ancient sense of priority, a system that few Americans would recognize as [their] own.<sup>179</sup>

Justice Marshall, joined by Justices Blackmun and Stevens, filed a one paragraph dissent in which he agreed with Justice Scalia that a probable cause hearing is sufficiently prompt only when it follows "immediately upon completion of the administrative steps incident to arrest."<sup>180</sup>

The battle in New York over arrest to arraignment delay has been a long one. Years ago the Legal Aid Society, still wedded to the belief that the federal courts were the best forum in which to conduct the fight, brought a class action suit challenging delays in

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543 F. Supp. 694, 701-03 (S.D. Tex. 1982); *Lively v. Cullinane*, 451 F. Supp. 1000, 1003-04 (D.D.C., 1978).

176. *County of Riverside*, 111 S. Ct. at 1677 (Scalia, J., dissenting).

177. *Id.* (Scalia, J., dissenting).

178. *Id.* (Scalia, J., dissenting).

179. *Id.* (Scalia, J., dissenting).

180. *Id.* at 1671 (Marshall, J., dissenting).

New York City that had reached 60 to 72 hours.<sup>181</sup> Judge Motley ruled that the Fourth Amendment prohibited delays greater than 24 hours,<sup>182</sup> but she was reversed by the United States Court of Appeals for the Second Circuit which held that the Fourth Amendment was not violated when New York City arrestees were arraigned within 72 hours of arrest.<sup>183</sup> Fortunately, this result, which was sanctioned in *County of Riverside v. McLaughlin*,<sup>184</sup> is not operative in New York. That is because the Legal Aid Society wisely, although belatedly, pursued an alternate strategy in the New York courts by “filing habeas corpus writs against the New York City Police and Correction Commissioners on behalf of arrestees who remained in pre-arraignment custody in excess of 24 hours.”<sup>185</sup>

Justice Brenda Soloff, a New York County Supreme Court Judge, consolidated these writs<sup>186</sup> and held that “delay[s] . . . [beyond] 24 hours raise[d] a presumption that the delay is unnecessary within the meaning of CPL 140.20(1),”<sup>187</sup>

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181. *Williams v. Ward*, 671 F. Supp. 225 (S.D.N.Y. 1987).

182. *Id.* at 226.

183. *Williams v. Ward*, 845 F.2d 374, 388 (2d Cir. 1988), *cert. denied*, 488 U.S. 1020 (1989).

184. 111 S. Ct. 1661 (1991).

185. *People ex rel. Maxian v. Brown*, 77 N.Y.2d 422, 424-25, 570 N.E.2d 223, 224, 568 N.Y.S.2d 575, 576 (1991) (court of appeals summarizing the prior proceedings in the instant case).

186. *People ex rel. Maxian v. Brown*, N.Y. L.J., April 30, 1990, at 26 (Sup. Ct. N.Y. County Apr. 20, 1990).

187. N.Y. CRIM. PROC. LAW § 140.20(1) (McKinney 1992).

Section 140.20(1) provides:

Upon arresting a person without a warrant, a police officer, after performing without unnecessary delay all recording, fingerprinting and other preliminary police duties required in the particular case, must except as otherwise provided in this section, without unnecessary delay bring the arrested person or cause him to be brought before a local criminal court and file therewith an appropriate accusatory instrument charging him with the offense or offenses in question. The arrested person must be brought to the particular local criminal court, or to one of them if there be more than one, designated in section 100.55 as an appropriate court for commencement of the particular action; except that:

(a) If the arrest is for an offense other than a felony committed in a town, but not in a village thereof having a village court, and the town



requiring, on demand, a satisfactory explanation of that delay.”<sup>188</sup> In a parallel proceeding, Justice Peter McQuillan, a New York County Supreme Court Judge, agreed with Justice Soloff, adding that he also found that there was a violation of article I, section 12,<sup>189</sup> the unreasonable search and seizure provision of the New York State Constitution.<sup>190</sup> The appellate division affirmed the judgments in both cases<sup>191</sup> and the court of appeals agreed, holding that CPL 140.20(1) “requires that a pre-arraignment detention not be prolonged beyond a time reasonably necessary to accomplish the tasks required to bring an arrestee to arraignment.”<sup>192</sup>

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court of such town is not available at the time, the arrested person may be brought before the town court of any adjoining town of the same county; and

(b) If the arrest is for an offense other than a felony committed in a village having a village court and such court is not available at the time, the arrested person may be brought before the town court of the town embracing such village or, if such town court is not available either, before the town court of any adjoining town of the same county;

(c) If the arrest is for a traffic infraction or for a misdemeanor relating to traffic, the police officer may, instead of bringing the arrested person before the local criminal court of the political subdivision or locality in which the offense was allegedly committed, bring him before the local criminal court of the same county nearest available by highway travel to the point of arrest.

*Id.*

188. *People ex rel. Maxian*, N.Y. L.J. at 27.

189. N.Y. CONST. art. I, § 12. This provision provides in pertinent part: The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

*Id.*

190. *People ex rel. Maxian*, 77 N.Y.2d at 426, 570 N.E.2d at 225, 568 N.Y.S.2d at 577. (Justice McQuillan’s unreported decision was entered May 4, 1990, approximately two weeks after Judge Soloff’s decision.)

191. *People ex rel. Maxian v. Brown*, 164 A.D.2d 56, 67-68, 561 N.Y.S.2d 418, 424 (1st Dep’t 1990).

192. *People ex rel. Maxian*, 77 N.Y.2d at 427, 570 N.E.2d at 225, 568 N.Y.S.2d at 577.

The regrettable aspect of the decision in *County of Riverside* is that it establishes a framework in which states, less sensitive than New York to the rights of persons who are presumptively innocent, can continue to function with arraignment delays that most lower federal courts and some state courts had found unacceptable. The majority's opinion shows its continued deference to the wishes of local law enforcement and its sensitivity to the inability of various localities to comply with a 24 hours arraignment requirement. The question is whether such deference is either justified or productive. The time spent unjustifiably in detention, to a person against whom the charges have been dismissed, can never be regained. And we know that many thousands of arrestees throughout the country are released after their first appearance.

Because such liberty interests ought not be deprecated, it is my belief that the Court would have been wiser to hold all states and localities to a 24-hour requirement. Had the Court done so, state and local criminal justice systems would have been required to get their houses in order. Since, as Justice Scalia pointed out, this was not a Fourth Amendment context in which only the guilty would benefit,<sup>193</sup> it is difficult to accept the Court's unwillingness to mandate improvement in one of the central features of our criminal justice system, namely, the first instance in which a judicial officer determines whether the police conduct brought to bear on a person satisfies the Fourth Amendment in its most fundamental aspect and the determination of probable cause to believe that the person arrested has committed a crime.

### COERCED CONFESSIONS AND THE HARMLESS ERROR RULE

In *Arizona v. Fulminante*,<sup>194</sup> the Rehnquist Court's criminal jurisprudence reached its epiphany. Not only did the Court overturn years of precedent which had held that coerced confessions were not subject to harmless error analysis,<sup>195</sup> it did so in a case

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193. See *supra* notes 177-78 and accompanying text.

194. 111 S. Ct. 1246 (1991).

195. See *infra* notes 212-15, 225-26 and accompanying text.

in which it upheld the lower court's determination that admission of the confessions in the case at bar was *not* harmless.<sup>196</sup> Thus, there was absolutely no reason for the Court to decide the issue of whether the numerous precedents holding harmless error inapplicable to coerced confession cases should be overruled. That a majority did so demonstrates that the Court had an agenda which it did not wish to postpone until a later time. Having been taught that pretermission of issues not ripe for decision is the hallmark of a non-activist Court, if the contrary action in *Fulminante* is not judicial activism, I do not know the meaning of the term.

Fulminante was serving a federal weapons conviction sentence in New York when rumors began circulating at the prison that he had murdered a child.<sup>197</sup> Another inmate named Sarivola, who had befriended Fulminante, offered him protection from other inmates who had begun mistreating Fulminante because of the rumors.<sup>198</sup> Unbeknownst to Fulminante, Sarivola, who was masquerading as an organized crime figure, was working as an FBI informant and was under instructions to get information from Fulminante.<sup>199</sup> Sarivola told Fulminante that in order to obtain protection, he would have to reveal the truth about the rumors.<sup>200</sup> Fulminante then told Sarivola the details of his murder of his young stepdaughter.<sup>201</sup> After Fulminante was released from prison, he again confessed to Sarivola's wife.<sup>202</sup> Both confessions were admitted into evidence at Fulminante's trial which resulted in his conviction and death sentence.<sup>203</sup>

The Arizona Supreme Court held that Fulminante's confession was the result of improper coercion by Sarivola but that its admission into evidence was harmless error.<sup>204</sup> However, on rear-

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196. *Fulminante*, 111 S. Ct. at 1250.

