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## Fourth, Fifth, and Sixth Amendments

William E. Hellerstein

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## FOURTH, FIFTH, AND SIXTH AMENDMENTS

*Judge George Pratt:*

The second segment of our program concerns the fourth, fifth, and sixth amendments, a heavy dose of material to be covered. Our speaker, William Hellerstein, is fully capable of handling it in the time allowed, particularly with regard to the fourth amendment. I think we all should be concerned about the threat to the fourth amendment that is embodied in the current attitude, concern, crisis, one might say even paranoia, of our society over crime in general and drugs in particular. Any objective viewer of the case law, particularly in the lower court, under the fourth amendment searches and seizures, could not help but be struck by the different rules that seem to be applied, not verbally, but in practice, to drug cases as opposed to other kinds of cases.

Professor Hellerstein is well qualified in this area. He is a graduate of Harvard Law School, a professor at Brooklyn Law School and has long experience in criminal litigation, appellate litigation, and Supreme Court arguments.

*William E. Hellerstein:*

The Supreme Court's 1989 Term was an extremely beneficial one for the interests of state and local governments. This is reflected in the fact that eighty percent of the Court's criminal procedure cases were decided in the government's favor. At last year's Symposium,<sup>1</sup> at which I analyzed only the previous Term's fourth amendment decisions, I characterized those decisions as a "good news/bad news" proposition depending on one's perspective.<sup>2</sup> I pointed out that on balance, from the vantage point of state and local government officials, the news was more good than bad,<sup>3</sup> in that the Court had been far more so-

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1. See Hellerstein, *Fourth Amendment, The Supreme Court and Local Government Law*, 6 *TOURO L. REV.* 31 (1989).

2. *Id.* at 32.

3. *Id.*

licitous of the needs of law enforcement than of persons claiming rights under the amendment.<sup>4</sup> The same is even truer of this past Term's rulings. If one were to describe the Court's fourth amendment decisions during the 1989 Term in current cinematographic terms, an appropriate title might be, "Honey, I Shrunk the Fourth Amendment;" if one were to do the same for the dissenting opinions written, the title could be "Field of Dreams."

Much the same can be said about the Court's fifth and sixth amendment decisions during the Term just concluded. State and local government interests did extremely well; they prevailed in all of the Court's decisions involving the privilege against self-incrimination and procedural due process,<sup>5</sup> and they predominated in the sixth amendment decisions as well.<sup>6</sup>

## I. THE FOURTH AMENDMENT

Let me turn first to fourth amendment developments. This past Term was, by comparison with the two previous Terms, one of considerably greater fourth amendment activity. The Court decided eleven fourth amendment cases, only one of which I shall not discuss. That is because, although it is both important and fascinating, *United States v. Verdugo-Urquidez*,<sup>7</sup> dealt with the question of the fourth amendment's application abroad and thus it is not terribly relevant to the interests of local governments. The Court's holding, that the fourth amendment did not apply to the search by American authorities of the Mexican residence of a Mexican citizen prosecuted in our federal courts, nonetheless was a major victory for the government, as was the case in six of the ten other cases.<sup>8</sup> And

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4. *Id.*

5. See *Pennsylvania v. Muniz*, 110 S. Ct. 2638 (1990); *Washington v. Harper*, 110 S. Ct. 1028 (1990); *Baltimore City Dep't of Social Serv. v. Bouknicht*, 110 S. Ct. 900 (1990).

6. See, e.g., *Michigan v. Harvey*, 110 S. Ct. 1176 (1990); *Maryland v. Craig*, 110 S. Ct. 3157 (1990); but see *Idaho v. Wright*, 110 S. Ct. 3139 (1990); see also *Holland v. Illinois*, 110 S. Ct. 803 (1990).

7. 110 S. Ct. 1056 (1990).

8. Decided favorably for the government were: *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990); *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481 (1990); *Alabama v. White*, 110 S. Ct. 2412 (1990); *Horton v. California*, 110 S. Ct. 2301

qualitatively, as shall be seen, the government fared even better in that when it lost, the Court, with little exception, gave the fourth amendment much to savor.

Of the decisions rendered, that in *Michigan Department of State Police v. Sitz*,<sup>9</sup> upholding by a vote of six to three, the constitutionality of highway sobriety checkpoints,<sup>10</sup> broke new constitutional ground and is of crucial importance to state and local government interests. The Court's holding will have a wide-ranging effect, particularly in those states, such as New York,<sup>11</sup> whose courts have chosen not to construe state constitutional search and seizure provisions as to sobriety checkpoints more broadly than they construe the fourth amendment. For the average police officer in New York, however, the most important ruling of the Term may be *Maryland v. Buie*,<sup>12</sup> in which the Court recognized the police officers' right to protect themselves through the use of a "protective sweep."<sup>13</sup> That will depend on how that issue will fare if and when it reaches the New York Court of Appeals.

Let me begin with the sobriety checkpoint case and follow that with the "protective sweep" decision. In *Sitz*,<sup>14</sup> the Michigan Department of State Police established a sobriety checkpoint pilot program under which checkpoints were to be set up at selected points along state roads.<sup>15</sup> All vehicles passing through a checkpoint would be stopped and their drivers ex-

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(1990); *New York v. Harris*, 110 S. Ct. 1640 (1990); *Maryland v. Buie*, 110 S. Ct. 1093 (1990). Those in which the defendant prevailed were: *Minnesota v. Olson*, 110 S. Ct. 1684 (1990); *Florida v. Wells*, 110 S. Ct. 1632 (1990); *Smith v. Ohio*, 110 S. Ct. 1288 (1990) (per curiam); *James v. Illinois*, 110 S. Ct. 648 (1990). The Court also decided a Title VIII case in the government's favor, holding that a failure to comply with the statutory requirement that tapes of a wiretap be immediately sealed would not result in suppression if the government's error was the result of a good faith, objectively reasonable misinterpretation of the statute. *United States v. Ojeda Rios*, 110 S. Ct. 1845, 1851 (1990).

9. 110 S. Ct. 2481 (1990).

10. *Id.* at 2483.

11. *See People v. Scott*, 63 N.Y.2d 518, 473 N.E.2d 1, 483 N.Y.S.2d 649 (1984).

12. 110 S. Ct. 1093 (1990).

13. *Id.* at 1094.

14. *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481 (1990).

15. *Id.* at 2484.

amined for signs of intoxication.<sup>16</sup> In instances where intoxication was detected, the motorist would be directed to a location out of the traffic flow where an officer would check the motorist's driver's license and car registration and, if warranted, conduct further sobriety tests.<sup>17</sup> Should the field tests and the officer's observations suggest that the driver was intoxicated, an arrest would be made.<sup>18</sup> All other drivers would be permitted to go on their way.<sup>19</sup>

The Michigan program was established in Saginaw County with the assistance of that county's sheriff's department. During the hour-and-fifteen-minute duration of its operation, one-hundred twenty-six vehicles passed through the checkpoint. The average delay for each vehicle was twenty-five seconds.<sup>20</sup> Two drivers were detained for field sobriety testing, and one of the two was arrested for driving under the influence.<sup>21</sup> A third driver who drove through the checkpoint without stopping was also arrested for driving under the influence.<sup>22</sup>

The Michigan checkpoint program was challenged the day before it went into operation in Saginaw County. After a trial at which the court heard extensive testimony about the effectiveness of highway sobriety checkpoint programs, the court ruled that the program violated both the fourth amendment and the Michigan State Constitution.<sup>23</sup> The Michigan Court of Appeals affirmed on fourth amendment grounds and did not reach the state constitutional question.<sup>24</sup> The Michigan Supreme Court denied leave to appeal.<sup>25</sup>

That the respondents sensed their victory in the Michigan courts was tenuous manifested itself early when, before the United States Supreme Court, they urged a line of analysis

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2484 (1990).

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Sitz v. Department of State Police*, 170 Mich. App. 433, 429 N.W.2d 180 (1988).

that differed from that adopted by the Michigan trial and appellate courts. Those courts had employed the balancing test set forth in *Brown v. Texas*<sup>26</sup> which meant “balancing the state’s interest in preventing accidents caused by drunk drivers, the effectiveness of sobriety checkpoints in achieving that goal, and the level of intrusion on an individual’s privacy caused by the checkpoints.”<sup>27</sup> Although it is normally considered poor strategy to dissociate oneself from the reasoning of a winning ruling below, one need not look too far to understand the gambit. As I pointed out last year, the Court’s current balancing exercises weigh heavily against the individual.<sup>28</sup> Consequently, seeking to avoid that process, the respondents sought refuge in the “special governmental needs” doctrine of last Term’s Treasury employees’ urine-testing case.<sup>29</sup> They argued that there must be a showing of some special governmental need “beyond the normal need” for criminal law enforcement before a balancing analysis could be embarked upon and that the government had failed to establish such a need.

The majority, led by Chief Justice Rehnquist, was not to be so easily shunted from its course. Cutting to the chase, the Chief Justice made it very clear that the “special governmental needs” doctrine of *Von Raab* was not relevant because “it was in no way designed to repudiate our prior cases dealing with police stops of motorists on public highways.”<sup>30</sup> Instead, the appropriate analytical framework, he maintained, was that of

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26. 443 U.S. 47, 50-51 (1979) (Determination of the constitutionality of seizures that are less intrusive than traditional arrests “involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty.”) *Id.*

27. *Sitz v. Michigan Dep’t of State Police*, 170 Mich. App. 433, 439, 429 N.W.2d 180, 182 (1988), *rev’d*, 110 S. Ct. 2481 (1990).

28. See Hellerstein, *The Fourth Amendment, The Supreme Court and Local Government Law*, 6 TOURO L. REV. 31, 34-35 (1989).

29. See *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). In *Von Raab*, the Court wrote: “Where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectations against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.” *Id.* at 665-66.

30. *Michigan Dep’t of State Police v. Sitz*, 110 S. Ct. 2481, 2485 (1990).

*United States v. Martinez-Fuerte*,<sup>31</sup> “which utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens,”<sup>32</sup> and the balancing approach of *Brown v. Texas*.<sup>33</sup>

Embarking on its balancing excursion, the Court immediately outlined the magnitude of the drunk-driving problem<sup>34</sup> and recited its own prior lamentations about the problem.<sup>35</sup> The majority then proceeded to minimize the individual privacy interest involved, characterizing it as “slight,” and equated it with the highway checkpoint stops for illegal aliens approved in *Martinez-Fuerte*.<sup>36</sup> However, up to this point, there was no dispute with the Michigan courts. The point of departure was reached with respect to the Michigan Court of Appeals’ assessment of the extent of the “subjective” intrusion on motorists caused by the checkpoints. The court of appeals had agreed with the trial judge’s conclusion that the checkpoints had the potential to generate fear and surprise in motorists, largely because the trial record failed to show that approaching motorists would be aware of their option to make U-turns or turnoffs to avoid the checkpoints.<sup>37</sup>

As to this factor, the Court ruled that the Michigan courts had misread the Court’s prior decisions, especially *Martinez-Fuerte*. The Court stated that the “‘fear and surprise’ to be considered are not the natural fear of one who has been drinking over the prospect of being stopped at a sobriety checkpoint but rather, the fear and surprise engendered in law abiding

31. 428 U.S. 543 (1976).

32. *Sitz*, 110 S. Ct. at 2485.

33. 443 U.S. 47, 50-51 (1979).

34. The Court cited statistics published in 1988 by the National Highway Traffic Safety Administrator that drunk drivers caused an annual death toll over 25,000 and a statement in a 1987 edition of Professor Wayne R. LaFare’s *Search and Seizure Treatise* which reported that drunk driving caused nearly one million personal injuries and more than five billion dollars in property damage annually. *Sitz*, 110 S.Ct. at 2486.

35. *Id.* (citing *South Dakota v. Neville*, 459 U.S. 553, 558 (1983) and *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957)).

36. *Michigan Dep’t of State Police v. Sitz*, 110 S. Ct. 2481, 2485 (1990) (citing *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

37. *Id.* at 2488.

motorists by the nature of the stop.”<sup>38</sup> Having already determined in *Martinez-Fuerte* that the circumstances of a checkpoint stop and search are far less intrusive than those of a roving-patrol stop in the case of illegal aliens, the Court reasoned that the “intrusion resulting from the brief stop at the sobriety checkpoint is for constitutional purposes indistinguishable from the checkpoint stops we upheld in *Martinez-Fuerte*.”<sup>39</sup>

From the perspective of state and local government officials, the Court’s denunciation of the *process* by which the Michigan Court of Appeals assessed one of the three *Brown v. Texas* balancing factors, “the degree to which the seizure advances the public interest,”<sup>40</sup> may be of great significance beyond the matter at issue in the case itself. In condemning the lower courts’ consideration, as part of the *Brown* balancing analysis, of the “effectiveness” of the proposed checkpoint program, the Court instructed that the passage from *Brown*:

was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger. Experts in police science might disagree over which of several methods of apprehending drunken drivers is preferable as an ideal. But for purposes of Fourth Amendment analysis, the choice among such reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources, including a finite number of police officers.<sup>41</sup>

The significance of this directive should be apparent; the Court, as it has many times in the recent past,<sup>42</sup> once again instructed courts to be extremely deferential to judgments made by governmental officials in their spheres of responsibility. Viewed another way, it is yet another message to system-challenging litigants and their lawyers that they should use the money expended on expert witnesses and statistical studies for some other, more worthwhile purpose. The Chief Justice

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38. *Id.* at 2486.

39. *Id.* at 2487.

40. *Brown v. Texas*, 443 U.S. 47, 51 (1979).

41. *Sitz*, 110 S. Ct. at 2485.

42. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 561 (1979); *Meachum v. Fano*, 427 U.S. 215, 228 (1976); *Pell v. Procunier*, 417 U.S. 817, 827 (1974); *Procunier v. Martinez*, 416 U.S. 396, 414 (1974), *rev’d*, 490 U.S. 401 (1989).



pointed out that, in both *Martinez-Fuerte* and *Delaware v. Prouse*,<sup>43</sup> a case involving safety inspections conducted by roving patrols,<sup>44</sup> there also had been discussions of the effectiveness of police methods. But neither case, he emphasized, afforded grounds for the Michigan courts' substitution of its own assessment of the effectiveness of the checkpoints for that of law enforcement officials.<sup>45</sup>

Nonetheless, the Chief Justice sought to repudiate on its merits the empirical conclusion of the Michigan courts by noting that the checkpoint program actually had produced better results than had the illegal alien checkpoint in *Martinez-Fuerte*. The sobriety checkpoint, he pointed out, produced two arrests for drunk driving out of one hundred twenty-six stops, approximately 1.5 percent, whereas the *Martinez-Fuerte* checkpoint uncovered illegal aliens in only 0.12 percent of the vehicles stopped.<sup>46</sup>

Wrapping it up, the Chief Justice stated that "the balance of the State's interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped, weighs in favor of the state program."<sup>47</sup>

Justice Blackmun concurred only in the judgment, rehearsing his past statements about "the slaughter on our highways" and his satisfaction "that the Court is now stressing this tragic aspect of American life."<sup>48</sup>

Justice Brennan, joined by Justice Marshall, dissented. He criticized the majority's refusal to require a "reasonable suspicion" predicate for what was indisputably a fourth amendment seizure, pointing out that "the Court potentially subjects the general public to arbitrary or harassing conduct by the police."<sup>49</sup> He also challenged the majority's reliance on *Martinez-Fuerte*, emphasizing that the checkpoint there was justified by

43. 440 U.S. 648 (1979).

44. *Id.* at 657.

45. *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481, 2485 (1990).

46. *Id.* at 2487-88.

47. *Id.* at 2488.

48. *Id.* (Blackmun, J., concurring).

49. *Id.* at 2489 (Brennan, J., dissenting).

the difficulty of determining whether a passing motor vehicle contained illegal aliens.<sup>50</sup> A similar difficulty in detecting drunk drivers, he argued, has not been shown.<sup>51</sup>

Justice Stevens, joined in part by Justices Brennan and Marshall, attacked every aspect of the majority's analysis: its minimization of the intrusiveness of nighttime checkpoints, its statistical analysis as to the efficacy of the checkpoints, and its reliance on *Martinez-Fuerte*.<sup>52</sup> As to intrusiveness, Justice Stevens maintained that the checkpoint stops were radically different from those involving illegal aliens. He pointed out that they are established without advance notice to motorists, are operated mostly at night, and can be moved at the discretion of the police. In addition to the important distinction between notice and surprise, the alien checkpoint leaves "no room for discretion in either the timing or the location of the stop — it is a permanent part of the landscape."<sup>53</sup> With sobriety checkpoints "the police have extremely broad discretion in determining the exact timing and placement of the roadblock."<sup>54</sup>

Justice Stevens also utilized the trial record to demonstrate the statistical shortcomings of the majority's analysis. Because the Michigan program was based on an older Maryland program, Stevens, as did the Michigan courts, thought that the Maryland experience was revealing because it pointed out that over a period of several years in which Maryland operated one hundred twenty-five checkpoints, only one hundred forty-three of 41,000 motorists (0.3 %) were arrested. He found it "inconceivable that a higher arrest rate could not have been achieved by more conventional means."<sup>55</sup> He emphasized, however, that "even if the 143 checkpoint arrests were assumed to involve a net increase in the number of drunk driving arrests per year, the figure would still be insignificant by comparison to the 71,000 such arrests made by Michigan State Police without

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50. *Id.*

51. *Id.*

52. *Id.* at 2492 (Stevens, J., dissenting).

53. *Id.*

54. *Id.*

55. *Id.* at 2491.

checkpoints in 1984 alone.”<sup>56</sup> Perhaps even more startling was the fact, pointed out by the Michigan Court of Appeals, that the results of Maryland’s own control study of its checkpoint program “‘showed that alcohol-related accidents in the checkpoint county decreased by ten percent, whereas the control county saw an eleven percent decrease; and while fatal accidents in the control county fell from sixteen to three, fatal accidents in the checkpoint county actually doubled from the prior year.’”<sup>57</sup>

Justice Stevens’ statistical analysis thus led him to reject the majority’s assessment of the “public interest” factor of the *Brown* triad. He concluded that the majority’s approach “resembles a business decision that measures profits by counting gross receipts and ignoring expenses,”<sup>58</sup> because it failed to ask whether the time and resources expended on running checkpoints could be put to better use.<sup>59</sup> In sum, from Stevens’ viewpoint, not only was the majority’s analysis of the data sorely deficient, “the most disturbing aspect” of the decision was “that it appears to give no weight to the citizen’s interest in freedom from suspicionless unannounced investigatory seizures.”<sup>60</sup>

The Court’s decision in *Sitz* can be easily understood even though some would find its reasoning flawed. It is consistent with the Court’s constant willingness to dilute fourth amendment principles to accommodate its perception of pressing social needs. As decisions such as these continue to proliferate,

56. *Id.*

57. *Id.* at 2491-92.

58. *Id.* at 2495.

59. *Id.* The essence of Justice Stevens’ complaint is contained in the following passage:

The evidence in this case indicates that sobriety checkpoints result in the arrest of a fraction of one percent of the drivers who are stopped, but there is absolutely no evidence that this figure represents an increase over the number of arrests that would have been made by using the same law enforcement resources in conventional patrols. Thus, although the *gross* number of arrests is more than zero, there is a complete failure of proof on the question whether the wholesale seizures have produced any *net* advance in the public interest in arresting intoxicated drivers.

*Id.* (emphasis in original).

60. *Id.* at 2497.

the question is whether we are paying a harsher price in terms of our liberty and privacy than may be necessary to meet those needs.

In *Maryland v. Buie*,<sup>61</sup> the Court, by a seven to two vote, held that police officers need no more than reasonable suspicion to make a "protective sweep" of a dwelling in which they are making a valid arrest.<sup>62</sup> In so doing, the Court made another significant inroad into an individual's fourth amendment interests, this time it was within the home, traditionally deemed the place in which fourth amendment protections are at their highest.<sup>63</sup>

In *Buie*, the police obtained a warrant to arrest Buie and another man for an armed robbery of a Godfather's Pizza restaurant.<sup>64</sup> They knew that during the crime one of the robbers had worn a red running suit.<sup>65</sup> Executing the warrant, six or seven officers entered Buie's house and arrested him as he emerged from the basement.<sup>66</sup> The arresting officer then went down into the basement "in case there was someone else" there.<sup>67</sup> Although he did not find anyone, he saw a red running suit in "plain view," which he seized.<sup>68</sup>

The Maryland Court of Appeals held that the running suit should have been suppressed because the officers had no right to search the basement without a warrant.<sup>69</sup> Stressing the special status of the home under the fourth amendment, it reasoned that the authority to search Buie's "grabbable area" incident to his lawful arrest did not extend to the basement, since there was no real possibility that Buie could reach downstairs

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61. 110 S. Ct. 1093 (1990).

62. A "protective sweep" was defined as "a quick and limited search of the premises, incident to an arrest and conducted to protect the safety of police officers and others." *Id.* at 1094.

63. *See Payton v. New York*, 445 U.S. 573, 585-86 (1980) (fourth amendment prohibits police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest).

64. *Buie*, 110 S. Ct. at 1095.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Buie v. State*, 550 A.2d 79, 83 (Md. 1988).

for a weapon.<sup>70</sup> The court also held that the search could not be upheld as a "protective sweep" because the police did not have probable cause to believe that the other suspect might be in the house.<sup>71</sup>

Writing for the Court, Justice White rejected both the Maryland court's probable cause requirement and the state's contention that no level of suspicion at all is needed for a sweep following an arrest in the home for a violent crime.<sup>72</sup> Moving the "stop and frisk" requirement of "reasonable suspicion" from the street into the home, Justice White declared that *Terry v. Ohio*<sup>73</sup> furnished the appropriate constitutional standard.<sup>74</sup> This meant, of course, that another balancing act was taking place. He reminded us that the balancing process of *Terry* allowed for a limited pat-down search of a person for weapons where a reasonable officer would be warranted in believing that he is dealing with a dangerous person and that *Terry's* analysis had been extended, in *Michigan v. Long*,<sup>75</sup> to the interior of a lawfully stopped car.

According to Justice White, the same factors that justified the decisions in *Terry* and *Long* exist in the "protective sweep" situation.<sup>76</sup> Both cases involved the ability of a police officer to protect himself from the danger that a person is armed or might gain control of a weapon to use against him.<sup>77</sup> In the instant case, he said, "there is an analogous interest of the officers in taking steps to assure themselves that the house in

70. *Id.*

71. *Id.*

72. *Buie*, 110 S. Ct. at 1097.

73. 392 U.S. 1 (1968).

74. *Buie*, 110 S. Ct. at 1097.

75. 463 U.S. 1032, 1035 (1983).

76. *Buie*, 110 S. Ct. at 1095.

77. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (The search of the passenger compartment of an automobile, limited to those areas in which a weapon may be hidden, is permissible if the police officer has a reasonable belief that the suspect is dangerous and may gain immediate control of weapons.); *Terry v. Ohio*, 392 U.S. 1, 27 (1968) (A reasonably prudent police officer may under certain circumstances in a given case when he believes that his safety or that of others is endangered, make a reasonable search for weapons of the individual believed by him to be armed and dangerous, regardless of whether he has probable cause to arrest that individual for a crime or the absolute certainty that the individual is armed.).

which a suspect is being or has just been arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack.”<sup>78</sup> Indeed, he argued, a residential arrest threatens as much or more danger than does an encounter with a person on the street or in a vehicle; in fact, the officer is at a further disadvantage by being on his adversary’s “‘turf.’”<sup>79</sup> Thus, he concluded, the interest of arresting officers in taking reasonable steps to ensure their safety during and after an in-home arrest outweighs the intrusion occasioned by the sweep.<sup>80</sup> Further, he pointed out that the level of justification is analogous to that developed in *Terry*—facts that would warrant a reasonably prudent officer in believing that the area to be inspected harbors someone posing a danger to those on the scene.<sup>81</sup>

Justice White also took pains to point out that a “protective sweep” is:

not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.<sup>82</sup>

Some may have thought that a major obstacle to the majority’s holding in *Buie* was its decision, twenty years ago, in *Chimel v. California*,<sup>83</sup> which delineated the “grabbable area” doctrine.<sup>84</sup> Under that ruling, a warrantless search in a home could not extend beyond the arrestee’s person or the area from within which the arrestee might have obtained a weapon.<sup>85</sup> However, Justice White brushed *Chimel* aside on two grounds: first, that *Chimel* “was concerned with a full-blown search of the entire house for evidence of the crime for which the arrest was made . . . not the more limited intrusion contemplated by

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78. *Buie*, 110 S. Ct. at 1097-98.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 1099.

83. 395 U.S. 752 (1969).

84. *Id.* at 763.

85. *Id.*

a protective sweep,"<sup>86</sup> and second, that "the justification for the search incident to arrest . . . was the threat posed by the arrestee, not the safety threat posed by the house or more properly by unseen third parties in the house."<sup>87</sup>

Justice Stevens, concurring, emphasized that the reasonable suspicion standard applies only to sweeps that are protective in nature.<sup>88</sup> He suggested that under the facts of the case, the state may have a difficult time demonstrating that that was the case.<sup>89</sup> Justice Kennedy sought to neutralize that view by stating that he believed the officers had acted properly.<sup>90</sup>

Justice Brennan, joined by Justice Marshall, criticized the extension of *Terry* into the home and argued that the police should be required to have probable cause to conduct a warrantless protective sweep of a dwelling.<sup>91</sup> He disputed the majority's minimization of the intrusiveness of such a sweep by pointing out that it "would bring within police purview virtually all personal possessions within the house not hidden from view in a small enclosed space."<sup>92</sup>

When understood as a *Terry* case, the majority's opinion, as pointed out by Justice Brennan, signals yet another instance of the "emerging tendency on the part of the court to convert the *Terry* decision from a narrow exception into one that swallows the general rule that searches are reasonable only if based on probable cause."<sup>93</sup> As such, it is no longer that newsworthy. However, the Court also seems to have taken a substantial bite out of *Chimel*, despite Justice White's disclaimer that this was not a *Chimel* case. Consider its very holding that "as an incident to the arrest the officers could, without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched."<sup>94</sup> As I read it, this gives the police

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86. *Maryland v. Buie*, 110 S. Ct. 1093, 1099 (1990).

87. *Id.*

88. *Id.* at 1100 (Stevens, J., concurring).

89. *Id.*

90. *Id.* at 1101 (Kennedy, J., concurring).

91. *Id.* at 1102 (Brennan J., joined by Marshall, J., dissenting).

92. *Id.*

93. *Id.* at 1101.

94. *Id.* at 1098.

far greater power than envisaged by *Chimel*. No longer will they be restricted to searching an area from which the suspect could grab a weapon or destroy evidence. The police may now search "closets and spaces" adjacent to the locus of the arrest, even if they have no cause at all to believe that anyone is hiding there and even if they are positive that the defendant is alone and could not possibly get a weapon. Given the "plain view" doctrine, the police may then seize whatever evidence they find while searching for a non-existent attack launcher. As has been observed elsewhere,"[a]lthough it is not surprising that the court chose to expand the scope of *Chimel* searches, it is odd that Justice White chose to do so in a case that did not involve a search incident to arrest or any 'adjoining closets or spaces.'"<sup>95</sup>

Whether *Buie* will benefit New York law enforcement personnel remains to be seen. The New York Court of Appeals has not been presented with the "protective sweep" issue. However, its great solicitude under article one, section twelve of the New York Constitution, for the "grabbable area" limiting doctrine of *Chimel* is well-known.<sup>96</sup> It is my belief that the court will be more sympathetic to the views held by the Maryland Court of Appeals in *Buie*, than it will be to those expressed by Justice White.<sup>97</sup>

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95. Mickenberg, *Defendants Lose as Police Power is Broadened*, Nat'l L. J., Aug. 13, 1990, S6, S7.

96. See *People v. Belton*, 55 N.Y.2d 49, 52-53, 432 N.E.2d 745, 746-47, 447 N.Y.S.2d 873, 874-75 (1982); see also *People v. Gokey*, 60 N.Y.2d 309, 312, 457 N.E.2d 723, 724, 469 N.Y.S.2d 618, 619 (1983).