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.* at 1251.

204. *State v. Fulminante*, 778 P.2d 602, 609-11 (Ariz. 1988).

gument, the court reversed the conviction on the ground that United States Supreme Court precedent precluded the use of harmless error analysis in the case of a coerced confession.<sup>205</sup>

Justice White, writing for a majority that included Justices Marshall, Blackmun, Stevens, and Scalia, agreed with the Arizona Supreme Court's conclusion that the confession was coerced.<sup>206</sup> White noted that the Arizona court had properly used the totality of circumstances test and that it was correct in reasoning that a credible threat of violence, as opposed to actual violence by a government agent, is sufficient to support a finding of coercion.<sup>207</sup> Justice White conceded that the question was a close one, but he concluded that Fulminante's "will was overborne in such a way as to render his confession the product of coercion."<sup>208</sup>

As to whether Fulminante's now coerced confession could be subject to harmless error analysis, a different alignment of the Court held that it could.<sup>209</sup> Justice Scalia, who originally sided with the White majority on the coercion issue, left it on the harmless error issue to form another majority with Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Souter.<sup>210</sup> In writing the harmless error majority's opinion, Rehnquist stated that "the common thread" connecting the Court's harmless error cases "is that each involved 'trial error,' error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was

205. *Id.*

206. *Fulminante*, 111 S. Ct. at 1251.

207. *Id.* at 1252.

208. *Id.* at 1252-53. It is worth noting that Justice White's opinion put to rest a well-known but quizzical passage in *Bram v. United States*, 168 U.S. 532 (1897), that stated that a confession may not be obtained by "any direct or implied promises, however slight . . . ." *Id.* at 538. Justice White left no doubt that "under current precedent" this passage "does not state the standard for determining the voluntariness of a confession . . . ." *Fulminante*, 111 S. Ct. at 1251.

209. *Fulminante*, 111 S. Ct. at 1261.

210. *Id.*

harmless beyond a reasonable doubt.”<sup>211</sup> In addition, the Court noted that the admission of an involuntary confession is a “classic ‘trial error.’”<sup>212</sup>

The decision in *Chapman v. California*,<sup>213</sup> which clearly stated that the admission of a coerced confession was one of the few errors that could not be categorized as harmless,<sup>214</sup> Rehnquist insisted that this passage is a mere historical reference, not a rule.<sup>215</sup> Furthermore, he said the other examples mentioned by *Chapman* -- deprivation of counsel, and trial before a biased judge -- are “structural defects in the constitution of the trial mechanism,”<sup>216</sup> whereas the error in *Fulminante*’s case was merely an error in the process itself.<sup>217</sup> Admission of a coerced confession may be devastating to a defendant,<sup>218</sup> but that fact merely points toward how the harmless error test should come out, not that it should not be performed.<sup>219</sup>

Yet still a different majority coalesced on the application of the now acceptable harmless error rule to *Fulminante*’s confession.<sup>220</sup> This time, Justice Kennedy made the difference. Seeking to salvage something from the harmless error applicability loss, White’s majority opinion on this issue emphasized initially how damaging to a defendant evidence of his own words can be.<sup>221</sup> He cautioned that because “[a] confession is like no other evidence”<sup>222</sup> in terms of the impact it can have on the fact finder, and that there is always a “risk that the confession is unreliable,” reviewing courts should “exercise extreme caution before determining that the admission of the confession at trial was harm-

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211. *Id.* at 1264.

212. *Id.*

213. 386 U.S. 18 (1967) (where the Court adopted the general rule that a constitutional error does not automatically require reversal of a conviction).

214. *Id.* at 24.

215. *Fulminante*, 111 S. Ct. at 1264.

216. *Id.* at 1265.

217. *Id.*

218. *Id.* at 1266.

219. *Id.*

220. *Id.* (Kennedy, J., concurring).

221. *Id.* at 1257.

222. *Id.*

less.”<sup>223</sup> Justice White then concluded that the state had not met its burden of showing that the admission of Fulminante’s confession was harmless beyond a reasonable doubt.<sup>224</sup>

Justice White, joined by Justices Marshall, Stevens, and Blackmun on the harmless error doctrine issue, denounced the Rehnquist majority opinion for “without any justification”<sup>225</sup> overruling “this vast body of precedent without a word,”<sup>226</sup> and for thus, “dislodg[ing] one of the fundamental tenets of our criminal justice system.”<sup>227</sup> Justice White emphasized what he believed was a fundamental difference between coerced statements and other evidence that may wrongfully make its way into court.<sup>228</sup> The point, he said, is not just that a jury finds a defendant’s own incriminating statements especially persuasive, or that coercion can produce false confessions,<sup>229</sup> the real problem is that the forced extraction of a confession runs counter to the principle “‘that ours is an accusatorial and not an inquisitorial system -- a system in which the State must establish guilt by evidence independently and freely secured and may not by coercion prove its charge against an accused out of his own mouth.’”<sup>230</sup>

Chief Justice Rehnquist’s majority opinion on the harmless error issue discards the “no harmless error analysis in coerced confession cases” that all of us had grown up with.<sup>231</sup> Absent, of course, from the opinion is any discussion of history or the policy upon which the *Chapman* rule was based. Instead, the opinion talked strictly in terms of a structural/non-structural dichotomy,<sup>232</sup> which simply extinguished the *Chapman* rule. However, the many decisions that barred harmless error analysis were not

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223. *Id.* at 1258.

224. *Id.* at 1261.

225. *Id.* at 1254 (White, J., dissenting).

226. *Id.* (White, J., dissenting).

227. *Id.* (White, J., dissenting).

228. *Id.* (White, J., dissenting).

229. *Id.* at 1256 (White, J., dissenting).

230. *Id.* (quoting *Rogers v. Richmond*, 365 U.S. 534, 541 (1961)).

231. See *supra* notes 212-13 and accompanying text.

232. *Id.* at 1254-55.

founded on sand; they were predicated on a basic distaste for police coercion. As Justice Black wrote almost a half century ago:

The Constitution of the United States stands as a bar against the conviction of any individual in an American court by means of a coerced confession. There have been, and are now, certain foreign nations with governments dedicated to an opposite policy: governments which convict individuals with testimony obtained by police organizations possessed of an unrestrained power to seize persons suspected of crimes against the state, hold them in secret custody, and wring from them confessions by physical or mental torture. So long as the Constitution remains the basic law of our Republic, America will not have that kind of government.<sup>233</sup>

## INTERROGATIONS

*Minnick v. Mississippi*<sup>234</sup> was one of the rare defense victories of significance during the 1990 Term. At a recent conference, Professor Yale Kamisar expressed not only surprise at the outcome, but also at the fact that Justice Kennedy's majority opinion sounded "just like Brennan or Marshall."<sup>235</sup> "I never thought I'd live to see the day when I could say that . . . the Rehnquist Court may have read *Miranda* more generously than the Warren Court might have read it itself."<sup>236</sup>

In *Minnick*, the defendant was first questioned by federal agents in California after being told by his jailers that he could not refuse the interview.<sup>237</sup> He answered some questions but did not discuss the crime at issue -- a double murder in Mississippi -- and he ended the interview by telling the agents to come back "when

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233. *Ashcraft v. Tennessee*, 322 U.S. 143, 155 (1944) (where the Court concluded that if Ashcraft made a confession that was not voluntary but compelled, his conviction, resting upon the alleged confession, must be set aside as in violation of the Federal Constitution).

234. 111 S. Ct. 486 (1990).

235. Yale Kamisar, Constitutitonal Law Conference of *United States Law Week* (Sept. 6-7, 1991), *synopsized and quoted in* 60 U.S.L.W. 2253, 2260 (Oct. 22, 1991).

236. *Id.* See also *Miranda v. Arizona*, 384 U.S. 436 (1966).

237. *Minnick*, 111 S. Ct. at 488.