97. The Court of Appeals may soon have an opportunity to examine the question. In *People v. Febus*, 157 A.D.2d 380, 556 N.Y.S.2d 1000 (1st Dep't 1990), a divided court held that a police officer's pushing open of an apartment door that was slightly ajar was reasonable in the context of a protective sweep where it took place immediately after and contemporaneous with the lawful arrest of a youth who was seen exiting the apartment with drugs in his hand. *Id.* at 384-85, 556 N.Y.S.2d at 1002. Although there are significant differences between this case and *Buie*, such as the fact that here the police were not on the premises when making the arrest, *id.* at 383, 556 N.Y.S.2d at 1001, the underlying policy of *Buie* will certainly be relied upon by the prosecution as it was by Justice Kupferman writing for the majority in *Febus*. *Id.*



In *Horton v. California*,<sup>98</sup> the Court further eased the way for police, once lawfully inside premises, to engage in searches and seizures.<sup>99</sup> This they did by expanding that commonly used exception to the warrant requirement, the "plain view" doctrine, to eliminate an element that most federal and state courts had assumed was essential—the requirement of "inadvertence."<sup>100</sup> By a seven to two vote, with Justice Stevens writing for the majority, the Court held that evidence need not be inadvertently discovered to qualify for seizure under the plain view doctrine.<sup>101</sup> A police officer may make a warrantless seizure of items whose character is "immediately apparent" as contraband or evidence and to which the officer has a lawful right of access, regardless of whether he had prior reason to believe the items would be encountered.<sup>102</sup> Inadvertence "is a characteristic of most legitimate 'plain view' seizures" wrote Justice Stevens, but "it is not a necessary condition."<sup>103</sup> This was a direct rejection of Justice Stewart's position in *Coolidge v. New Hampshire*.<sup>104</sup>

In *Horton*, the police were executing a search warrant at the defendant's house in search of property stolen during an armed robbery. In the course of their search, they came across weapons the victim had described as those used to commit the crime—a machine gun, two "stun guns," and a set of handcuffs.<sup>105</sup> The warrant, however, did not list weapons, but one of the officers testified that he had been interested in finding other evidence connecting the defendant to the robbery.<sup>106</sup>

Justice Stevens at first distinguished between searches and seizures in terms of the different interests—privacy and posses-

98. 110 S. Ct. 2301 (1990).

99. *Id.* at 2311.

100. *Id.* at 2310.

101. *Id.*

102. *Id.*

103. *Id.* at 2304.

104. 403 U.S. 443, 469 (1971). Justice Stevens emphasized that the portion of Stewart's opinion establishing the inadvertence requirement was a plurality opinion and that Justice Harlan did not join in the plurality's discussion of the plain view doctrine. *Horton*, 110 S. Ct. at 2307.

105. *Horton*, 110 S. Ct. at 2307.

106. *Id.*

sion, that they affect. If an item is in plain view, the only fourth amendment interests its seizure can implicate, he explained, are possessory interests; no invasion of privacy can be involved.<sup>107</sup> He then proceeded to repudiate Justice Stewart's argument that an inadvertence requirement is essential to the preservation of the fourth amendment's particularity mandate.<sup>108</sup> First, he argued, an objective standard is superior to a subjective one which is contingent on a police officer's state of mind:

The fact that an officer is interested in an item of evidence and fully expects to find it in the course of a search should not invalidate its seizure if the search is confined in area and duration by the terms of a warrant or a valid exception to the warrant requirement.<sup>109</sup>

Second, he argued, there is no reason to believe that the police will intentionally omit a particular description of an item to be seized in an application for a search warrant; on the contrary, he maintained, it is in their interest to include everything for which they think they have probable cause, so an omission is more likely to be the product of mistake or carelessness than of deliberate choice.<sup>110</sup>

Continuing his refutation of Stewart's thesis in *Coolidge*,<sup>111</sup> Stevens asserted that the inadvertence requirement is not needed to prevent general searches because that goal is already

107. *Id.*

108. *Id.*

109. *Id.* at 2308-09.

110. *Id.* at 2309.

111. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Justice Stewart wrote: The rationale of the exception to the warrant requirement . . . is that a plain-view seizure will not turn an initially valid (and therefore limited) search into a "general" one, while the inconvenience of procuring a warrant to cover an inadvertent discovery is great. But where the discovery is anticipated, where the police know in advance the location of the evidence and intend to seize it, the situation is altogether different. The requirement of a warrant to seize imposes no inconvenience whatever, or at least none which is constitutionally cognizable in a legal system that regards warrantless searches as "*per se* unreasonable" in the absence of "exigent circumstances."

If the initial intrusion is bottomed upon a warrant that fails to mention a particular object, though the police know its location and intend to seize it, then there is a violation of the express constitutional requirement of "Warrants . . . particularly describing . . . [the] things to be seized."

*Id.* at 469-71.

served by other requirements. If the search is made under a warrant, the warrant must be "particular"; if the search is conducted without a warrant, its scope must be in keeping with the exigencies that justified it in the first place: "[O]nce those commands have been satisfied and that officer has a lawful right of access . . . , no additional Fourth Amendment interest is furthered by requiring that the discovery of evidence be inadvertent."<sup>112</sup>

Applying this analysis to the facts of the case, Stevens pointed out that the scope of the search was not enlarged by the omission of the weapons from the warrant.<sup>113</sup> The warrant gave the officers access to the weapons, and it was immediately apparent that they were instrumentalities of the crime.<sup>114</sup> Accordingly, he concluded, the California courts correctly denied their suppression.<sup>115</sup>

Justice Brennan, joined by Justice Marshall, dissented. He maintained that Justice Stewart had correctly pointed out that the "inadvertence" requirement furthered the particularity command of the fourth amendment as well as the protection of a person's possessory interests.<sup>116</sup> The purpose of the plain view doctrine, Brennan emphasized, is to save police inconvenience, but the rationale "loses much, if not all, of its force," if the police could have included an item in the warrant but failed to do so.<sup>117</sup>

In an attempt at damage control, Justice Brennan observed that the Court had not been called upon to confront the question of "pretextual searches,"<sup>118</sup> that such searches could never

112. *Horton v. California*, 110 S. Ct. 2301, 2309-10 (1990).

113. *Id.* at 2310.

114. *Id.*

115. *Id.* at 2311.

116. *Id.* at 2312 (Brennan J., joined by Marshall, J., dissenting).

117. *Id.*

118. As examples of such searches, Justice Brennan listed the following:

[I]f an officer enters a house pursuant to a warrant to search for evidence of one crime when he is really interested only in seizing evidence relating to another crime, for which he does not have a warrant, his search is "pretextual" and the fruits of that search should be suppressed. . . . Similarly, an officer might use an exception to the generally applicable warrant requirement, such as "hot pursuit," as a pretext to enter a home to seize items he knows he will find in plain view. Such conduct would be a deliberate attempt

result in inadvertent discovery, and that “even state courts that have rejected the inadvertent discovery requirement have held that the fourth amendment prohibits pretextual searches.”<sup>119</sup>

Given its limited factual setting, and that the Court’s opinion was authored by Justice Stevens, who is not considered niggardly towards the fourth amendment, *Horton*, standing alone, need not prompt great hand-wringing by fourth amendment aficionados. That comforting thought, however, could be offset by the Court’s growing predilection for less than textual adherence to the specific wording of the fourth amendment—in this case, the warrant clause’s particularity requirement.

The case that I consider the “sleeper” of the year is *Alabama v. White*,<sup>120</sup> in which the Court, by a six to three vote, held that an anonymous tip, corroborated by some police surveillance, exhibited sufficient indicia of reliability to provide reasonable suspicion for an investigatory stop.<sup>121</sup> Although the case is very fact specific, and Justice White disclaims that an anonymous tip by itself will generally not be sufficient to provide reasonable suspicion, the Court affords the police considerably greater license to rely on anonymous tips than previously.<sup>122</sup>

In *White*, the police received an anonymous telephone tip that the defendant would be leaving a particular apartment at a particular time in a particular vehicle, that she would be going to a particular motel, and that she would be carrying a briefcase containing cocaine.<sup>123</sup> They immediately went to the apartment building, saw a vehicle matching the caller’s description, observed the defendant as she left the building and entered the vehicle, and followed her along the most direct route to the motel, stopping her vehicle just short of the

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to circumvent the constitutional requirement of a warrant “particularly describing the place to be searched, and the persons or things to be seized,” and cannot be condoned.

*Id.* at 2313-14.

119. *Id.* at 2314.

120. 110 S. Ct. 2412 (1990).

121. *Id.* at 2416-17.

122. *Id.* at 2416.

123. *Id.* at 2414.

motel.<sup>124</sup> The officers, however, did not see a briefcase.<sup>125</sup> At the officers' request, other police stopped the defendant just short of the motel.<sup>126</sup> A consent search uncovered marijuana in the briefcase and cocaine in the defendant's purse.<sup>127</sup>

The Alabama Court of Criminal Appeals reversed White's conviction for possession of marijuana and cocaine, holding that the trial court should have suppressed the drugs because the police did not have reasonable suspicion under *Terry v. Ohio*<sup>128</sup> to justify the investigatory stop of her vehicle.<sup>129</sup>

This case could have gone either way and Justice White acknowledged that "it is a close case."<sup>130</sup> But rather than rein in police conduct based on anonymous tips, he chose to build upon the leeway previously given to the police, in *Illinois v. Gates*,<sup>131</sup> when they act on such information. Justice White accepted a lesser "totality of circumstance" requirement for investigatory stops based on anonymous tips than *Gates* requires for arrests. The justification for this result, of course, already resided in the stop and frisk doctrine of *Terry* insofar as "the level of suspicion required for a *Terry* stop is obviously less demanding than for probable cause."<sup>132</sup> Consequently, it was but a small step for Justice White to conclude that the fact that the tip in *White* was neither as detailed as the one in *Gates* nor corroborated to the same extent was not an obstacle to finding the stop of the defendant reasonable.<sup>133</sup>

In this case, reasoned Justice White, the police officers' surveillance, furnished "significant" corroboration of the tip. Although there was nothing to indicate the informant's reliability

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 2415.

128. 392 U.S. 1, 21 (1968); see *supra* notes 69-72 and accompanying text.

129. *White v. State*, 550 So.2d 1074, 1079-80 (Ala. Ct. App. 1989), *rev'd*, *Alabama v. White*, 110 S. Ct. 2412 (1990).

130. *Alabama v. White*, 110 S. Ct. 2412, 2417 (1990).

131. 462 U.S. 213 (1983) (under the "totality of the circumstances" analysis, corroboration of details of an informant's tip by independent police work is sufficient to conclude that probable cause exists).

132. *White*, 110 S. Ct. at 2416 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)).

133. *Id.*

at the outset, much of what he or she predicted had come true by the time the stop occurred. Because the anonymous tipster had shown that he or she had inside information about the defendant's travel plans, it was reasonable for the police to think that he or she also had "access to reliable information about [the defendant's] illegal activities."<sup>134</sup> Consequently, "under the totality of the circumstances the anonymous tip, as corroborated, exhibited sufficient indicia of reliability to justify the investigatory stop of [the defendant's] car."<sup>135</sup>

Justice Stevens, joined by Justices Brennan and Marshall, dissented. "Millions of people," he pointed out, "leave their apartments at about the same time every day carrying an attache case and heading for a destination known to their neighbors."<sup>136</sup> Therefore, "an anonymous neighbor's prediction about somebody's time of departure and probable destination is anything but a reliable basis for assuming that the commuter is in possession of an illegal substance—particularly when the person is not even carrying the attache case described by the tipster."<sup>137</sup> He then underscored the dual danger that emerges from the majority's ruling: (1) that a prankster or a person with a grudge could easily formulate a tip similar to the one predicting the defendant's excursion, and (2) that "every citizen is subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed."<sup>138</sup>

Why this case is a "sleeper" should be apparent. Anonymous tips have long been a serious concern to fourth amendment jurisprudence. The obvious potential for abuse formed the basis for the Warren Court's adoption of the "two pronged test" of "veracity" and "basis of knowledge" in *Aguilar v. Texas*<sup>139</sup>

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134. *Id.* at 2417.

135. *Id.*

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

137. *Id.* at 2417-18.

138. *Id.* at 2418.

139. 378 U.S. 108 (1964).

and *Spinelli v. United States*.<sup>140</sup> This test made it difficult for the police to make searches and seizures based on anonymous, uncorroborated tips. *Gates* eased that burden by introducing a "totality of circumstances"<sup>141</sup> test for probable cause determinations. The decision in *White*, by extending the "totality of circumstance" doctrine of *Gates* to investigatory stops requiring even less of a "totality" reduces that burden even further.<sup>142</sup>

Having given the police, in *Buie* and *Horton*, broader powers to search and seize once inside the home the Court, in *Illinois v. Rodriguez*,<sup>143</sup> made it easier for the police to gain entry into the home. Previously, in *United States v. Matlock*,<sup>144</sup> the Court held that a warrantless entry and search does not violate the fourth amendment if the police have obtained the consent of a third party who possesses common authority over the premises.<sup>145</sup> In *Rodriguez* the Court, again by a six to three vote, decided the issue it had left open in *Matlock*: whether a warrantless entry is valid when based upon the consent of a third party whom the police, at the time of the entry, reasonably believe to possess common authority over the premises, but who in fact does not.<sup>146</sup> In giving constitutional approval to the

140. 393 U.S. 410 (1969). Under the "basis of knowledge" prong, the judicial officer who would be making the probable cause determination, was to be present with certain facts which would detail the basis of the allegations that a certain individual had been, was or would be involved in criminal conduct. Additionally, under the "veracity" prong, sufficient facts had to be revealed to determine either the inherent credibility of the informant or the reliability of his information on this particular occasion. *Id.* at 415.

141. *Illinois v. Gates*, 462 U.S. 213, 230 (1983).

[W]e reaffirm the totality of the circumstances analysis that traditionally has informed probable cause determinations. . . . The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

*Id.*

142. See *Alabama v. White*, 110 S. Ct. 2412, 2416 (1990).

143. 110 S. Ct. 2793 (1990).

144. 415 U.S. 164 (1974).

145. *Id.* at 167.

146. *Rodriguez*, 110 S. Ct. at 2796.

doctrine of “apparent authority,” Justice Scalia, writing for the Court, held that while the police must act responsibly in evaluating and acting upon facts, they do not always have to be correct in their evaluation.<sup>147</sup>

In this case, the police were told by a young woman that she had been beaten up by the defendant earlier that day in an apartment.<sup>148</sup> She repeatedly referred to the premises as “our” apartment and stated that she had clothes and furniture there.<sup>149</sup> The record was unclear as to whether she indicated that she currently lived at the apartment or only that she used to live there. Disdaining a warrant, the police went to the apartment and the woman opened the door with her key and gave the police permission to enter.<sup>150</sup> Once inside, the police observed in plain view drug paraphernalia and containers filled with cocaine.<sup>151</sup> They entered the bedroom and found the defendant asleep and discovered additional containers of cocaine. They arrested the defendant and seized the drugs and paraphernalia.<sup>152</sup> It subsequently became clear that the woman in fact was no longer a resident at the apartment but had moved out weeks earlier. It was also established that she had never been listed on the lease, did not pay rent, and had apparently stolen the key during an earlier visit.<sup>153</sup>

The trial court suppressed the evidence seized from the apartment and was affirmed by the appellate court of Illinois, which held that the defendant’s girlfriend lacked actual authority to consent to the entry and that the police were not entitled to rely on any apparent authority she might have. The Illinois Supreme Court declined to hear the case.<sup>154</sup>

In reversing, Justice Scalia agreed that the complainant did not have the common authority over the apartment necessary to give the officers valid permission to enter.<sup>155</sup> However, he

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147. *Id.* at 2801.

148. *Id.* at 2796.

149. *Id.* at 2797.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*



said, a reasonable belief by the investigating officers that the complainant did have such authority could validate the search.<sup>156</sup> That is because the fourth amendment does not guarantee that the police will never search a person's home unless he or she consents but simply that no such intrusion will take place that is "unreasonable."<sup>157</sup>

Justice Scalia relied on a number of prior decisions that support the proposition that factual mistakes by the police do not necessarily render their conduct unreasonable. For example, he pointed out, *Illinois v. Gates*<sup>158</sup> states that reasonableness "does not demand that the government be factually correct in its assessment" that a search will produce a participant in crime or evidence of one.<sup>159</sup> Nor, as held in *Maryland v. Garrison*,<sup>160</sup> does a factual error that makes a warrant overbroad taint the resulting search if the executing officers' reliance upon it is objectively reasonable.<sup>161</sup> Similarly, as held in *Hill v. California*,<sup>162</sup> a warrantless search incident to a mistaken arrest of the wrong person, made in good faith, is nevertheless valid.<sup>163</sup>

For Justice Scalia, all of this added up to the proposition that:

in order to satisfy the "reasonableness" requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government—whether the magistrate issuing a warrant, the police officer executing a warrant, or the police officer conducting a search or seizure under one of the exceptions to the warrant requirement—is not that they always be correct, but that they always be reasonable.<sup>164</sup>

This rule, he then argued, is equally applicable with regard to facts bearing upon the authority to consent to a search.<sup>165</sup> And to ease the way, he cautioned that it is not to say that the

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156. *Id.* at 2798.

157. *Id.* at 2799.

158. 462 U.S. 213 (1983).

159. *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2799 (1990).

160. 480 U.S. 79 (1987).

161. *Id.* at 88.

162. 401 U.S. 797 (1971).

163. *Id.* at 806.

164. *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2800 (1990).

165. *Id.*

police may always act on someone's invitation to enter the premises, noting that "[e]ven when the invitation is accompanied by an explicit assertion that the person lives there, the surrounding circumstances could conceivably be such that a reasonable person would doubt its truth and not act upon it without further inquiry."<sup>166</sup>

Justice Marshall, joined by Justices Brennan and Stevens, wrote a forceful dissent. He emphasized that the majority opinion misperceived the very basis for third-party consent searches: "[T]hat such searches do not give rise to claims of constitutional violations rests not on the premise that they are 'reasonable' under the Fourth Amendment . . . but on the premise that a person may voluntarily limit his expectation of privacy by allowing others to exercise authority over his possessions."<sup>167</sup> And if "an individual has not so limited his expectation of privacy, the police may not dispense with the safeguards of the Fourth Amendment."<sup>168</sup> Since there was no exigency here that would have justified dispensing with the warrant requirement, Marshall argued, "[t]he weighty constitutional interest in preventing unauthorized intrusions into the home overrides any law enforcement interest in relying on the reasonable but potentially mistaken belief that a third party has authority to consent to such a search or seizure."<sup>169</sup>

Justice Marshall also sought to negate Justice Scalia's reliance on cases such as *Hill* and *Garrison* by pointing out that in warrantless arrests, the possibility of factual error is already built into the probable cause standard and that where a reasonable mistake occurs in the execution of a validly obtained warrant it is acceptable because searches based on warrants are generally reasonable by definition.<sup>170</sup> However, argued Justice Marshall, "[b]ecause reasonable factual errors by law enforcement officers will not validate unreasonable searches, the

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166. *Id.* at 2801.

167. *Id.* at 2802 (Marshall, J., joined by Brennan and Stevens, JJ., dissenting).

168. *Id.*

169. *Id.* at 2803.

170. *Id.* at 2805-06.

reasonableness of the officer's mistaken belief that the third party had authority to consent is irrelevant."<sup>171</sup>

The Court's decision is extremely troubling. Given the premium placed by the Court previously on the privacy of the home, is there, absent exigent circumstances, any valid reason for dispensing with the warrant requirement in third-party consent searches based on apparent authority? I would argue that searches of this kind are among those most amenable to a magistrate's scrutiny. Absent exigency, the magistrate is well-suited to inquire into the basis upon which the police have determined that the consent given them is legitimate. Thus, I share Justice Marshall's exasperated conclusion to his dissent:

Where this free-floating creation of "reasonable" exceptions to the warrant requirement will end, now that the Court has departed from the balancing approach that has long been part of our Fourth Amendment jurisprudence is unclear. But by allowing a person to be subjected to a warrantless search in his home without his consent and without exigency, the majority has taken away some of the liberty that the Fourth Amendment was designed to protect.<sup>172</sup>

In two cases involving the fruit of the poisonous tree doctrine,<sup>173</sup> the Court ruled once in the prosecution's favor and once for the defendant. In *New York v. Harris*,<sup>174</sup> the Court held that despite a violation of the rule in *Payton v. New York*,<sup>175</sup> that absent exigent circumstances, a warrantless arrest within the home is illegal, the exclusionary rule does not preclude the prosecution's use of a statement made by the defendant outside of his home even though the statement is made after an illegal arrest of the defendant inside his home.<sup>176</sup>

Armed with enough information to constitute probable cause that Harris had murdered the deceased in her Bronx apart-

171. *Id.* at 2805.

172. *Id.* at 2806-07.

173. At times, challenged evidence is "secondary" or "derivative" in nature, in that a confession may be obtained after an illegal arrest or physical evidence is located after an illegally obtained confession. Therefore, it is necessary to determine whether the derivative evidence is "tainted" by the prior constitutional or other violation. See *Wong Sun v. United States*, 371 U.S. 471 (1963); *Nardone v. United States*, 308 U.S. 338 (1939).

174. 110 S. Ct. 1640 (1990).

175. 445 U.S. 573 (1980).

176. *Harris*, 110 S. Ct. at 1642.

ment, the police went to his residence to arrest him.<sup>177</sup> They knocked on his door, displayed their guns and badges and Harris let them enter.<sup>178</sup> Inside the apartment, Harris was given *Miranda* warnings and he proceeded to confess to killing the deceased.<sup>179</sup> He was then arrested and taken to the station house, where he again confessed, in writing, after being given a new set of *Miranda* warnings. The police subsequently read Harris a third set of *Miranda* warnings and videotaped an incriminating statement, even though Harris had indicated that he wanted to end the interrogation.<sup>180</sup>

The trial court suppressed the first and third statements so that the only issue was the admissibility of the second statement.<sup>181</sup> As to that statement, the New York Court of Appeals held that it was the fruit of Harris's illegal arrest because the connection between the statement and the arrest was not sufficiently attenuated.<sup>182</sup> While noting that some courts had reasoned that the "wrong in *Payton* cases . . . lies not in the arrest, 'but in the unlawful *entry* into a dwelling without proper judicial authorization' "<sup>183</sup> and had therefore refused to suppress confessions that were made after *Payton*-violative entries, the court of appeals declined to follow those cases.<sup>184</sup>

By a five to four vote, with Justice White writing for the majority, the Court reversed.<sup>185</sup> Justice White reasoned that exclusion must "bear some relation to the purpose which the law is to serve," and that exclusion is uncalled for "because the rule in *Payton* was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects . . . protection for statements made outside their premises where

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177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.*

181. *People v. Harris*, 84 Misc. 2d 973, 974-75, 376 N.Y.S.2d 779, 780 (Sup. Ct. N.Y. County 1974).

182. *People v. Harris*, 72 N.Y.2d 614, 532 N.E.2d 1229, 536 N.Y.S.2d 1 (1988).

183. *Id.* at 623, 532 N.E.2d at 1234, 536 N.Y.S.2d at 6.

184. *Id.*

185. *New York v. Harris*, 110 S. Ct. 1640 (1990).

the police have probable cause to arrest the suspect for committing a crime."<sup>186</sup>

Contrary to the court of appeals, Justice White concluded that the essence of *Payton* was the illegal entry, not the arrest. Because there was probable cause to arrest Harris, he was lawfully in police custody.<sup>187</sup> Consequently, the case is the same as if the unlawful entry had been for the purpose of looking for evidence and had occurred between an arrest of the defendant outside his home and his subsequent interrogation. Viewed as such, Harris' situation was different from those cases where a statement is obtained after an arrest made without probable cause.<sup>188</sup> In those cases, the statement is at least in some sense the product of the illegality, so "attenuation" analysis is required. But here, Harris' statement "was not the product of being in unlawful custody. Neither was it the fruit of having been arrested in the home rather than someplace else."<sup>189</sup> Accordingly, the attenuation analysis engaged in by the New York Court of Appeals, Justice White reasoned, was inappropriate.

Addressing the question of deterrence, Justice White maintained that "suppressing the statement taken outside the house would not serve the purpose of the rule that made Harris in-house arrest illegal."<sup>190</sup> The warrant requirement of *Payton* is for the protection of the home and that purpose, he argued, was served by suppressing "anything incriminating the police gathered from arresting Harris in his home, rather than elsewhere . . . ."<sup>191</sup> Expanding suppression to cover the police conduct to which Harris was subjected, White concluded, would add little to the deterrent value of the exclusionary rule.<sup>192</sup> And in cases in which there is probable cause for an arrest, Justice White thought it "doubtful . . . that the desire to secure

186. *Id.* at 1642-43.

187. *Id.*

188. See *Taylor v. Alabama*, 457 U.S. 687 (1982); *Dunaway v. New York*, 442 U.S. 200 (1979); *Brown v. Illinois*, 422 U.S. 590 (1975).

189. *New York v. Harris*, 110 S. Ct. 1640, 1644 (1990).

190. *Id.*

191. *Id.*

192. *Id.*

a statement from a criminal suspect would motivate the police to violate *Payton*.<sup>193</sup>

Justice Marshall dissented, joined by Justices Brennan, Blackmun and Stevens.<sup>194</sup> In arguing that attenuation analysis should be applied, Justice Marshall put his finger on a subtle reality of New York police practice which was important to the New York Court of Appeals but which Justice White chose to ignore. However, it is this reality that explains the dearth of arrest warrant applications for home arrests by New York police despite that ten years have elapsed since *Payton* was decided. The record in *Harris* reveals that the arresting officers decided not to seek an arrest warrant in line with “departmental policy”<sup>195</sup> against doing so. The question thus arises as to why this is the case. The answer lies in the peculiar confluence of New York statutory law, case law and *Payton* itself.

Under New York law, an arrest warrant may not issue until an “accusatory instrument” has been filed.<sup>196</sup> Once an accusatory instrument has been filed, *People v. Samuels*<sup>197</sup> prohibits any questioning of the accused in the absence of an attorney. Thus, if the police comply with *Payton*, as Justice Marshall points out:

[T]he suspect’s lawyer will likely tell him not to say anything, and the police will get nothing. On the other hand, if they violate *Payton* by refusing to obtain a warrant, the suspect’s right to counsel will not have attached at the time of the arrest, and the police may be able to question him without interference by a lawyer.<sup>198</sup>

As Justice Marshall acutely perceived, had the majority not ruled that attenuation analysis was irrelevant, it would have had great difficulty in avoiding the flagrancy component of *Brown v. Illinois*.<sup>199</sup> By choosing a different “battleground,” to

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193. *Id.*

194. *Id.* at 1647 (Marshall, J., joined by Brennan, Blackmun, and Stevens, JJ., dissenting).

195. *Id.*

196. N.Y. CRIM. PROC. LAW § 120.20 (McKinney 1981).

197. 49 N.Y.2d 218, 400 N.E.2d 1344, 424 N.Y.S.2d 892 (1980).

198. *New York v. Harris*, 110 S. Ct. 1640, 1647 n.2 (1990) (Marshall, J., dissenting).

199. 422 U.S. 590 (1975). The question whether a confession is voluntary under *Wong Sun* can only be answered according to the facts of each case; even though

sidestep that issue observed Justice Marshall, "the Court redrafts our cases in the service of conclusions they straightforwardly and explicitly reject."<sup>200</sup> The essential difference between the majority and the dissent in *Harris* is the worth of the exclusionary rule. The majority's distaste for it has been a fact of life for many years. However, for the dissenters, the majority's refusal to apply traditional attenuation analysis to illegal entries into the home scuttles much of what was thought to have been secured by *Payton*.

Given *Harris*, the decision in *James v. Illinois*<sup>201</sup> is surprising. With Justice White joining the four *Harris* dissenters in an opinion authored by Justice Brennan, the Court held that the rule announced in *Walder v. United States*,<sup>202</sup> which allows evidence obtained in violation of the fourth amendment to be used to impeach a defendant, does *not* extend to the impeachment of other defense witnesses.<sup>203</sup>

In *James*, Darryl James, a fifteen-year-old, was suspected by the Chicago police of having shot another youth who was returning home from a party with a group of friends.<sup>204</sup> The day after the shooting, two detectives found James under a hair dryer in his mother's beauty parlor; when he emerged, his hair was black and curly.<sup>205</sup> After placing James in their car, the detectives questioned him about his prior hair color.<sup>206</sup> He stated that the previous day his hair had been reddish-brown, long and combed straight back.<sup>207</sup> At the station, in response to further questioning, he admitted that he went to the beauty parlor in order to have his hair "dyed black and curled in order

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*Miranda* warnings are administered, they are not the only factor to be considered. *Id.* at 603. One must also consider the temporal proximity of the arrest and confession, the presence of intervening circumstances, particularly, and the purposes and flagrancy of the official misconduct. *Id.* at 604.

200. *Harris*, 110 S. Ct. at 1647 (Marshall, J., dissenting).

201. 110 S. Ct. 648 (1990).

202. 347 U.S. 62, 65 (1954).

203. *James*, 110 S. Ct. at 650.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

to change is appearance.”<sup>208</sup> These statements were suppressed prior to James’s trial on the ground that they were the fruit of his warrantless arrest for which the police lacked probable cause.<sup>209</sup>

At trial, five of the victim’s associates made in-court identifications of James and each testified that the person who did the shooting had “reddish” hair, worn shoulder length in a slicked-back “butter” style.<sup>210</sup> Each also remembered seeing James several weeks earlier at a party with such a hair color and style.<sup>211</sup> James did not take the stand. Had he done so, there was no question he could have been impeached, under *Walder*, with his own, illegally seized statements.<sup>212</sup> Instead, he called as a defense witness, Jewel Henderson, a family friend. She testified that on the day of the shooting she had taken James to register for high school and that, at that time, his hair was black.<sup>213</sup> The prosecution was permitted to impeach her by calling one of the interrogating detectives to testify about James’s admissions about his hair color on the night in question and his attempts to change it.<sup>214</sup>

Although successful in having his conviction reversed by the Illinois Appellate Court, the Illinois Supreme Court reinstated James’s conviction, holding that in order to deter a defendant from engaging in perjury “by proxy,” the impeachment exception to the exclusionary rule ought to be expanded to cover defense witnesses.<sup>215</sup>

By a five to four vote, the Supreme Court reversed.<sup>216</sup> But the majority and the dissenters did agree on one thing—that the case involved a balancing of interests. The dispute between them was over the manner in which the balance should be drawn. Justice Brennan emphasized that the balance changes significantly when tainted evidence is used to impeach defense

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208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *See supra* note 190 and accompanying text.