I have a lawyer.”<sup>238</sup> Subsequently, a lawyer was appointed for Minnick and the two conferred together several times.<sup>239</sup> Later, a Mississippi deputy sheriff arrived to question Minnick who was told by his jailers that he “ha[d] to talk.”<sup>240</sup> Upon being advised of his rights, Minnick refused to sign a waiver form.<sup>241</sup> This time, however, he described the events surrounding the murder, although he attempted to minimize his culpability by claiming that he acted under duress.<sup>242</sup> The statements were admitted into evidence and Minnick was convicted.<sup>243</sup>

The admissibility of Minnick’s confession turned upon the meaning to be given to a passage in *Edwards v. Arizona*<sup>244</sup> which held that the Fifth Amendment forbids further interrogation until counsel has been made available to the defendant, unless the defendant himself initiates further discussions with the police.<sup>245</sup> In affirming Minnick’s conviction, the Mississippi Supreme Court, relying on this passage, interpreted *Edwards* as permitting further police-initiated questioning once the suspect has met with and received advice from his attorney.<sup>246</sup>

By a 6-2 vote, the Supreme Court disagreed.<sup>247</sup> Justice Kennedy wrote that “[i]n context, the requirement that counsel be ‘made available’ to the accused refers to more than an opportunity to consult with an attorney outside the interrogation room.”<sup>248</sup> He pointed out that the *Edwards* Court made repeated references to counsel being “present,” and it emphasized the importance of cutting off interrogation once the suspect has expressed his desire to deal with the police only through counsel.<sup>249</sup> Thus, concluded Justice Kennedy:

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238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 489.

242. *Id.*

243. *Id.*

244. 451 U.S. 477 (1981).

245. *Id.* at 484-85.

246. *Minnick v. State of Mississippi*, 551 So. 2d 77, 83 (Miss. 1988).

247. *Minnick*, 111 S. Ct. at 488-89.

248. *Id.* at 490.

249. *Id.*



[A] fair reading of *Edwards* and subsequent cases demonstrates that we have interpreted the rule to bar police-initiated interrogation unless the accused has counsel with him at the time of questioning. Whatever the ambiguities of our earlier cases on this point, we now hold that when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney.<sup>250</sup>

This application of *Edwards* is "appropriate and necessary,"<sup>251</sup> Kennedy pointed out, because merely giving an accused an opportunity to consult with a lawyer does not insulate him from persistent police attempts to elicit a waiver of rights, nor does it eliminate the coercive pressures attendant upon continued custody.<sup>252</sup>

Justice Scalia, joined by Chief Justice Rehnquist, dissented.<sup>253</sup> He saw no reason to create an "irrebuttable presumption" that a suspect who has invoked his right to counsel can never validly waive it during an encounter initiated by police even after he has consulted with his lawyer.<sup>254</sup> He labeled the majority's holding "the latest stage of prophylaxis built upon prophylaxis, producing a veritable fairyland castle of imagined constitutional restriction upon law enforcement."<sup>255</sup>

As Justice Scalia's opinion implies, his real problem is with *Edwards* itself.<sup>256</sup> He questioned its justification and called it a "mistake."<sup>257</sup> The assumption underlying *Edwards*, he said, is that a person who is being interrogated for the first time and has not yet spoken with counsel may need special protection from unknowing or coerced waivers on account of being ignorant of his rights and feeling "isolated in a hostile environment."<sup>258</sup> This

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250. *Id.* at 491.

251. *Id.*

252. *Id.*

253. *Id.* at 492 (Scalia, J., dissenting).

254. *Id.* (Scalia, J., dissenting).

255. *Id.* at 497 (Scalia, J., dissenting).

256. *Id.* at 497-98 (Scalia, J., dissenting).

257. *Id.* at 498 (Scalia, J., dissenting).

258. *Id.* at 495 (Scalia, J., dissenting).

assumption is “tenuous”;<sup>259</sup> but the probability of its being true is even lower, he said, once the accused has had a chance to consult with counsel.<sup>260</sup>

If one views *Miranda* as designed to protect against the pressures of custodial interrogation, then a legitimate question can be raised as to whether a suspect who has in fact consulted with counsel nonetheless chooses to speak, falls within *Miranda*’s concerns. On the other hand, despite having met with his attorney, Minnick was again told that he had to talk, strongly supports the majority’s reluctance to allow case by case adjudication of the meaning of the term “consultation.”

*Minnick*, of course, will have no impact in New York because it has long been the rule, under article I, section 6 of the New York State Constitution,<sup>261</sup> that once a suspect invokes the right to counsel, he or she may not waive that right in the absence of counsel.<sup>262</sup>

Some may have thought that the majority that ruled for the defendant in *Minnick*, could also be assembled in *McNeil v. Wisconsin*,<sup>263</sup> in which the defendant’s Sixth Amendment<sup>264</sup> right to counsel had attached by dint of his arraignment on a specific

259. *Id.* at 497 (Scalia, J., dissenting).

260. *Id.* at 495-96 (Scalia, J., dissenting).

261. N.Y. CONST. art. I, § 6. Section 6 provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”

262. *See* *People v. Hobson*, 39 N.Y.2d 479, 481, 348 N.E.2d 894, 896, 384 N.Y.S.2d 419, 420 (1976) (where the court held that any statements elicited by an agent of the State, however subtly, after a purported “waiver” obtained without the presence or assistance of counsel, are inadmissible); *People v. Arthur*, 33 N.Y.2d 327, 329, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 666 (1968) (where the court held that once an attorney enters a proceeding, the police may not question the defendant in the absence of counsel unless there is an affirmative waiver, in the presence of the attorney, of the defendant’s right to counsel).

263. 111 S. Ct. 2204 (1991).

264. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”

charge but was held not to preclude police questioning as to another offense.<sup>265</sup>

McNeil was arraigned on robbery charges in Milwaukee County Court and he was represented by a public defender.<sup>266</sup> Later that same day, McNeil was visited in jail by a detective who was investigating a murder and other related crimes in Caledonia, Wisconsin.<sup>267</sup> He gave McNeil *Miranda* warnings and McNeil signed a waiver form.<sup>268</sup> McNeil did not deny knowledge of the Caledonia crimes, but said that he had not been involved.<sup>269</sup> Two days later, the detective and other police officers again questioned McNeil; this time McNeil incriminated himself.<sup>270</sup>

McNeil argued in the Supreme Court that his appearance with counsel at the bail hearing was an assertion of his Sixth Amendment right to counsel which, under *Michigan v. Jackson*,<sup>271</sup> would preclude the police from questioning him in the absence of counsel about the charged offense.<sup>272</sup> From this undisputed proposition, he next argued that his assertion of his Sixth Amendment right should be construed as also invoking his Fifth Amendment rights, which would entitle him to the benefit of the decisions in *Edwards v. Arizona*<sup>273</sup> and *Arizona v. Roberson*<sup>274</sup>

265. *McNeil*, 111 S. Ct. at 2208.

266. *Id.* at 2206.

267. *Id.*

268. *Id.*

269. *Id.*

270. *Id.* at 2206-07.

271. 475 U.S. 625 (1986) (where the Court held that once the right to counsel has attached and has been invoked, any subsequent waiver during a police-initiated custodial interview is ineffective).

272. *McNeil*, 111 S. Ct. at 2207.

273. 451 U.S. 477 (1981) (where the Court held that when an accused has invoked his right to counsel being present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police initiated questioning, even if he has been advised of his rights).

274. 486 U.S. 675 (1988) (where the Court held that an invocation of the right to counsel under the *Edwards* rule was not offense-specific and, thus, precluded interrogation on crimes other than the one for which the suspect invoked his right to counsel).

that prohibit police-initiated interrogation in the absence of counsel even as to unrelated offenses.<sup>275</sup>

Justice Scalia, writing for a majority of six, was not accommodating.<sup>276</sup> Although conceding that McNeil's Sixth Amendment right to counsel had attached, he emphasized that the right is "offense-specific"<sup>277</sup> and that the *Jackson* prohibition on interrogation without counsel unlike the *Edwards-Roberson* rule, is similarly limited, stating:

To invoke the Sixth Amendment interest is, as a matter of fact, not to invoke the *Miranda-Edwards* interest. One might be quite willing to speak to the police without counsel present concerning many matters, but not the matter under prosecution. It can be said, perhaps, that it is *likely* that one who has asked for counsel's assistance in defending against a prosecution would want counsel present for all custodial interrogation, even interrogation unrelated to the charge. That is not necessarily true, since suspects often believe that they can avoid the laying of charges by demonstrating an assurance of innocence through frank and unassisted answers to questions. But even if it were true, the *likelihood* that a suspect would wish counsel to be present is not the test for the applicability of *Edwards*. The rule of that case . . . requires, at a minimum, some statement that can reasonably be construed to be expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*. Requesting the assistance of an attorney at a bail hearing does not bear that construction.<sup>278</sup>

Justice Scalia further argued that the rule sought by the defendant was unsound as a matter of policy.<sup>279</sup> It is not needed to protect defendants from being badgered into talking because under *Jackson*, the subject of the police questions will have to be different from the offense for which the defendant has requested counsel<sup>280</sup> and, under *Edwards*, the defendant must not have al-

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275. *McNeil*, 111 S. Ct. at 2207.

276. *Id.* at 2206.

277. *Id.* at 2207.

278. *Id.* at 2209.

279. *Id.* at 2210.

280. *Id.*

ready rejected interrogation without counsel.<sup>281</sup> Conversely, Scalia argued that the proposed rule would seriously hamper the police by making a suspect off-limits soon after he is picked up and charged with any serious crime, since counsel is usually provided at that time.<sup>282</sup> Moreover, "if we were to adopt petitioner's rule, most persons in pretrial custody for serious offenses would be *unapproachable* by police officers suspecting them of involvement in other crimes, *even though they have never expressed any unwillingness to be questioned.*"<sup>283</sup> Since the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good, society would be the loser.<sup>284</sup>

Justice Kennedy wrote a brief concurrence, expressing criticism of the *Roberson* rule and reiterating the views of his *Roberson* dissent that an invocation of the *Miranda* right to counsel should be offense-specific as well.<sup>285</sup>

Justice Stevens, joined by Justice Blackmun and Marshall, dissented.<sup>286</sup> Stevens maintained that the majority's "parsimonious 'offense-specific'"<sup>287</sup> reading of the Sixth Amendment also "ignores the substance of the attorney-client relationship that the legal profession has developed over the years."<sup>288</sup> Stevens also maintained that the majority's limited construction of a Sixth Amendment invocation would have little practical effect.<sup>289</sup> He reasoned that because *Roberson* held that an invocation of *Miranda* rights is *not* offense-specific,<sup>290</sup> "the entire offense-specific house of cards that the Court has erected"<sup>291</sup> for the Sixth Amendment would collapse whenever the defendant or counsel

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281. *Id.*

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.* at 2211 (Kennedy, J., concurring).

286. *Id.* at 2212 (Stevens, J., dissenting).

287. *Id.* (Stevens, J., dissenting).

288. *Id.* at 2213 (Stevens, J., dissenting).

289. *Id.* at 2212 (Stevens, J., dissenting).

290. *Arizona v. Roberson*, 486 U.S. 675, 677-78 (1988).

291. *McNeil*, 111 S. Ct. at 2212 (Stevens, J., dissenting).

makes an explicit statement invoking *Miranda* rights at the initial appearance.<sup>292</sup>

A legitimate question arises as to whether Justice Stevens' argument is correct. A footnote in Justice Scalia's opinion may suggest that he is not: "We have . . . never held that a person can invoke his *Miranda* rights anticipatorily, in a context other than in 'custodial interrogation,' which a preliminary hearing will not always, or even usually, involve."<sup>293</sup> Such reasoning, he pointed out, would lead to the unacceptable conclusion that *Miranda* rights could be invoked "by a letter prior to arrest, or indeed even prior to identification as a suspect."<sup>294</sup> Thus, if *Miranda* rights cannot be invoked at an initial appearance before a judicial officer, then Justice Stevens' belief that the majority "opinion probably will have only a slight impact on current custodial interrogation procedures,"<sup>295</sup> may prove an unwise bet.

*McNeil* may also have a greater impact in New York because of the decision in *People v. Bing*.<sup>296</sup> Under *People v. Bartolomeo*,<sup>297</sup> a suspect, represented by counsel on a prior pending charge, could not waive his rights in the absence of counsel and answer questions on new, unrelated charges.<sup>298</sup> If the police were chargeable with knowledge of the prior representation, any statements made by the suspect, not only about the prior charges, but also about the new charges, had to be suppressed.<sup>299</sup> However, *Bing* overruled *Bartolomeo*.<sup>300</sup> Thus, the police are no longer under an obligation to ascertain the status of the defen-

292. *Id.* (Stevens, J., dissenting).

293. *Id.* at 2211 n.3.

294. *Id.*

295. *Id.* at 2212 (Stevens, J., dissenting).

296. 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990) (where the court held that defendants, represented by counsel on prior pending unrelated charges, were not deprived of rights to counsel under the state constitution where in absence of counsel, defendants waived their *Miranda* rights and made statements in response to police questioning on matters unrelated to the prior pending charge).

297. 53 N.Y.2d 225, 423 N.E.2d 371, 440 N.Y.S.2d 894 (1981).

298. *Id.* at 230-31, 423 N.E.2d at 374, 440 N.Y.S.2d at 897.

299. *Id.* at 232, 423 N.E.2d at 375, 440 N.Y.S.2d at 897-98.

300. *Bing*, 76 N.Y. 2d at 350, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485.

dant's prior pending charge.<sup>301</sup> However, *Bing* did not disturb the ruling in *People v. Rogers*,<sup>302</sup> which held that once a defendant is represented on the charge on which he was held in custody, he cannot be interrogated in the absence of counsel on any matter, whether related or unrelated to the subject of the representation.<sup>303</sup> In *Bing*, the court made it clear that despite its overruling of *Bartolomeo*, *Rogers* remains.<sup>304</sup> The distinction, the court explained, is this:

In *People v. Rogers*, the right to counsel had been invoked on the charges on which defendant was taken into custody and he and his counsel clearly asserted it. To protect his rights, we established a bright-line rule preventing the police from questioning defendant about those charges or any other charges. In *People v. Bartolomeo*, however, defendant was taken into custody for questioning on a new, unrelated charge. He was not represented on that charge and freely waived his right to counsel. Since the right to counsel is personal and may be waived by a defendant, the court had to create an indelible right, a right that defendant could not waive in the absence of counsel, to justify suppression of the voluntary statement. It did so by implying a derivative right arising from the prior pending charges. We find the *Bartolomeo* rule unworkable, and therefore overrule it, but our decision today should not be understood as retreating from the stated holding of *Rogers*.<sup>305</sup>

The effect of *McNeil* may well turn, therefore, on timing more than anything else. If at arraignment on a certain charge A, the defendant and his counsel make clear that there is to be no questioning of the defendant as to any other charges and the police are clearly on notice, then *Rogers* would seem to control. However, if at that same arraignment, no reference is made to interrogation as to any other charges, then the defendant would, after *Bing*, seem clearly at risk because, unlike in *Rogers*, his attorney has

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301. *Id.* at 344-51, 558 N.E.2d at 1018-23, 559 N.Y.S.2d at 481-86.

302. 48 N.Y.2d 167, 397 N.E.2d 709, 422 N.Y.S.2d 18 (1979).

303. *Id.* at 168, 397 N.E.2d at 710, 422 N.Y.S.2d at 19.

304. *Bing*, 76 N.Y.2d at 350, 558 N.E.2d at 1022, 559 N.Y.S.2d at 485.

305. *Id.*

not opted to shield him from all questioning so that the police are on actual notice of that interdiction.<sup>306</sup>

### THE SIXTH AMENDMENT AND PRECLUSION OF THE DEFENSE CASE

In *Michigan v. Lucas*<sup>307</sup> the Supreme Court revisited the issue of the constitutionality of state preclusion rules where the defendant failed to comply with statutorily-imposed notice requirements. Like most states, Michigan has a rape-shield statute<sup>308</sup>

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306. Such a defendant would seem to be in a position similar to that of the defendant in *People v. Cawley*, 76 N.Y.2d 331, 558 N.E.2d 1011, 559 N.Y.S.2d 474 (1990), one of the cases decided with *Bing*. In *Cawley*, defendant was charged in New York with robbery. *Id.* at 336, 558 N.E.2d at 1013, 559 N.Y.S.2d at 476. After his arraignment, and with counsel present, he was released on bail. *Id.* He absconded and remained a fugitive for six months before he was returned to New York on a bench warrant. *Id.* He was then interrogated by police who were unaware of his prior representation, waived his *Miranda* rights, and gave inculpatory statements about several murders. *Id.*

307. 111 S. Ct. 1743 (1991).