213. *James v. Illinois*, 110 S. Ct. 648, 650 (1990).

214. *Id.* at 650-51.

215. *Id.*

216. *Id.* at 657.



witnesses other than the defendant. First, he argued, the Illinois Supreme Court's "perjury by proxy"<sup>217</sup> premise was suspect, because the threat of a perjury prosecution itself was far more likely to deter a witness from lying than a defendant already facing conviction. Second, and more important, expansion of the impeachment exception to encompass all defense witnesses, "would chill some defendants from presenting their best defense—and sometimes any defense at all—through the testimony of others."<sup>218</sup> He argued that whenever police obtained evidence illegally, defendants would have to assess the likelihood that their witnesses could be impeached with it and that even if those witnesses were positioned to offer truthful testimony, they might make some statement "in sufficient tension with the tainted evidence," that would allow the tainted evidence in.<sup>219</sup> He pointed out that defendants at times must call "reluctant" or "hostile" witnesses who will frequently "not share the defendants' concern for avoiding statements that invite impeachment through contradictory evidence, and that even "friendly" witnesses cannot be relied upon to testify without running afoul of impeachment because of "insufficient care or attentiveness" to their statements on direct. Consequently, for Justice Brennan, these differences between the defendant as witness and other defense witnesses "alters the balance of values underlying the current impeachment exception governing defendants' testimony."<sup>220</sup>

In addition to the chilling effect of expanding the impeachment exception, Justice Brennan maintained that such expansion would significantly diminish the exclusionary rule's deterrent effect on police misconduct because it would "significantly enhance the expected value to the prosecution of illegally obtained evidence"<sup>221</sup> by greatly increasing the number of occasions on which such evidence could be used. There would be many more witnesses to impeach and, as earlier noted, the evi-

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217. *Id.* at 653.

218. *Id.*

219. *Id.*

220. *Id.* at 654.

221. *Id.* at 655.

dence could be used to “chill” the calling of witnesses altogether.

Justice Kennedy, joined by the Chief Justice and Justices O'Connor and Scalia, disputed all of Justice Brennan's postulates. First, he argued, the defense will now enjoy “broad immunity to introduce whatever false testimony it can produce from the mouth of a friendly witness.”<sup>222</sup> This is even worse than preventing impeachment of the defendant, he asserted, because the jury will be foreclosed from considering a supposedly independent witness's testimony with the skepticism it would accord a defendant's self-serving testimony. Second, he criticized the “chilling effect” argument as “far too speculative to justify the rule here announced.”<sup>223</sup> Third, he rejected the argument that the police would have greater motivation to engage in unconstitutional behavior if the prosecution was allowed to impeach defense witnesses: “[T]he officer may or may not even know the identity of the ultimate defendant. He certainly will not know anything about potential defense witnesses, much less what the content of their testimony might be.”<sup>224</sup> What the officer will know, Kennedy pointed out, “is that evidence from an illegal search or arrest (which may well be crucial to securing a conviction) will be lost to the case chief.”<sup>225</sup>

An assessment of the significance of *James* is not easy. It is clearly an interruption of a consistent line of impeachment by illicit fruits cases that began in 1947 with *Walder* which involved physical evidence wrongfully obtained. *Walder* was then expanded in *Harris v. New York*<sup>226</sup> and *Oregon v. Hass*,<sup>227</sup> to allow impeachment through statements obtained in violation of law as long as they were voluntary. In *United States v. Havens*,<sup>228</sup> *Walder* was expanded further to allow use in rebuttal of illegally obtained physical evidence that contradicted a

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222. *Id.* at 657 (Kennedy, J., dissenting).

223. *Id.* at 658.

224. *Id.* at 660-61.

225. *Id.* at 661 (Kennedy, J., dissenting).

226. 401 U.S. 222 (1971).

227. 420 U.S. 714 (1975).

228. 446 U.S. 620 (1980).

defendant's statement uttered, not on direct as in *Walder*, but on cross-examination.

The "oasis-like" character of *James* is even more striking when, in addition to *New York v. Harris* this Term, the Court also decided *Michigan v. Harvey*,<sup>229</sup> in which it held that it was permissible to impeach a defendant with statements obtained from him in violation of *Michigan v. Jackson*,<sup>230</sup> which held that the police cannot initiate interrogation of a formally charged defendant once the defendant has invoked his sixth amendment right to counsel.<sup>231</sup> In this melange, one thing seems clear; impeachment of witnesses other than the defendant has been accorded, by a very slim margin, a type of *sui generis* status. Whether that status will be enlarged to encompass other than fruits of fourth amendment violations is unclear.

Having taken something of a detour to discuss the "fruits" cases, I now return to the three fourth amendment decisions in which local law enforcement came up short.

The most important of the three was *Minnesota v. Olson*,<sup>232</sup> in which the Court, rather resoundingly, held that one's status as an overnight guest is alone sufficient to show that he or she has an expectation of privacy in the home that society is prepared to recognize as reasonable.<sup>233</sup> Justice White, who had written a forceful dissent in *Payton*,<sup>234</sup> wrote for a majority of seven; only the Chief Justice and Justice Blackmun dissented and they did so without an opinion.

Olson had been suspected by the police of being the driver of the getaway car used in a robbery-murder.<sup>235</sup> After recovering the murder weapon and arresting the suspected murderer, they surrounded the home of two women with whom they believed Olson had been staying.<sup>236</sup> When the police telephoned the

229. 110 S. Ct. 1176 (1990).

230. 475 U.S. 625 (1986).

231. *Id.*

232. 110 S. Ct. 1684 (1990).

233. *Id.*

234. *Payton v. New York*, 445 U.S. 573, 603 (1980) (White, J., dissenting).

235. *Olson*, 110 S. Ct. at 1686.

236. *Id.* at 1687.

home and told one of the women that Olson should come out, a male voice was heard saying "tell them I left."<sup>237</sup> Without seeking permission and with weapons drawn, they entered the home, found Olson hiding in a closet, and arrested him.<sup>238</sup> Shortly thereafter, he made an inculpatory statement, which was admitted in evidence at trial.<sup>239</sup> He was convicted of murder and other crimes but the Minnesota Supreme Court reversed, holding that Olson had a sufficient interest in the womens' home to challenge the legality of his warrantless arrest, that the arrest was illegal because there were no exigent circumstances to justify a warrantless entry, and that his statement was tainted and should have been suppressed.<sup>240</sup>

At last year's Symposium, I criticized the Court for using the language in *Katz v. United States*<sup>241</sup> that renders an expectation of privacy legitimate if it is "one that society is prepared to recognize as 'reasonable,'"<sup>242</sup> to constrict rather than expand fourth amendment rights. I argued that such use was against the very intention of *Katz*.<sup>243</sup> Happily, *Olson* employs that test as I believe Justice Stewart, the author of *Katz*, intended. Seeking reversal, the state argued that Olson's relationship to the premises did not satisfy twelve factors which determine whether a dwelling is a home.<sup>244</sup> Justice White rejected the notion that such a weighty and complex calculus was required. He held that the Court need go no further than to conclude that Olson's status as an overnight guest was sufficient to legitimate his expectation of privacy.<sup>245</sup>

An overnight guest has a legitimate expectation of privacy, argued Justice White, because "[s]taying overnight in an-

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237. *Id.*

238. *Id.*

239. *Id.*

240. *State v. Olson*, 436 N.W.2d 92 (1989).

241. Hellerstein, *Fourth Amendment, The Supreme Court and Local Government Law*, 6 TOURO L. REV. 31, 48 (1989) (citing *Katz v. United States*, 389 U.S. 347 (1967)).

242. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

243. Hellerstein, *Fourth Amendment, The Supreme Court and Local Government Law*, 6 TOURO L. REV. 31, 48 (1989).

244. See *Minnesota v. Olson*, 110 S. Ct. 1684, 1687 n.4 (1990).

245. *Id.* at 1689.

other's home is a longstanding social custom that serves functions recognized as valuable by society. . . . We will all be hosts and we will all be guests many times in our lives."<sup>246</sup> A person seeks shelter in a home at night, White observed, "precisely because it provides him with privacy"; it is "a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside." The fact that the host, rather than the guest, has the final say as to whether others, including the police, might be admitted to the home he concluded, does not defeat the guest's privacy expectation.<sup>247</sup>

Unlike *Payton*, where the Court had no occasion to decide the question of exigent circumstances, the Court did address the issue in *Olson*. However, it offered little guidance on the subject. The majority merely concluded that the Minnesota Supreme Court had applied "essentially the correct standard" and that it was "not inclined to disagree with [the] fact-specific application of the proper legal standard"<sup>248</sup> which had emphasized that despite the seriousness of the crime, the residence was surrounded by police, there was no suggestion that others in the dwelling were in danger and it was evident that the suspect was not about to flee.<sup>249</sup>

There is little in *Olson* with which to quarrel. It is entirely consistent with the holding and spirit of *Payton*. As Justice

246. *Id.*

247. *Id.*

248. *Id.* The Supreme Court has never delineated the full extent of the exigent circumstances doctrine. *See* *Welsh v. Wisconsin*, 466 U.S. 740 (1984) (exigent circumstance exist when there is danger of imminent destruction of evidence); *Chimel v. California*, 395 U.S. 752 (1969) (where the search is incident to a lawful arrest); *Warden v. Hayden*, 387 U.S. 294 (1966) (exigent circumstances exist where police are in "hot pursuit" of a suspect); *Schmerber v. California*, 384 U.S. 757 (1966) (where there is danger of imminent destruction of evidence); *Johnson v. United States*, 333 U.S. 10 (1948) (exigent circumstances can be found where there is danger of flight). In the absence of clear lines from the Supreme Court, lower courts have struggled to articulate various formulae. *See, e.g., Dorman v. United States*, 435 F.2d 385 (D.C. Cir. 1969). The lack of greater guidance from the Supreme Court may not be condemnable; there is no escape from the fact-specific nature of the inquiry.

249. Justice Kennedy concurred but emphasized that he regarded the Court's resolution of the exigency issue as based on deference to, and not an endorsement of, the Minnesota Supreme Court's assessment of the issue. *Minnesota v. Olson*, 110 S. Ct. 1684, 1690 (1990) (Kennedy, J., concurring).

White pointed out, *Payton* was a case about protecting the home from warrantless, non-exigent entries; it was not a case about protecting the person of the suspect. Indeed, that is the very basis of the decision in *New York v. Harris* previously discussed. It is also consistent with *Steagald v. United States*<sup>250</sup> in which the Court held that to arrest a person in someone's home other than his or her own, a search warrant is required.

*Olson*, however, does leave an important question unanswered—what is the legitimate expectation of privacy of a houseguest who does not stay overnight? This question may underscore that *Olson* is quintessentially a standing case because *Rakas v. Illinois*,<sup>251</sup> the Court's leading decision on standing, rejected the "legitimately on the premises" standing doctrine of *Jones v. United States*.<sup>252</sup> Although *Olson* signals no retreat from *Rakas*, it "recognized that, as an overnight guest, Jones was much more than just legitimately on the premises,"<sup>253</sup> which at least sounds as though there remains some life in *Jones*. Nonetheless, neither *Rakas*, by its own terms, nor *Olson*, due to the precise issue decided by the Court, tells us much about the status of the guest who does not stay overnight. For that, a multiple-factor analysis may still be required.

The remaining two cases in which the defendant prevailed will not, for fourth amendment devotees, "make their day." Nor will they cause much hand-wringing by local law enforcement personnel. Indeed, in one of the two, *Florida v. Wells*,<sup>254</sup> it is debatable which of the two interests actually prevailed. I would submit that although Wells's conviction was set aside, law enforcement was the clear winner—and by a considerable margin.

Wells was arrested for driving under the influence and he proceeded to give the Florida Highway Patrol trooper who ar-

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250. 451 U.S. 204 (1981).

251. 439 U.S. 128 (1978).

252. 362 U.S. 257 (1960).

253. *Minnesota v. Olson*, 110 S. Ct. 1684, 1688 (1990).

254. 110 S. Ct. 1632 (1990).

rested him permission to open the trunk of his car.<sup>255</sup> An inventory search of the car produced two marijuana cigarette butts in an ashtray and a locked suitcase in the trunk.<sup>256</sup> Police personnel forced open the suitcase and in it discovered a garbage bag containing a substantial amount of marijuana.<sup>257</sup>

Ruling for Wells, the Florida Supreme Court, relying on *Colorado v. Bertine*,<sup>258</sup> held that the opening of any closed container found during an inventory search is valid only in the context of a policy specifically mandating the opening of all containers so found.<sup>259</sup> In an opinion written by Chief Justice Rehnquist, the Court affirmed the judgment but specified that it disagreed with the Florida Supreme Court's reasoning. Although agreeing that the search plainly violated *Bertine* because the police had no policy at all addressing closed containers, he faulted the Florida court's ruling that: "[t]he police under *Bertine* must mandate either that all containers will be opened during an inventory search, or that no containers will be opened."<sup>260</sup>

The Chief Justice considered this statement unwarranted under *Bertine*. Although *Bertine* and the Court's other inventory cases<sup>261</sup> forbid "uncanalized discretion to police officers conducting inventory searches, there is no reason," he said, "to insist that they be conducted in a totally mechanical 'all or nothing' fashion."<sup>262</sup> Instead, a police officer "may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and the characteristics of the container itself."<sup>263</sup> A policy requiring the opening of all containers would be permissible, said the Chief Justice, but the fourth amendment does not

255. *Id.* at 1634.

256. *Id.*

257. *Id.*

258. 479 U.S. 367 (1987).

259. *Wells v. State*, 539 So. 2d 264 (Fla. 1989), *aff'd sub nom. Florida v. Wells*, 110 S. Ct. 1632 (1990).

260. *Florida v. Wells*, 110 S. Ct. 1632, 1635 (1990).

261. See *Illinois v. Lafayette*, 462 U.S. 640 (1983); *South Dakota v. Opperman*, 428 U.S. 364 (1976).

262. *Wells*, 110 S. Ct. at 1635.