308. MICH. COMP. LAWS § 750.520j (1979). The Michigan statute provides:

- (1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted under sections 520b to 520g unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:
  - (a) Evidence of the victim's past sexual conduct with the actor.
  - (b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.
- (2) If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1). If new information is discovered during the course of the trial that may make the evidence described in subsection (1)(a) or (b) admissible, the judge may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1).

*Id.*



designed to protect rape victims from harassing or irrelevant questions concerning their sexual behavior. An exception to the statute allows a defendant to introduce evidence of his own past sexual conduct with the victim provided that he do so in a written motion within ten days of arraignment.<sup>309</sup>

Justice O'Connor, writing for a majority of six Justices, treated the case as presenting a narrow question: whether the Michigan Court of Appeals erred in adopting a *per se* rule that preclusion of evidence of a rape victim's prior sexual relationship with a criminal defendant violated the Sixth Amendment.<sup>310</sup> She concluded that such a *per se* rule was inappropriate, because the notice requirement could serve a legitimate state purpose in some instances, and a defendant's non-compliance with the notice requirement could be so egregious as to warrant the preclusion sanction.<sup>311</sup> She pointed out that in *Taylor v. Illinois*<sup>312</sup> the Court approved preclusion as a sanction for a discovery violation, on the basis of the trial court's findings that the defendant's violation of a state discovery rule was "willful misconduct" and designed to obtain a "tactical advantage."<sup>313</sup>

The Court did not decide whether the Michigan notice period, the shortest in the nation, requiring notice to be given well before trial,<sup>314</sup> was in fact "arbitrary and disproportionate" to the state's

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309. *See id.*

310. *Lucas*, 111 S. Ct. at 1746.

311. *Id.* at 1748.

312. 484 U.S. 400 (1988). In *Taylor*, the defendant violated a state procedural rule by failing to identify a particular defense witness in response to a pretrial discovery request. *Id.* at 403. The trial court sanctioned this violation by refusing to allow the undisclosed witness to testify. *Id.* at 406. The Court held that alternative sanctions would be "adequate and appropriate in most cases." *Id.* at 413. However, the Court explicitly stated that there could be circumstances in which preclusion was justified because a less severe penalty "would perpetuate rather than limit the prejudice to the State and the harm to the adversary process." *Id.* The Court determined that *Taylor* was such a case given that the trial court found that Taylor's discovery amounted to "willful misconduct" and was designed to obtain "a tactical advantage." *Id.* at 417.

313. *Lucas*, 111 S. Ct. at 1748.

314. The statute provides that the defendant must "propose to offer [such] evidence within 10 days after arraignment." MICH. COMP. LAWS § 750.520j(2).

legitimate interests.<sup>315</sup> Instead, the Court remanded to determine whether preclusion was appropriate under the circumstances of the case.<sup>316</sup>

Justice Stevens, joined by Justice Marshall, criticized the Court for reaching out to attack the *per se* strawman that the Michigan Court of Appeals had not, in fact, embraced: That “a state court’s opinion could have been written more precisely than it was is not, in my view, a sufficient reason for either granting certiorari or requiring the state court to write another opinion. Our task is limited to reviewing ‘judgments, not opinions.’”<sup>317</sup> Because, in Stevens’ view (and which he believed was the majority view as well), the 10 day requirement “is overly restrictive, the use of that notice requirement to preclude evidence of a prior sexual relationship between the defendant and victim clearly provides adequate support for the Court of Appeals’ holding that the statute is unconstitutional.”<sup>318</sup>

The *Lucas* decision is not particularly exciting. It adds little to the Court’s Sixth Amendment jurisprudence on preclusion issues. However, it does represent yet another example of the Court’s willingness to address a constitutional issue when it is not necessarily presented. This is the same pattern that was present in *Florida v. Bostick*<sup>319</sup> and *Arizona v. Fulminante*.<sup>320</sup> Moreover, this is characteristic of many decisions in previous terms, and reflects an activist philosophy which Justice Stevens has consistently criticized as inconsistent with the Court’s institutional role, especially when it is called upon to review decisions of state courts.<sup>321</sup>

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315. *Lucas*, 111 S. Ct. at 1748.

316. *Id.*

317. *Id.* at 1749 (Stevens, J., dissenting).

318. *Id.* at 1750 (Stevens, J., dissenting).

319. 111 S. Ct. 2382 (1991).

320. 111 S. Ct. 1246 (1991).

321. *See, e.g., Michigan v. Long*, 463 U.S. 1032, 1065-72 (1983) (Stevens, J., dissenting).

## THE JURY SELECTION CASES

Whatever antipathy liberals have towards the Rehnquist Court, it cannot be directed at the Court for its work with respect to jury selection. The 1990 Term witnessed the Court's relentless dismantling of the detritus of *Swain v. Alabama*,<sup>322</sup> viewed by many as one of the most disheartening rulings of the Warren Court.<sup>323</sup>

This past term, the Court decided four cases<sup>324</sup> which continued the path chosen by the Court in *Batson v. Kentucky*<sup>325</sup> with respect to peremptory challenges based on race.

In *Powers v. Ohio*,<sup>326</sup> the Court held that racial identity between a criminal defendant and particular members of his petit jury venire is not required in order for the defendant to assert a claim, based on the Equal Protection Clause,<sup>327</sup> that the prosecutor relied on race in using peremptory challenges to eliminate prospective jurors.<sup>328</sup> Justice Kennedy, who previously expressed exceptionally strong feelings about the dignity of jurors,<sup>329</sup> wrote for a 7-2 majority. He stated that the race of the defendant is irrelevant because the equal protection rights at stake are those of the excluded jurors who have a right not to be excluded from jury service on the basis of race.<sup>330</sup>

322. 380 U.S. 202 (1965).

323. Roger S. Kuhn, *Jury Discrimination: The Next Phase*, 41 S. CAL. L. REV. 235, 283-303 (1968); see generally Elizabeth Glazer, Note, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357 (1985); Gary L. Geeslin, Note, *Peremptory Challenge - Systematic Exclusion of Prospective Jurors on the Basis of Race*, 39 MISS. L.J. 157 (1967); Comment, *Swain v. Alabama: A Constitutional Blueprint for the Perpetuation of the All-White Jury*, 52 VA. L. REV. 1157 (1966).

324. *Powers v. Ohio*, 111 S. Ct. 1364 (1991); *Edmondson v. Leesville Concrete Co.*, 111 S. Ct. 2077 (1991); *Hernandez v. New York*, 111 S. Ct. 1859 (1991); *Ford v. Georgia*, 111 S. Ct. 850 (1991).

325. 476 U.S. 314 (1986).

326. 111 S. Ct. 1364 (1991).

327. U.S. CONST. amend. XIV, § 1, cl. 3.

328. *Powers*, 111 S. Ct. at 1373-74.

329. See, e.g., *Holland v. Illinois*, 493 U.S. 474, 488-89 (1990) (Kennedy, J., concurring).

330. *Powers*, 111 S. Ct. at 1371.

The writing on the wall for the outcome in *Powers* was fairly evident in *Holland v. Illinois*.<sup>331</sup> Although the Court held in *Holland* that a white defendant's claim that a prosecutor's use of peremptory strikes to exclude black jurors did not violate his Sixth Amendment right to trial by jury,<sup>332</sup> a majority of the justices could be tallied as having a different view if the claim of the white defendant had been based on the Equal Protection Clause.<sup>333</sup>

In *Powers*, Justice Kennedy acknowledged that *Batson* spoke of the harm caused when a member of the defendant's own race had been excluded from the jury.<sup>334</sup> However, "*Batson* was designed 'to serve multiple ends,'"<sup>335</sup> Kennedy said, one of which is upholding the right of ordinary citizens to participate in the administration of justice.<sup>336</sup> He emphasized that the Court has long recognized that, except for voting, "jury duty is th[e] most significant opportunity [a citizen has] to participate in the democratic process."<sup>337</sup> Thus, as many of the Court's precedents demonstrate, "[w]hile States may prescribe relevant qualifications for their jurors, a member of the community may not be excluded from jury service on account of his or her race."<sup>338</sup> Kennedy pointed out that Congress had also addressed the issue by providing in the Civil Rights Act of 1875,<sup>339</sup> that no citizen may

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331. 493 U.S. 474 (1990).

332. *Id.* at 478.

333. *Id.* at 486-87.

334. *Powers*, 111 S. Ct. at 1368.

335. *Id.*

336. *Id.*

337. *Id.* at 1369 (citation omitted).

338. *Id.*

339. 18 U.S.C. § 243 (1992). The Act provides:

No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause, shall be fined not more than \$5,000.

*Id.*

be disqualified from jury service on account of race or color.<sup>340</sup> Kennedy also relied on *Peters v. Kiff*,<sup>341</sup> which held that a white defendant could challenge the systematic exclusion of blacks from grand and petit juries.<sup>342</sup> Although the *Peters* Court did not produce a majority for any particular constitutional rationale, Kennedy pointed out that six Justices did agree that "racial discrimination in the jury selection process cannot be tolerated and that the race of the defendant has no relevance to his or her standing to raise the claim."<sup>343</sup>

In addressing the standing issue, Kennedy concluded that a criminal defendant, irrespective of color, met all the conditions required for third-party standing: injury in fact, a close relation to the third party, and the existence of some hindrance to the third party's ability to assert his or her own rights.<sup>344</sup> Racial discrimination infecting criminal proceedings, he pointed out, impugns the integrity of the judicial process and casts the fairness of the proceedings in doubt.<sup>345</sup> A verdict reached by a jury so composed will not be understood or accepted by the community as fair.<sup>346</sup> Therefore, "a criminal defendant suffers a real injury when the prosecutor excludes jurors at his or her own trial on account of race."<sup>347</sup> Consequently, argued Kennedy, a criminal defendant will be a zealous advocate of the excluded juror's rights.<sup>348</sup> The defendant's stake in proving that an equal protection violation occurred, on which his liberty may depend, is the kind of keen interest traditionally thought to confer third-party standing.<sup>349</sup> However, one can be less romantic and rely on the propensity of criminal defendants to raise any issue that might provide the basis for an appeal.

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340. *Powers*, 111 S. Ct. at 1369.

341. 407 U.S. 493 (1972).

342. *Id.* at 505.

343. *Powers*, 111 S. Ct. at 1369.

344. *Id.* at 1370-71.

345. *Id.*

346. *Id.*

347. *Id.* at 1372.

348. *Id.*

349. *Id.*

Justice Scalia, joined by Chief Justice Rehnquist, dissented.<sup>350</sup> He claimed that the majority had departed radically from the Court's prior equal protection decisions.<sup>351</sup> He argued that *Batson* and its precursors had all focused on the equal protection rights of the defendant and that no case had held that a prospective juror had a right of his or her own to sit in a particular case.<sup>352</sup> Consequently, assuming *arguendo* that there was third-party standing, there was no constitutional violation, and no claim for the defendant to raise vicariously, when a person of a race other than his is excluded from his jury.<sup>353</sup> While the majority's "supposed blow against racism"<sup>354</sup> was undoubtedly "enormously self-satisfying,"<sup>355</sup> Scalia opined that the "innumerable claims it is likely to give rise to will not advance racial justice significantly."<sup>356</sup>

In *Edmondson v. Leesville Concrete Co.*,<sup>357</sup> Justice Kennedy, writing for a 6-3 majority, had still another opportunity to demonstrate his commitment to racially-sanitized jury selection processes. For here, the Court extended *Batson* to civil cases, holding that a private civil litigant's race-based peremptory challenge of a prospective juror is state action that violates the Equal Protection Clause.<sup>358</sup> The state action analysis is the most significant aspect of the opinion, and Martin Schwartz has ably analyzed it.<sup>359</sup> However, because the Court's opinion is broadly written, I believe that it has positive implications for the issue that the Court has just decided to resolve: Whether criminal defendants are limited by *Batson*. On Monday, November 4, 1991, the Court granted certiorari in *Georgia v. McCollum*,<sup>360</sup> in which the issue

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350. *Id.* at 1374 (Scalia, J., dissenting).

351. *Id.* (Scalia, J., dissenting).

352. *Id.* at 1377-78 (Scalia, J., dissenting).

353. *Id.* at 1378-79 (Scalia, J., dissenting).

354. *Id.* at 1382 (Scalia, J., dissenting).

355. *Id.* (Scalia, J., dissenting).

356. *Id.* (Scalia, J., dissenting).

357. 111 S. Ct. 2077 (1991).

358. *Id.* at 2080.

359. Schwartz, *Section 1983 Litigation, The Supreme Court and Local Government Law*, 9 TOURO L. REV. 3, 20-22 (1992).

360. 112 S. Ct. 931 (1991), *since decided*, 112 S. Ct. 2348 (1992).

is presented. Although the state action issue was not an obstacle in *Edmondson*, there is a passage in Justice Kennedy's opinion in *Edmondson* which suggests that defense lawyers in criminal cases may not be considered state actors because they are in an adversarial relation to the state.<sup>361</sup> Thus, it will be interesting to see whether, in a case such as *McCullum*, the Court will decline to hold criminal defense attorneys bound by *Batson*.<sup>362</sup>

If the Court so holds, New York criminal defense attorneys will not be able to enjoy its fruits, given the New York Court of Appeals' decision in the Howard Beach case<sup>363</sup> which held that it was not error to refuse to permit the defendant to exercise peremptories on a racial basis.<sup>364</sup> Another interesting question surfaced recently in a so-called "gay-bashing" case in Queens.<sup>365</sup> Should defense counsel be permitted to inquire into the sexual preferences of prospective jurors, ostensibly to inform an exercise of peremptory challenges?

*Hernandez v. New York*<sup>366</sup> was an interesting, but not terribly important, case that involved the use of peremptories to exclude Hispanic jurors in the trial of a Hispanic defendant. The prosecutor defended his action because he feared that the venire persons would ignore the official English translation of Spanish-language testimony.<sup>367</sup> The main problem in the case was the murky nature of the record.<sup>368</sup> This caused six Justices to conclude that there was no clear error in the New York Court of Appeals' approval of the peremptory challenges.<sup>369</sup> Justice Kennedy, writing for a plurality of four, explored the possibility that the prosecu-

361. *Edmondson*, 111 S. Ct. at 2086.

362. *Georgia v. McCullom*, 112 S. Ct. 2348 (1992), was decided June 18, 1992. In *McCullum*, the Court held that a criminal defendant is constitutionally prohibited from engaging in purposeful race discrimination in the exercise of peremptory challenges. *Id.* at 2359.

363. *People v. Kern*, 75 N.Y.2d 638, 554 N.E.2d 1235, 555 N.Y.S.2d 647 (1990).

364. *Id.* at 649-50, 554 N.E.2d at 1241, 555 N.Y.S.2d at 653.

365. *People v. Bici*, No. 6999/90 (N.Y. Sup. Ct. Nov. 20, 1991).

366. 111 S. Ct. 1859 (1991).

367. *Id.* at 1864-65.

368. *Id.* at 1867.

369. *Id.* at 1871.

tor's explanation was actually a pretext, but he deferred to the trial court's finding that the explanation was valid.<sup>370</sup>

Hernandez argued that the use of Spanish-language ability as a ground for use of the peremptory challenge denied equal protection because it bore "a close relation to ethnicity."<sup>371</sup> Justice Kennedy concluded that the argument missed the mark because it did not square with the facts in the case.<sup>372</sup> The prosecutor had not relied solely on the prospective jurors' Spanish-language ability, rather, the prosecutor "explained that the specific responses and demeanor of the two individuals during *voir dire* caused him to doubt their ability to defer to the official translation of Spanish-language testimony."<sup>373</sup> Kennedy concluded that on its face, this is an adequate, race-neutral ground for *Batson* purposes.<sup>374</sup> The prosecutor's challenges rested neither on an intention to exclude Latino or bilingual jurors, nor on stereotypical assumptions about Latinos or bilinguals.<sup>375</sup>

Lastly, in *Ford v. Georgia*,<sup>376</sup> the Court refused to permit procedure to interfere with its commitment to the substance of *Batson* and unanimously held that judicial consideration of a defendant's claim of discriminatory use of peremptory challenges cannot be barred by a procedural rule announced after the defendant's trial.<sup>377</sup> The case will probably be most remembered because it was Justice Souter's first opinion.