263. *Id.*

require it; "it would be equally permissible . . . to allow the opening of closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors."<sup>264</sup>

Justice Brennan, joined by Justice Marshall, concurred in the judgment. However, pointing out that the rest of the majority opinion was dictum, he argued that it was also wrong because it is "inconsistent with the reasoning underlying our inventory search cases and relies on a mischaracterization of the holding in *Bertine*."<sup>265</sup> Justice Brennan emphasized that *Bertine* held that the police may open closed containers found within an impounded vehicle only if the inventory policy mandated the opening of all such containers; it did not establish that the police had such discretion absent such a policy.<sup>266</sup>

Justices Blackmun and Stevens also wrote separate concurrences, but each took issue with the majority's willingness to allow for individual police discretion. It is that very discretion, argued Justice Blackmun, that "creates the potential for abuse of Fourth Amendment rights our earlier inventory-search cases were designed to guard against."<sup>267</sup> Justice Stevens echoed the same criticism but also castigated the "Court's activism" in granting certiorari in a case in which the Florida Supreme Court's judgment was "obviously correct."<sup>268</sup>

The impact of the Court's opinion can be significant depending on what practice law enforcement agencies choose to follow. As the Court's dictum tells us, the opening of closed containers during inventory searches does not violate the fourth amendment so long as law enforcement authorities are acting pursuant to standardized criteria or an established routine; the particular criteria or routine need not require that all containers be opened.<sup>269</sup> That the statement is dictum will not, as Jus-

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264. *Id.*

265. *Id.* at 1637 (Brennan, J., concurring).

266. *Id.* (Brennan, J., concurring) (citing *Colorado v. Bertine*, 479 U.S. 367 (1987)).

267. *Id.* at 1639 (Blackmun, J., concurring).

268. *Id.* (Stevens, J., concurring).

269. *Id.* at 1635.



tices Brennan and Blackmun recognized, and as we all know, deter policymakers.<sup>270</sup> The Court did say it, did it not?

Lastly, there is the case of *Smith v. Ohio*,<sup>271</sup> as to which it is appropriate to ask how the Ohio Supreme Court could have decided the case against the defendant. In a brief *per curiam* opinion, the Court articulated a fourth amendment principle which even my slower students comprehended: that a warrantless search that provides probable cause for an arrest cannot be justified as incident to that arrest.<sup>272</sup>

Smith was approached by two plainclothes officers as he and a companion exited a private residence and entered a parking lot. He was carrying a brown paper grocery bag. The officers, who did not know Smith, thought he was carrying the bag in a "gingerly" fashion. One of the officers left their car and asked Smith to "come here a minute." Smith ignored the command and kept walking. When the officer identified himself, Smith threw the bag onto the hood of a parked car and turned around. The officer asked Smith what the bag held and, upon receiving no answer, opened it. Inside he found drug paraphernalia and arrested the defendant.<sup>273</sup>

Despite the Ohio Supreme Court's finding that Smith had not been arrested until after the contraband was discovered, it nonetheless upheld the search under the search incident doctrine.<sup>274</sup> This was even too much for the state's attorney who argued that Smith had abandoned the bag when he threw it on his car and turned to face the officer.<sup>275</sup> The Court was unreceptive to both arguments. As to the search incident argument, it reminded the Ohio Supreme Court that the doctrine "does not permit the police to search any citizen without a warrant or probable cause so long as an arrest immediately follows."<sup>276</sup> As to the "abandonment" argument, it reminded the State's attorney that the Ohio Supreme Court had this one

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270. *Id.* at 1635, 1637.

271. 110 S. Ct. 1289 (1990).

272. *Id.*

273. *Id.*

274. *Id.* at 1290.

275. *Id.*

276. *Id.*

right: “[A] citizen who attempts to protect his private property from inspection, after throwing it on a car to respond to a police officer’s inquiry, clearly has not abandoned that property.”<sup>277</sup> Of this, nothing more need be said.

## II. THE FIFTH AMENDMENT

In the fifth amendment arena this Term, governmental interests fared particularly well; indeed, it was virtually a complete sweep. In *Pennsylvania v. Muniz*,<sup>278</sup> the Court turned back a drunk driver’s claim that videotaped and audiotaped answers given to routine questions by police during booking, absent *Miranda* warnings, violated the privilege against self-incrimination.<sup>279</sup> In *Baltimore City Department of Social Services v. Bouknight*<sup>280</sup> the Court held that the privilege was unavailable to a mother who had regained custody of her abused child under specified custodial conditions and sought subsequently to resist a court order to produce the child.<sup>281</sup> And in *Washington v. Harper*,<sup>282</sup> the Court held that the due process clause did not require that prison officials obtain judicial approval before forcing an inmate to take powerful anti-psychotic drugs.<sup>283</sup> Given the interests implicated in each of these cases, the Court’s rulings were very important and I will discuss them at greater length. In a case of somewhat lesser portent, and which I will not discuss further, law enforcement interests also prevailed. In *Illinois v. Perkins*<sup>284</sup> the Court, with Justice Marshall the sole dissenter, held that a police undercover agent need not inform a jailhouse inmate of his *Miranda* rights before seeking to elicit incriminating statements.<sup>285</sup>

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277. *Id.*

278. 110 S. Ct. 2638, 2644 (1990).

279. *Id.*

280. 110 S. Ct. 900 (1990).

281. *Id.* at 905.

282. 110 S. Ct. 1028 (1990).

283. *Id.* at 1039.

284. 110 S. Ct. 2394 (1990).

285. *Id.* at 2399. It should be noted that this holding would not apply to a suspect who previously had invoked the right to silence or to legal assistance during interrogation, or to a suspect already formally charged with a crime and represented by a lawyer. The Court emphasized that when a suspect is unaware that he is being

*Pennsylvania v. Muniz*<sup>286</sup> is a cornucopia of good news for law enforcement in its battle with drunk drivers. Combined with *Sitz's* solicitude for sobriety-check points, the Court clearly placed its weight behind governmental measures to combat the carnage on our highways. The *Muniz* decision will also serve as a current primer on the status of self-incrimination doctrine, particularly with respect to the Court's continuing efforts to delineate differences between testimonial and non-testimonial evidence.

Muniz was arrested for driving while under the influence on a Pennsylvania highway.<sup>287</sup> Without being advised of his *Miranda* rights, he was taken to a booking center where, as was the routine practice, he was told that his actions and voice would be videotaped.<sup>288</sup> He then answered seven questions regarding his name, address, height, weight, eye color, date of birth, and current age, stumbling over two responses.<sup>289</sup> He was also asked, and was unable to give, the date of his sixth birthday.<sup>290</sup> In addition, he made several incriminating statements while he performed physical sobriety tests and when he was asked to submit to a breathalyzer test.<sup>291</sup> He refused to take the breathalyzer test and was advised, for the first time, of his *Miranda* rights.<sup>292</sup> Both the video and audio portions of the tape were admitted at trial and he was convicted.<sup>293</sup> His motion for a new trial on the ground that the court should have excluded, *inter alia*, the videotape was denied.<sup>294</sup> The Pennsylvania Superior Court reversed.<sup>295</sup> While finding that the videotape of the sobriety testing exhibited physical rather than testi-

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questioned, the policies underlying *Miranda* are inapplicable. Nor were the sixth amendment cases prohibiting such police conduct apposite since Perkins had not been formally charged. *Id.*

286. 110 S. Ct. 2638 (1990).

287. *Id.* at 2642.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

monial evidence within the meaning of the fifth amendment, the court concluded that Muniz's answers to questions and his other verbalizations were testimonial and, thus, the audio portion of the tape should have been suppressed.<sup>296</sup>

In one of its multi-part participatory decisions, the Court vacated the judgment, remanded the case for further proceedings, and gave us these holdings:

1. *Miranda* warnings are not a prerequisite to the admissibility of a videotape of a drunk-driving suspect performing sobriety tests and responding to questions in slurred speech, because the suspect's exhibition of slurred speech and lack of muscle coordination amounts to non-testimonial information that is not within the scope of the privilege against compelled self-incrimination.<sup>297</sup> However, asking the suspect if he knew the date of his sixth birthday did violate the privilege because it sought to elicit testimonial evidence because the content of the answer that he did not know the correct date would implicitly disclose that he was mentally confused.<sup>298</sup>

2. Questions of a drunk-driving suspect regarding his name, address, height, weight, eye color and date of birth constitute custodial interrogation, but answers to these questions are nonetheless admissible because the inquiries are encompassed by a "routine booking question" question exception to the *Miranda* warning requirement; that exemption includes questions to obtain the biographical data necessary to complete booking or pretrial services when those questions are requested for record-keeping purposes only and are reasonably related to police administrative concerns.<sup>299</sup>

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296. *Muniz v. State*, 377 Pa. Super. 382, 547 A.2d 419 (1988), *vacated sub nom. Pennsylvania v. Muniz*, 110 S. Ct. 2638 (1990).

297. *Pennsylvania v. Muniz*, 110 S. Ct. 2638, 2654 (1990). Only Justice Marshall disagreed with this portion of the Court's holding.

298. *Id.* at 2649, 2651. This holding drew only a bare majority consisting of Justices Brennan, Marshall, O'Connor, Scalia and Kennedy.

299. *Id.* at 2650. The "booking exception" to the *Miranda* aspect of this holding was joined only by a plurality consisting of Brennan, O'Connor, Scalia, and Kennedy. However, the Chief Justice concurred in the result, joined by White, Blackmun and Stevens, on the ground that Muniz's responses to the booking questions were not testimonial and therefore did not warrant application of the privilege. Consequently, according to Chief Justice Rehnquist, "it is unnecessary to determine

3. Police instructions to a drunk driving suspect concerning how sobriety tests and a breathalyzer examination were to be performed and attendant questions as to whether the suspect understood what was required and whether he would submit to the breathalyzer were not custodial interrogation and thus the suspect's responses were "voluntary" and admissible.<sup>300</sup>

The most interesting issues in the case concerned "the sixth birthday question" and the "routine booking exception" question. The "sixth birthday question" required the Court to again confront the difficult task of drawing the line between evidence which is testimonial and that which is not.<sup>301</sup> Justice Brennan reasoned that Muniz's answer to the question was incriminating, not because of the manner of its delivery but because it was testimonial in nature.<sup>302</sup> He rejected the State's argument that Muniz's inability to calculate his birthday date did no more than demonstrate the physiological functioning of his brain and therefore constituted only physical evidence.<sup>303</sup> Instead, Justice Brennan argued that the response was within the privilege because it was "drawn from a testimonial act . . . ." To define "testimonial," he wrote: "Whenever a suspect is asked for a response requiring him to communicate an express or implied assertion of fact or belief, the suspect confronts the 'cruel trilemma' of truth, falsity, or silence and hence the response (whether based on truth or falsity) contains a testimonial component."<sup>304</sup> "This approach," he pointed out, "accords with each of our post-*Schmerber* cases finding that a particular oral or written response to express or implied questioning was non-testimonial."<sup>305</sup>

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whether the questions fall within the 'routine booking question' exception to *Miranda* Justice Brennan recognizes." *Id.* at 2641, 2650, 2652.

300. Justice Marshall was the sole dissenter from this holding. *Id.* at 2656.

301. *Id.* at 2647.

302. *Id.* at 2649.

303. *Id.*

304. *Id.* at 2648.

305. *Id.* Justice Brennan, it should be remembered, authored the opinion in *Schmerber v. California*, 384 U.S. 757 (1966), a decision which many thought surprising from a justice of his "liberal" bent. And the many cases that are considered its progeny have strived for consistency in the application of its distinction between physical and testimonial evidence. *See, e.g., Doe v. United States*, 487 U.S. 210

Applying that analysis to *Muniz*, Justice Brennan wrote:

The content of his truthful answer supported an inference that his mental faculties were impaired, because his assertion (he did not know the date of his sixth birthday) was different from the assertion (he knew the date was [the correct date]) that the trier of fact might reasonably have expected a lucid person to provide. Hence, the incriminating inference of impaired mental faculties stemmed, not just from the fact that Muniz slurred his response, but also from a testimonial aspect of that response.<sup>306</sup>

The dissenters on this issue, Justices White, Blackmun, and Stevens, led by the Chief Justice, expressed the view that “[i]f the police may require Muniz to use his body in order to demonstrate the level of his physical coordination, there is no reason why they should not be able to require him to speak or write in order to determine his mental coordination.”<sup>307</sup>

Comparing the two positions, one can see how difficult remains the task of drawing distinctions between evidence that falls on one side of the *Schmerber* line, and that which falls on the other. And the task is not eased by Justice Brennan’s reminder in *Muniz* that the Court need not “explore the outer boundaries of what is ‘testimonial’ today.”<sup>308</sup>

The “routine booking question” issue is also fascinating because it produced one of those rare disagreements between Justices Marshall and Brennan. Justice Brennan is not the first Justice one looks to for creating exceptions to *Miranda*. Yet here he argued that although the seven booking questions put to Muniz amounted to custodial interrogation, *Miranda* warnings were not required because they were asked for “record-keeping purposes only” and were “reasonably related to the police’s administrative concerns.”<sup>309</sup> As such, they fell within a “routine booking question” exception to *Miranda*.<sup>310</sup> Does it matter that this portion of Brennan’s opinion is technically a

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(1988); *Braswell v. United States*, 487 U.S. 99 (1988); *United States v. Dionisio*, 410 U.S. 1 (1973); *Gilbert v. United States*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967).

306. *Pennsylvania v. Muniz*, 110 S. Ct. 2638, 2649 (1990).

307. *Id.* at 2653.

308. *Id.* at 2647.

309. *Id.* at 2650.

310. *Id.*

"plurality" opinion? Hardly likely, given that four other members of the Court felt no need no even talk about "exceptions" to *Miranda* since they concluded that Muniz's responses to the videotaped "booking" questions were not testimonial.<sup>311</sup>

If you thought the physical evidence/testimonial evidence distinction issue in *Muniz* difficult, you should enjoy even more the self-incrimination issue in *Baltimore City Department of Social Services v. Bouknight*.<sup>312</sup>

Cases such as *Bouknight* are harbingers of what lies in store for the Court as child abuse cases, which until recently have not generated much constitutional jurisprudence, wend their way to the Court. Given the outcome in *Bouknight*, I believe that social service agencies will find the Court generally sympathetic to their concerns.

The issue in *Bouknight* was "whether a mother, the custodian of a child pursuant to a court order, may invoke the Fifth Amendment privilege against self-incrimination to resist an order of the Juvenile Court to produce the child."<sup>313</sup> Resolution of the issue was a much more complicated matter than its mere statement and it resulted in an extremely cautious, narrowly drawn decision. The facts demonstrate why.

Jacqueline Bouknight initially lost custody of her son, Maurice, when the Baltimore City Department of Social Services (BCDSS) obtained a juvenile court order based on evidence of severe physical abuse. Several months later, she regained custody of him when that order was modified. However, extensive conditions were imposed and the boy was placed under BCDSS's continuing oversight.<sup>314</sup> Ms. Bouknight was required to cooperate with BCDSS, continue in therapy, participate in parental aid and training programs and refrain from inflicting physical punishment on her son. Several months thereafter, BCDSS returned to juvenile court to regain custody of the boy, alleging that Bouknight had violated the conditions of the protective order, informing the court that the boy's father had died in a shooting incident and that Bouknight could not pro-

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311. *Id.* at 2654.

312. 110 S. Ct. 900 (1990).

313. *Id.* at 903.

314. *Id.*

vide adequate care for the child in light of her psychological status and her history of drug use.<sup>315</sup>

The juvenile court granted BCDSS's petition to remove the child for placement in foster care.<sup>316</sup> The agency informed the court, however, that on visits to Bouknight's home, she refused to reveal the location of the child or had indicated he was staying with an aunt whom she refused to identify.<sup>317</sup> The agency further informed the court that inquiries of Bouknight's known relatives had revealed that none of them had recently seen the boy and that BCDSS had asked the police to issue a missing person's report for the child and that it had referred the case for investigation to the homicide division.<sup>318</sup> At a hearing, the juvenile court cited Bouknight for violating the protective order and for failing to appear at the hearing. The court issued an order to show cause why Bouknight should not be held in civil contempt for failure to produce the child and issued a bench warrant for her.<sup>319</sup>

At a hearing one week later, Bouknight claimed that the boy was with a relative in Dallas. Investigation disclosed that the relative had not seen the boy. The next day, following another hearing at which Bouknight refused to produce the boy, the juvenile court held her in contempt and ordered that she be imprisoned until she produced the child.<sup>320</sup>

The juvenile court rejected Bouknight's claim that the contempt order violated her privilege against self-incrimination.<sup>321</sup> However, the Maryland Court of Appeals vacated the order on the ground that it unconstitutionally compelled Bouknight to admit through the act of production "a measure of continuing control and dominion over Maurice's person" in circumstances in which "Bouknight has a reasonable apprehension that she will be prosecuted."<sup>322</sup>

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315. *Id.*

316. *Id.*

317. *Id.* at 904.

318. *Id.*

319. *Id.*

320. *Id.*

321. *Id.*

322. *In re Maurice M.*, 314 Md. 391, 403-04, 550 A.2d 1135, 1141 (1988).



The Supreme Court reversed by a seven to two vote.<sup>323</sup> Writing for the Court, Justice O'Connor observed initially that Bouknight had no privilege with respect to anything that an examination of her son might reveal and that she could also not assert the privilege "upon the theory that the child produced is in fact Maurice (a fact the State could readily establish, rendering any testimony regarding existence or authenticity insufficiently incriminating)."<sup>324</sup> The real problem, however, was that Bouknight's main contention was otherwise; it was that the act of production would amount to testimony that would establish her control over and possession of Maurice. Under *Fisher v. United States*, this presented a problem because under the rule there announced, acts of production are testimonial if they contain implicit statements of fact.<sup>325</sup> And, as Justice Marshall pointed out in his dissent, that Bouknight's "ability to produce the child not only would conclusively establish her actual and present physical control over him with respect to criminal abuse and neglect charges, it could also be used to incriminate her should she be charged with causing the child's death."<sup>326</sup>

To avoid this obstacle, the Court deftly shifted gears and held that "Bouknight may not invoke the privilege to resist the production order because she had assumed custodial duties related to production and production is required as part of a non-criminal regulatory scheme."<sup>327</sup> To accomplish this, the Court drew upon those few instances in which it had ruled that the privilege could not be invoked to avoid compliance with various regulatory schemes that were unrelated to the enforcement of criminal laws.<sup>328</sup> The key case upon which it relied was *California v. Byers*, which had upheld the enforcement of a statu-

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323. *Baltimore City Dep't of Social Servs. v. Bouknight*, 110 S. Ct. 900, 904 (1990).

324. *Id.* at 905.

325. *Id.* (citing *Fisher v. United States*, 425 U.S. 391, 411 (1976)).

326. *Id.* at 909-10 (Marshall, J., dissenting).

327. *Id.* at 905.

328. *Id.* See *Shapiro v. United States*, 335 U.S. 1, 3 (1948) (no privilege for records required to be kept under the Emergency Price Control Act); *In re Harris*, 221 U.S. 274 (1911) (court order compelling bankrupt to produce account books did not violate the privilege).

tory requirement that drivers of cars involved in accidents stop and provide their names and addresses.<sup>329</sup>

Applying the principles of these cases to Bouknight's situation, the Court reasoned that: (1) Maurice's care had become the particular object of the State's regulatory interest once the Juvenile Court adjudicated him a child in need of assistance; (2) by taking responsibility for such care subject to the custodial order's conditions, Bouknight submitted to the regulatory system's routine operations, agreed to hold Maurice in a manner consonant with the State's interests, and accepted the obligation to permit inspection; (3) the obligation to allow inspection was part of a broadly directed, noncriminal regulatory regime governing children cared for under custodial orders; (4) the efforts of BCDSS and the judiciary to gain access to the children focus primarily on the children's well-being rather than on criminal conduct, and are enforced through measures unrelated to criminal law enforcement and (5) production in the vast majority of cases will embody no incriminating testimony.<sup>330</sup> The narrowness of the Court's opinion is reflected in the fact that it left open the question of whether the State would be able to use the testimonial aspects of Bouknight's production of the child in subsequent criminal proceedings.

Justice Marshall, joined only by Justice Brennan, strived mightily to refute point by point the majority opinion and the dissent is well worth reading.<sup>331</sup> But it is almost beside the point. Could the case really have been decided other than it

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329. 402 U.S. 424 (1971). Byers was an extremely close case. A plurality found the risk of incrimination too insubstantial to implicate the fifth amendment. *Id.* at 427-28. Justice Harlan cast the crucial vote, conceding that the California statute would implicate incriminating testimony, but concluding that the noncriminal purpose and general applicability of the reporting requirement demanded compliance nonetheless. *Id.* at 458.

330. *Baltimore City Dep't of Social Servs. v. Bouknight*, 110 S. Ct. 900, 905-09 (1990).

331. Justice Marshall pointed out that the "act of production" cases relied on by the majority had never been extended beyond collective entities; that *Shapiro* was not such a case because although Shapiro was an individual, the records he was required to keep were part of a generalized regulatory system that required all businesses to retain records of certain transactions; and that under the very statutory scheme governing a parent's relationship to a child in need of assistance, Bouknight was "not acting as a custodian in the traditional sense of that word because she is

was? I doubt it. Allowing Bouknight to continue in her refusal to produce the child seems unacceptable; my own canvass of lay people and most lawyer-friends produced hardly a soul who would have ruled otherwise. But did that make it an easy case? Not at all. And to the extent that the majority's analysis is accurately criticized by the dissent, it is another instance of a hard case arguably making bad law.<sup>332</sup> Could the issue have been avoided entirely? Justice Marshall apparently thought so when he noted that the state had represented to the Court at oral argument that "[a]s a matter of law, [granting limited use immunity for the testimonial aspects of Bouknight's compliance with the production order] would now be possible."<sup>333</sup>

In *Washington v. Harper*,<sup>334</sup> the Court continued on its rather steady course of leaving the administration of prisons to those in charge<sup>335</sup> even in a circumstance that some might consider extreme: the administration of antipsychotic drugs without judicial approval to a mentally-ill inmate against his will.<sup>336</sup> Walter Harper was a long-time denizen of the Washington prison system with serious mental problems and had been diagnosed as a manic-depressive. Pursuant to prison policy, he was required to take antipsychotic drugs after a committee consisting of a psychiatrist, a psychologist and a prison official determined that such treatment was justified.<sup>337</sup> The Washington Supreme Court held that under the due process clause, the state could administer antipsychotic medication to a competent, nonconsenting inmate only if, in a judicial hearing at which the inmate had the full panoply of adversarial procedural protections, the state proved by "clear, cogent, and con-

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not acting *on behalf of the State*." *Id.* at 910-11 (Marshall, J., dissenting) (emphasis in original).

332. Determining the question of whether the act of producing the child could be used against Bouknight in a criminal prosecution was undoubtedly a wise choice. Even Justice Marshall drew a degree of comfort from it. *Id.* at 914.

333. *Id.* at 914 n.2.

334. 110 S. Ct. 1028 (1990).

335. *See, e.g.,* O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987); Turner v. Saffley, 482 U.S. 78 (1987); Bell v. Wolfish, 441 U.S. 520 (1979); Jones v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119 (1977).

336. *Harper*, 110 S. Ct. at 1040.

337. *Id.* at 1033.

vincing” evidence that the administration of such medication was both necessary and effective for furthering a compelling state interest.<sup>338</sup>

Justice Kennedy, writing for a majority of six, disagreed. The essence of his position was that “[a]n inmate’s interests are adequately protected and perhaps better served by allowing the decision to medicate to be made by medical professionals rather than a judge.”<sup>339</sup> Justice Stevens, joined by Justices Brennan and Marshall, took precisely the opposite view, stating that the Court mistakenly “has concluded that a mock trial before an institutionally biased tribunal constitutes due process of law”<sup>340</sup> and that “[a] competent individual’s right to refuse psychotropic medication is an aspect of liberty requiring the highest order of protection under the Fourteenth Amendment.”<sup>341</sup>

These disparate views reflect more than just a disagreement about the facts of the case. They signify different visions about institutional life. In recent years, the Court has grown constantly more sanguine about the integrity of prison and other institutional officials. The Court has also been growingly concerned about fiscal and other burdens which it believes accompany a more extensive due process model.<sup>342</sup>

Despite the majority’s concessions that the “forcible injection of medication into a nonconsenting person’s body represents a substantial interference with that person’s liberty,”<sup>343</sup> and that the antipsychotic drugs sought to be administered to Harper “can have serious, even fatal, side effects,”<sup>344</sup> the majority saw no need for judicial intervention. Justice Stevens, on the other hand, maintained that the challenged procedure, because of its built-in conflict of interest, cried out for it. He pointed out that “the panel members must review the work of

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338. *Harper v. State*, 110 Wash. 2d 873, 883-84, 759 P.2d 358, 364-65 (1988).

339. *Washington v. Harper*, 110 S. Ct. 1028, 1042 (1990).

340. *Id.* at 1045 (Stevens, J., dissenting).

341. *Id.* at 1056.

342. As stated by Justice Kennedy, the Court cannot “ignore the fact that requiring judicial hearings will divert scarce prison resources, both money and the staff’s time, from the care and treatment of mentally ill inmates.” *Id.* at 1042.

343. *Id.* at 1041.

344. *Id.*

treating physicians who are their colleagues and who, in turn, regularly review their decisions,"<sup>345</sup> and that "the panel members, as regular staff of the Center, must be concerned not only with the inmate's best medical interests, but also with the most convenient means of controlling the medically disturbed inmate."<sup>346</sup>

Given the course of the Court's procedural due process cases over the past decade or more, I believe it accurate for government officials to believe themselves in a relatively safe harbor; the risk of judicial intervention in the management of institutional affairs has greatly diminished. This is true, of course, only to the extent that state courts, interpreting state constitutions, do not carve out a different route.

### III. THE SIXTH AMENDMENT

Reflecting the ongoing conundrum of the problem of child abuse, this Term produced two cases under the sixth amendment's confrontation clause that revealed deep differences among the justices. Two years ago, in *Coy v. Iowa*,<sup>347</sup> the Court held that it was not a violation of the confrontation clause to place a screen between the defendant and the witness stand that prevented the parties from seeing each other.<sup>348</sup> Since the decision in *Coy*, state courts have struggled with the problem of affording defendants the right to confront their accusers, while simultaneously protecting child witnesses from the possibly traumatic effects of testifying.<sup>349</sup> In *Idaho v. Wright*<sup>350</sup> and *Maryland v. Craig*,<sup>351</sup> the Court addressed the problem in two discrete contexts.

345. *Id.* at 1052 (Stevens, J., dissenting).

346. *Id.* at 1053. In the context of psychotropic drug administration, Justice Stevens pointed out that "[m]any states require a judicial determination of incompetence, other findings, or a substituted judgment . . ." *Id.* at 1055 n.31. New York is one of those states. See *Rivers v. Katz*, 67 N.Y.2d 485, 497, 495 N.E.2d 337, 343-44, 504 N.Y.S.2d 74, 81 (1986).

347. 487 U.S. 1012 (1988).

348. *Id.* at 1022.

349. Mickenberg, *Defendants Lose as Police Power is Broadened*, Nat'l L.J., Aug. 13, 1990, S6, S20.

350. 110 S. Ct. 3139 (1990).

351. 110 S. Ct. 3157 (1990).

In *Idaho v. Wright*, the defendant was charged with sexually abusing her five and one-half and two and one-half year old daughters. At trial, it was agreed that the younger daughter was not "capable of communicating to the jury."<sup>352</sup> However, under Idaho's residual hearsay exception, the trial court admitted statements she made to a pediatrician who was experienced in child abuse cases. The doctor testified that the child had reluctantly answered questions about her own abuse but had spontaneously volunteered information about her sister's abuse.<sup>353</sup>

The Idaho Supreme Court reversed Wright's conviction, finding that the admission of the doctor's testimony under the residual hearsay exception violated the confrontation clause.<sup>354</sup> The court noted that the doctor's interview with the child was not recorded on videotape, employed very leading questions and was conducted by "someone with a preconceived idea of what the child should be disclosing."<sup>355</sup> The court went on to prescribe a number of procedural safeguards to ensure the reliability of a child's statements that are a prerequisite to admission of such testimony such as recordation on videotape and the asking of non-leading questions.<sup>356</sup>

By a five to four vote, in an opinion by Justice O'Connor, the Court agreed with the Idaho Supreme Court that the confrontation clause had been violated because the doctor's hearsay testimony lacked any "particularized guarantee of trustworthiness."<sup>357</sup> However, the Court rejected "the apparently dispositive weight placed by Idaho Supreme Court on the lack of procedural safeguards at the interview," deeming them, in many cases, "to be inappropriate or unnecessary to a determination whether a given statement is sufficiently trustworthy for Confrontation Clause purposes."<sup>358</sup> Instead, wrote Justice O'Connor, all that is required is a case by case analysis of the

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352. *Wright*, 110 S. Ct. at 3140.

353. *Id.*

354. *Id.*

355. *State v. Wright*, 116 Idaho 382, 385, 775 P.2d 1224, 1227 (1989).

356. *Id.* at 388, 775 P.2d at 1230.

357. *Idaho v. Wright*, 110 S. Ct. 3139, 3148 (1990).