Ford, a black defendant, was charged with the murder of a white woman.<sup>378</sup> Before trial, defense counsel asked the trial judge to discourage the state from exercising peremptories in a racially biased manner; he claimed that there was a long history of such discrimination by the local prosecutor and his assis-

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370. *Id.* at 1868-71.

371. *Id.* at 1866.

372. *Id.* at 1866-67.

373. *Id.* at 1867.

374. *Id.* at 1868.

375. *Id.* at 1872-73.

376. 111 S. Ct. 850 (1991).

377. *Id.* at 858.

378. *Id.* at 852.



tants.<sup>379</sup> The motion was denied.<sup>380</sup> Later, after the jury was sworn and opening statements had been made, the defense objected to the fact that the prosecution had used nine of its ten peremptories to exclude blacks.<sup>381</sup> Again the trial judge overruled the objection and did not require the prosecution to explain its challenges.<sup>382</sup> Defense counsel made reference only to the Sixth Amendment cross-section requirement and did not raise an equal protection claim.<sup>383</sup>

Ford's petition for certiorari was still pending when *Batson* was decided.<sup>384</sup> *Batson* was later held to apply retroactively to a case such as Ford's and it was remanded to the Georgia Supreme Court.<sup>385</sup> On remand, however, the Georgia Supreme Court ruled that Ford had never raised an equal protection claim.<sup>386</sup> It also held that its intervening decision in *State v. Sparks*,<sup>387</sup> which said that a *Batson* claim must be raised before the jurors are sworn,<sup>388</sup> meant that a *Batson* claim was premature if it was made before the jurors are chosen.<sup>389</sup> Therefore, under this rule, Ford's claim was barred.<sup>390</sup>

Justice Souter held that Ford did in fact raise a *Batson*-type claim when he complained of the prosecutor's exclusion of black jurors.<sup>391</sup> Despite the absence of a citation to the relevant constitutional provision, Ford's allegations "could reasonably have been intended and interpreted to raise a claim under the Equal Protection Clause on the evidentiary theory articulated in *Bat-*

379. *Id.* at 852-53.

380. *Id.* at 853.

381. *Id.*

382. *Id.*

383. *Id.* at 853-54.

384. *Id.* at 854. *Batson v. Kentucky*, 476 U.S. 79 (1986), was decided April 30, 1986.

385. *Ford*, 111 S. Ct. at 854.

386. *Ford v. State*, 362 S.E.2d 764, 766 (Ga. 1987).

387. 355 S.E.2d 658 (Ga. 1987).

388. *Id.* at 659.

389. *Ford*, 362 S.E.2d at 766.

390. *Id.*

391. *Ford*, 111 S. Ct. at 855.

*son's* antecedent, *Swain*.<sup>392</sup> In fact, he pointed out, the Georgia Supreme Court itself recognized that a claim under *Swain* had been raised.<sup>393</sup> Moreover, "[b]ecause *Batson* did not change the nature of the violation recognized in *Swain*, but merely the quantum of proof necessary to substantiate a particular claim,"<sup>394</sup> a claim under *Swain* necessarily serves a claim under *Batson*.<sup>395</sup>

Justice Souter did not dispute that the *Sparks* rule, requiring a *Batson* claim to be raised in the interim between the selection of the jurors and the administration of their oaths, was "a sensible rule."<sup>396</sup> Nonetheless, he pointed out that in any given case "the sufficiency of such a rule to limit all review of a constitutional claim itself depends upon the timely exercise of the local power to set procedure."<sup>397</sup> Justice Souter explained that *James v. Kentucky*<sup>398</sup> established that "an adequate and independent state procedural bar to the entertainment of constitutional claims must have been 'firmly established and regularly followed' by the time as of which it is to be applied."<sup>399</sup> Souter concluded that the *Sparks* rule applied in this case.<sup>400</sup> However, having been announced only two years after Ford's trial, Souter determined that

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392. *Id.*

393. *Id.*

394. *Id.* at 856.

395. *Id.*

396. *Id.* at 857.

397. *Id.*

398. 466 U.S. 341 (1984). In *James*, the judge denied defense counsel's request that "an admonition be given to the jury that no emphasis be given to the defendant's failure to testify." *Id.* at 345. Petitioner was convicted, and on appeal he argued that the trial judge's refusal to charge the jury as requested violated *Carter v. Kentucky*, 450 U.S. 288 (1981), which held that in order to fully effectuate the right to remain silent, a trial judge must, if requested to do so, instruct the jury not to draw an adverse inference from the defendant's failure to testify. *Id.* Thus, the Court held that petitioner's request for a *Carter* "admonition," *i.e.*, that no adverse inference be drawn from his failure to testify, rather than a *Carter* "instruction" was not an adequate basis under state law to refuse to so inform the jury. *Id.*

399. *Ford*, 111 S. Ct. at 857.

400. *Id.*

the *Sparks* rule cannot be said to have been “firmly established.”<sup>401</sup>

#### CONCLUSION

In sum, with the exception of the jury selection cases, the Court’s important criminal law decisions again demonstrated its heavy preference for law enforcement interests over those of the individual. On the basis of the cases that I have discussed, many of you may conclude that I have misrepresented the landscape, that it was more balanced with the government winning some and the individual others. Consider if you will, however, that I have not even addressed the Court’s Eighth Amendment and habeas corpus decisions. In those two areas, the rout was overwhelming.

But don’t take my word for any of this. Consider those of Jesse H. Choper, Dean and Earl Warren Professor of Public Law at the University of California at Berkeley. The United States Law Week, at this year’s annual conference in Washington, D.C., noted that for years, Dean Choper had “defied what he call[ed] the ‘conventional wisdom’ of the news media and various constitutional law scholars that the ‘Reagan Revolution’ has hit the U.S. Supreme Court.”<sup>402</sup> However Dean Choper finally conceded “that the conservative dominance that has been predicted for two decades has finally taken hold.”<sup>403</sup>

To you, representatives of state and local governments, I say “*carpe diem* and enjoy yourselves.”

*Professor Eileen Kaufman:*

Professor Hellerstein, I wonder if I could prevail upon you to engage in speculation and comment on *Batson*’s potential application to gender based peremptory challenges?

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401. *Id.* at 857-58.

402. 60 U.S.L.W. 2253 (Oct. 22, 1991) (synopsizing and quoting Jesse H. Choper, Constitutional Law Conference of *United States Law Week* (Sept. 6-7, 1991)).

403. *Id.*

*Professor William E. Hellerstein:*

I think that it will go the same way. That is just my general sense. Without analyzing in depth the interplay between the compelling interest standard<sup>404</sup> and lesser scrutiny standards<sup>405</sup> in the equal protection area, I cannot give a definitive answer. I have a hard time conjuring *Batson* not applying to gender. I don't think it would make much sense not to apply *Batson* because you would have to come up with the same stereotypical applications as to what a woman would do. I think that maybe I draw sustenance from what I understand Justice O'Connor said at the James Madison lectures at NYU with respect to feminist jurisprudence in the constitutional sense.<sup>406</sup> I'm paraphrasing, based on what I read in the Law Journal, that it was something to the effect that there are no wise men and wise women, that there are only wise judges.<sup>407</sup> I think she was saying that principles with respect to judging are gender neutral and that since jurors judge, it would be hard not to have that same principle apply to women as it does apply to some ethnic groups. So, I am not terribly worried that women will be treated differently.

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404. See U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.* Once strict scrutiny is applied to a particular law, the law will be upheld only if it is necessary to achieve a compelling governmental interest. See JOHN E. NOWACK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW*, 575 (4th ed. 1991).

405. Under the Equal Protection Clause, the standard for the lowest level of review is the "rational relationship" test. See NOWACK, *supra* note 404 at 574. Once the "rational relationship" test is applied to a particular law, the law will be upheld if it is conceivable that there is some rational relation between the means selected by the legislature and a legitimate legislative objective. *Id.* at 574-75. A more recent development is the intermediate standard of review. *Id.* at 576. Once the standard for "intermediate" level of scrutiny is applied to a particular law, the law will be upheld if it serves an important governmental objective and is substantially related to the achievement of those objectives. *Id.*

406. Sandra Day O'Connor, *Portia's Progress*, 66 N.Y.U. L. REV. 1546 (1991).

407. Deborah Pines, *O'Connor Discounts Feminist Jurisprudence*, N.Y. L.J., Oct. 31, 1991, at 1.

I think much more difficult is the problem that came up in the Queens case.<sup>408</sup> You are defending somebody in a gay bashing case and query, would you not like to know what a person's views about gays are, in the sense that a potential juror may be gay and that he or she was a victim previously? I think from the defense perspective it is a very close question. The only reason that it is even arguable, I think, is because gays have not yet achieved the same constitutional protection that gender and race have.<sup>409</sup>

But I think the Court might still not necessarily sustain such an inquiry as it might also not sustain one as to religion. I think it is difficult at this stage of development of the law to be certain because you are running up against the time tried notion of what peremptories are for; they serve to ascertain certain things about prospective jurors.<sup>410</sup> When you get down to very discrete cir-

408. *Poeple v. Bici*, No. 6999/90 (N.Y. Sup. Ct. Nov. 20, 1991).

409. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186 (1986). Although *Bowers* involved a fundamental rights analysis under the Due Process, not the Equal Protection Clause, the Court's reasoning seems applicable to the latter as well. The majority stated that:

[T]he Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution . . . [T]here should be, therefore, great resistance to expanding the substantive reach of [the Due Process Clause], particularly if it requires redefining the category of rights deemed to be fundamental.

*Id.* at 194-95.

The Court in *Bowers* in fact, found no "fundamental right [of] homosexuals to engage in sodomy." *Id.* at 192. *Cf. Craig v. Boren*, 429 U.S. 190 (1976) (where the Court articulated the applicable standard for gender discrimination as those classifications that serve important governmental objectives and are substantially related to the achievement of those objectives); *Brown v. Board of Education*, 347 U.S. 483 (1954) (where the Court explicitly rejected the "separate but equal" doctrine); *Loving v. Virginia*, 388 U.S. 1 (1967) (where the Court held that a statute that prevents marriages between persons solely on the basis of racial classifications violates the Fourteenth Amendment).

410. A component of the jury selection process is the litigant's privilege to strike individual jurors through peremptory challenges. A peremptory challenge entitles a litigant to exercise a challenge for any reason at all, as long as that reason is related to his or her view concerning the outcome of the case to be tried, subject, of course, to the commands of the Equal Protection Clause.

cumstances, not black or white stereotypes or women, but where the core of your focus is a little smaller, a different situation emerges. For example, if you were defending a Nazi war criminal, would you want to know something about the background and religion, perhaps, of the jurors? Or would you feel comfortable defending a Nazi war criminal with twelve orthodox Jews who had their families wiped out seated in the jury box?

It is a question of degree and I'm glad that I don't have to make a ruling on the gay bashing case. I know that Justice Phyllis Skloot Bamberger has rendered an opinion in *People v. Iri-zarry*<sup>411</sup> on gender that supports my instincts, and I think she is quite right.

*Hon. George C. Pratt:*

I would like to go back to *Bostwick*, basically because I authored an opinion in the Second Circuit, *United States v. Madison*,<sup>412</sup> which we intentionally decided before *Bostwick* came down. In *Madison*, undercover police officers from the Port Authority found the defendant's conduct to be suspicious.<sup>413</sup> When the defendant boarded a bus bound for New Jersey,<sup>414</sup> the police officers followed him in order to question him.<sup>415</sup> Thereafter, one police officer asked the defendant whether the knapsack located alongside defendant belonged to him, and he responded in the negative.<sup>416</sup> Of course the police officer knew that the bag was the defendant's, as he had seen him holding it.<sup>417</sup> After no one claimed ownership of the knapsack, the police officer opened the bag, and found crack.<sup>418</sup> Subsequently, the police officer arrested the defendant.<sup>419</sup>

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411. 142 Misc. 2d. 793, 536 N.Y.S.2d 630 (Sup. Ct. Bronx County 1988).

412. 936 F.2d 90 (2d Cir. 1991).

413. *Id.* at 91.

414. *Id.*

415. *Id.*

416. *Id.* at 92.

417. *Id.* at 91.

418. *Id.* at 92.

419. *Id.*

The district court found that the defendant was not free to leave, thereby invalidating the search.<sup>420</sup> However, the court of appeals, stating that the police officer's behavior was innocuous, held that the officer's action did not compel defendant to cooperate with the questioning.<sup>421</sup> The court of appeals did not uphold the district court's finding that defendant was compelled to comply with the police officer's requests due to the fact that they were on a bus.<sup>422</sup> As the defendant "freely placed himself in the confined environment," it was unthinkable to then invalidate the search on the basis of the defendant's voluntary actions.<sup>423</sup> Therefore, the court of appeals upheld the search since defendant was not "seized" under the Fourth Amendment.<sup>424</sup>

A disturbing aspect of the "war on drugs" is those decisions which discuss flight as evidence of guilt.<sup>425</sup> Resistance and refusal to cooperate with the police has been interpreted by some judges as grounds for temporary seizure and examination. For example, in *United States v. Esieke*,<sup>426</sup> the Second Circuit held that defendant's refusal to undergo an x-ray was a factor in de-

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420. 744 F. Supp. 490, 496-97 (S.D.N.Y. 1990), *rev'd*, 936 F.2d 90 (2d Cir. 1991).

421. 936 F.2d at 93.

422. *Id.* at 94.

423. *Id.* at 95.

424. *Id.* at 94. U.S. CONST. amend. IV provides in pertinent part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . but upon probable cause . . . ." *Id.*

425. *See, e.g., California v. Hodari D.*, 111 S. Ct. 1547, 1549 n.1 (1991) ("That it would be unreasonable to stop, for brief inquiry, young men who scatter in panic upon the mere sighting of the police is not self-evident, and arguably contradicts proverbial common sense."). *See also United States v. Silva*, 957 F.2d 157, 160 (5th Cir. 1992) (the court relied on the fact that defendant fled from a police officer as support for its finding that the seizure was based on reasonable suspicion), *petition for cert. filed*, (U.S. July 21, 1992) (No. 92-5259).

426. 940 F.2d 29 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 610 (1991). *See also United States v. Montoya De Hernandez*, 473 U.S. 531, 534, 544 (1985) (customs officials correctly detained defendant who refused to submit to an x-ray examination); *United States v. Odofin*, 929 F.2d 56, 58 (2d Cir. 1991) (affirming defendant's detainment when he refused to undergo an x-ray or monitored bowel movement), *cert denied*, 112 S. Ct. 154 (1991).

termining that his detention was reasonable.<sup>427</sup> Although police may find valuable evidence as a result of these searches, I find this trend in the law to be disturbing.

We have invested enormous amounts of time and resources into the "war on drugs" by putting everybody into jail. Unfortunately, we have only aggravated the problem by creating overcrowded prisons. In the sense that government is not providing financial support to build more prisons, or make present prisons habitable, we have degraded the criminal law by using it as a method of social control. Certainly, the "war on drugs" has not been successful.

*Professor William E. Hellerstein:*

If you go back to where this all started, remember that the Warren Court, when it came down with the decision in *Terry v. Ohio*,<sup>428</sup> recognized then that some adjustment had to be made to the Warrant Clause and to the probable cause requirement of the Fourth Amendment.<sup>429</sup> To deal with the situation of an unfolding, heavily suspicious situation, a casing of a store in Cleveland at which a police officer had, by common reason, the right to do what he did, the Court had a hard time fitting his behavior into the Fourth Amendment.<sup>430</sup> So, it gave us justifiable suspicion to detain, which is a seizure,<sup>431</sup> and to search by frisking for weapons where there was a reasonable belief that the person that was detained was armed.<sup>432</sup> From that modest doctrinal departure, the Court has dispensed greatly with warrants, probable cause, with even justifiable suspicion, and has gone all the way to the other end of the spectrum because of what Judge Pratt more adequately points out is what the war on drugs has done to the

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427. *Esieke*, 940 F.2d at 34.

428. 392 U.S. 1 (1968).

429. *Id.* at 31. The Fourth Amendment provides in pertinent part: "[N]o Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

430. *Terry*, 392 U.S. at 30-31.

431. *Id.* at 28.

432. *Id.* at 28-29.



Constitution. The question that I raised last year,<sup>433</sup> and the year before<sup>434</sup> is, will it have been worth it? I think you know where I stand.

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433. William E. Hellerstein, *Fourth, Fifth, and Sixth Amendments, The Supreme Court and Local Government Law*, 7 TOURO L. REV. 319, 376-77 (1991).

434. William E. Hellerstein, *Fourth Amendment, The Supreme Court and Local Government Law*, 6 TOURO L. REV. 31, 53-54 (1989).