358. *Id.*

“totality of circumstances” under which the child’s statements are obtained.<sup>359</sup>

Applying the “totality” test to the child’s statements in the case, Justice O’Connor concluded that the Idaho Supreme Court “properly focused on the presumptive unreliability of the out-of-court statements and on the suggestive manner in which [the doctor] conducted the interview.”<sup>360</sup> She turned aside the state’s argument that corroborating evidence, such as physical evidence of abuse, should be considered on the reliability issue, holding instead that such evidence is best taken into consideration on the issue of harmless error.<sup>361</sup> She reasoned that “the use of corroborating evidence to support a hearsay statement’s ‘particularized guarantees of trustworthiness’ would permit admission of a presumptively unreliable statement by bootstrapping on the trustworthiness of other evidence at trial,”<sup>362</sup> This result would be “at odds with the requirement that hearsay evidence admitted under the Confrontation Clause be so trustworthy that cross-examination of the declarant would be of marginal utility.”<sup>363</sup>

Justice Kennedy, joined by the Chief Justice and Justices White and Blackmun, dissented. He saw no constitutional justification for the preclusion of “corroborating evidence from consideration on the question whether a child’s statements are reliable.”<sup>364</sup> He argued that “[i]t is a matter of common sense for most people that one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence.”<sup>365</sup> Moreover, he argued:

Nothing in the law of evidence or the law of the Confrontation Clause countenances such a result; on the contrary, most federal courts have looked to the existence of corroborating evidence or the lack thereof to determine the reliability of hearsay statements not coming within one of the traditional hearsay exceptions.<sup>366</sup>

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359. *Id.* at 3151-52.

360. *Id.* at 3152.

361. *Id.* at 3150.

362. *Id.*

363. *Id.*

364. *Id.* at 3153 (Kennedy, J., dissenting).

365. *Id.*

366. *Id.* at 3154.

In *Wright*, the State may have lost a battle, but certainly it did not lose the war. By rejecting, as a matter of confrontation clause jurisprudence, the procedural protections prescribed by the Idaho Supreme Court, the Court left it open for states to utilize hearsay evidence that does not fall within a "firmly rooted" hearsay exception so long as that evidence has a greater indicia of trustworthiness than did the evidence in *Wright*.

In *Maryland v. Craig*,<sup>367</sup> the state's victory was complete, and what a victory it was. Under the Maryland procedure at issue, a child victim's testimony could be taken outside the courtroom if the trial judge found that the child would suffer "serious emotional distress such that the child could not reasonably communicate."<sup>368</sup> Once such a finding was made, the child, prosecutor, and defense attorney would proceed to another room while the judge, jury, and defendant remained in the courtroom to view the child's testimony on a television monitor. The child would not be able to see the defendant while testifying and the defendant remains in electronic communication with his attorney; objections could be made and ruled on as if the witness were in the courtroom.<sup>369</sup>

In *Craig*, the trial judge invoked the statute on the basis of expert testimony that the children who had accused Craig of sexual abuse would not be able to communicate effectively and would suffer anxiety if forced to testify in his presence.<sup>370</sup> The Maryland Court of Appeals, which reversed Craig's conviction, held that while face-to-face confrontation is not always required, the confrontation clause requires the trial judge to observe the child in the defendant's presence and to explore alternatives to one-way television before invoking the statute.<sup>371</sup>

Again writing for a five to four majority, Justice O'Connor disagreed. She argued that face-to-face confrontation is not an

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367. 110 S. Ct. 3157 (1990).

368. *Id.* at 3161 (citing MD. CTS. & JUD. PROC. CODE ANN. § 9-102(a)(1)(ii) (1989)).

369. *Id.*

370. *Id.* at 3162.

371. *State v. Craig*, 316 Md. 551, 556-62, 560 A.2d 1120, 1122-25 (1989).



indispensable element of the confrontation clause.<sup>372</sup> The central purpose of the clause, she said, is to “ensure the reliability of evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact.”<sup>373</sup> Reliability is assured by the “combined effect” of the “elements of confrontation” which include the physical presence of the witness, the witness’s oath, cross-examination, and the factfinder’s observation of the witness’s demeanor.<sup>374</sup> Acknowledging that “face-to-face confrontation forms ‘the core of the values furthered by the Confrontation Clause,’ ”<sup>375</sup> Justice O’Connor observed that “we have nevertheless recognized that it is not the *sine qua non* of the confrontation right.”<sup>376</sup>

Having emphasized that but for the absence of face-to-face confrontation between the child and the defendant, Maryland’s procedure preserved the other elements of confrontation, Justice O’Connor turned her attention to whether the Maryland procedure furthered an important state interest.<sup>377</sup> Drawing upon the Court’s recent decision in *Osborne v. Ohio*,<sup>378</sup> which upheld Ohio’s “compelling interest” in protecting child from the child pornography industry, Justice O’Connor reasoned that “a State’s interest in the physical and psychological well-being of child abuse victims may be sufficiently important to outweigh, at least in some cases, a defendant’s right to face his or her accusers in court.”<sup>379</sup> To buttress her argument, she noted that “a significant majority of States had enacted statutes to protect child witnesses from the trauma of giving testimony in child abuse cases . . . .”<sup>380</sup> She noted, however, that an

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372. *Craig*, 110 S. Ct. at 3163.

373. *Id.*

374. *Id.*

375. *Id.*

376. *Id.* at 3164. The cases relied on for this proposition were *Kentucky v. Stincer*, 482 U.S. 730 (1987); *Delaware v. Fensterer*, 474 U.S. 15 (1985); *Ohio v. Roberts*, 448 U.S. 56 (1980); *Davis v. Alaska*, 415 U.S. 308 (1974); *Douglas v. Alabama*, 380 U.S. 414 (1965); *Pointer v. Texas*, 380 U.S. 400 (1965).

377. *Maryland v. Craig*, 110 S. Ct. 3157, 3167 (1990).

378. *Id.* (citing *Osborne v. Ohio*, 110 S. Ct. 1691 (1990)).

379. *Id.*

380. *Id.* at 3167-68.

adequate; case-specific showing of “necessity” must be made and that the trial court must hear evidence and determine that testifying by one-way television is “necessary to protect the welfare of the particular child witness who seeks to testify.”<sup>381</sup> Additionally, the trial judge must find that any trauma suffered by the witness would stem from the presence of the defendant, not just from the courtroom atmosphere and that the trauma must be more than “*de minimis*.”<sup>382</sup>

In one of the most fascinating opinions of the Term, Justice Scalia issued a scathing dissent which, of course, found him in the rather unusual company of Justices Brennan, Marshall and Stevens. Although he authored the Court’s opinion in *Coy v. Iowa*,<sup>383</sup> the precise issue presented in *Craig* presented for him a direct assault on the “literal, unavoidable text” of the confrontation clause, rather than the “*implications*” of the clause involved in all the “precedents” relied upon by the majority.<sup>384</sup>

Mincing no words, Justice Scalia stated that “[s]eldom has this Court failed so conspicuously to sustain a categorical guarantee of the Constitution against the tide of prevailing current opinion.”<sup>385</sup> The critical error in the majority’s reasoning, he argued, is that it “abstracts from the right [of confrontation] to its purposes, and then eliminates the right . . . the Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence, undeniably among which was ‘face-to-face’ confrontation.”<sup>386</sup> The majority’s reliance on cases about hearsay is misplaced, he pointed out, because an out-of-court declarant is not literally a witness against the defendant.<sup>387</sup> True to his hallmark as a strict constructionist, he emphasized that

381. *Id.* at 3169.

382. *Id.* at 3170. Justice O’Connor noted, however, that two additional safeguards, first, that the child must be questioned in the defendant’s presence and second, that the trial judge must consider whether the child would suffer “severe emotional distress” if two-way, rather than one-way, television were employed, were not constitutionally mandated. *Id.* at 3170-71.

383. 487 U.S. 1012 (1988).

384. *Maryland v. Craig*, 110 S. Ct. 3157, 3172-73 (1990) (Scalia, J., dissenting).

385. *Id.* at 3171.

386. *Id.* at 3172.

387. *Id.*

“‘[t]he necessities of trial and the adversary process’ are irrelevant here, since they cannot alter the constitutional text.”<sup>388</sup> Nor can they, he maintained, “free [the Court] to conduct a cost-benefit analysis of clear and explicit constitutional guarantees, and then to adjust their meaning to comport with out findings.”<sup>389</sup>

With these two sixth amendment decisions, and that in *Bouknight*, it seems clear that, when faced in the future with the difficult issues generated in child abuse proceedings, the Court will be more receptive to prosecutorial needs than to a defendant’s rights. Although the defendant prevailed in *Wright*, the decision is more important for what it told the states was not required. And the Court’s rejection in *Craig* of Justice Scalia’s argument that if the confrontation clause means anything, it means the right to “eyeball” one’s accusers, certainly conveys a very strong indication of its general disposition in matters affecting children who may have been the victims of abuse.

In sum, the Court’s fourth, fifth and sixth amendment decisions in the 1989 Term can be appraised in various ways. Other years have produced more decisions of greater impact and fanfare. That its decisions are not of the Warren Court genre is no surprise. On the other hand, it was not a Term during which Warren era precedents were undone. And there was even a surprise or two. Nonetheless, the current Court has continued to cast its lot heavily in favor of governmental interests over the rights of the individual and it is interesting to note how frequently it has reversed decisions of high state courts, whose solicitude for individual rights has been far more generous. Whether the balance that the Court has struck is best, in the long run, for our society is a subject more appropriate for another forum. For this gathering, I close simply with an expression of concern that I have long harbored: that as the problems that confront our communities grow even more troublesome, will we, as a society, be willing to relinquish even more of those rights and liberties, which the fourth, fifth and

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388. *Id.* at 3173.

389. *Id.* at 3176.

sixth amendments were designed to secure, in the belief that by so doing, we will better combat the evils which plague us? If the answer is yes, it will not be a message lost on the Court.

*Professor Gary Shaw:*

I am more nervous about Judge Souter, since the opinions that he had written as a state court judge, I think, clearly come out in favor of the government's interest rather than those representing the defendant's.<sup>390</sup> One of the primary aspects of your talk, Professor Hellerstein, was that there is a balancing taking place. Originally, under the fourth amendment, we defined "unreasonable" by balancing state interests versus individual interests. Now, we see this balancing spreading to the sixth amendment confrontation clause,<sup>391</sup> which does not concern unreasonable or reasonable confrontations.<sup>392</sup> What is disturbing to me is that every time this Court balances societal interests versus individual interests, it decides that the societal interests outweigh the individual interests. When that happens it suggests to me that there is not a lot of balancing.

What is surprising to me, is not only the fact that the state courts are now taking a more liberal perspective or a more protective perspective, but also how readily the Supreme Court is willing to take those cases and overrule the state courts. The classic example is the *Michigan v. Long*<sup>393</sup> case, where the

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390. See *State v. Denney*, 130 N.H. 217, 536 A.2d 1242 (1987) (Justice Souter dissented, finding that in his opinion, a police officer's failure to advise motorists that refusal to submit to blood alcohol testing could be admitted against them at trial, did not violate the New Hampshire Constitution); *State v. Koppel*, 127 N.H. 286, 499 A.2d 977 (1985) (state should only be required to show that the value of roadblocks to the state outweighs the burden on individuals, rather than having to show that the roadblock "significantly" advances the state's interests).

391. U.S. CONST. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

*Id.*

392. See *Maryland v. Craig*, 110 S. Ct. 3157, 3165-67 (1990).

393. 463 U.S. 1032 (1983).

Michigan Supreme Court held a search to be unconstitutional and at least inferred that their decision was predicated upon the state constitution.<sup>394</sup> The Supreme Court turned federal jurisprudence on its head by holding that where it is not clear whether there are adequate and independent state grounds for the state court's decision,<sup>395</sup> it will presume that the case was decided under the federal Constitution. The Supreme Court then is eager to take these state court decisions that give broader protection, and decide that those protections are in fact impermissible under the federal Constitution.

*Professor William Hellerstein:*

Putting emphasis on *Michigan v. Long*, I think is the heart. That, to me, is where life changes. Prior to *Michigan v. Long*, when a case came to the Supreme Court, and it was ambiguous as to whether to decide it on a state constitutional ground or a federal, the Court assumed it was state, and left it alone.<sup>396</sup> *Michigan v. Long* inverted that. Unless the state court had indicated clearly it was under the state constitution, it was assumed the Supreme Court would consider it federal.<sup>397</sup> So, as a litigator in front of the court of appeals, I have on occasion ended my arguments, very awkwardly, very embarrassed, with: "If your Honors are inclined to reverse on my behalf, I would request humbly that you do so under the state constitution." And sometimes they do, and sometimes they do not. You then go up to the Supreme Court, you lose, you go back, and win anyway.

I think the broader problem with me, is that I do not know what really goes into the justices' heads. For many years the Warren Court was criticized for being activist, but could there be a more activist Court than a Court that is unwilling to allow states to construe individual rights? All I can say, is that I think that a congruence of the Justices are essentially imposing

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394. *People v. Long*, 412 Mich. 461, 463, 320 N.W.2d 866, 870 (1982), *rev'd sub nom. Michigan v. Long*, 463 U.S. 1032 (1983).

395. *Long*, 463 U.S. at 1040-41.

396. *Id.* at 1066 (Stevens, J. dissenting).

397. *Id.* at 1040-41.

their own personal views and values as to what police practices ought to be allowed.

*Judge George Pratt:*

What is it with the state supreme courts that they are reluctant to make their decisions under the state constitutions? Do they like the comfort of being second guessed by the Supreme Court? Why don't they have the courage to say: "We don't care what the Supreme Court says, in this state this is the way the local constitution is going to read."

*Professor William Hellerstein:*

I frequently ask that question, and I have never gotten and probably should not get an answer. I can only speculate as to what the intentions of the judges are. In the last case that I was involved in, a legal aid case, *New York v. Class*,<sup>398</sup> involved a search of a car that we won in New York Court of Appeals.<sup>399</sup> We thought the decision was on the state constitution. We thought the state court of appeals had said so. The Supreme Court took it nonetheless. The court of appeals then issued a subsequent opinion in which they referred to our case as having been decided on the state constitution,<sup>400</sup> and the Supreme Court still decided against it. We went back to the New York Court of Appeals and won.<sup>401</sup> Sometimes I have the feeling that the justices want to float it up there and see what the Supreme Court will do with it, perhaps in order to influence their judgment. Sometimes I get the feeling that they want these cases to go up to the Supreme Court, have them come back, and decide not to go along with it as a matter of pride and ego. It is a mystery to me. I do not think a litigator can

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398. 475 U.S. 106, 109 (1986) (Court assumed jurisdiction due to the lack of a plain statement that the decision below rested on independent state grounds).

399. *People v. Class*, 63 N.Y.2d 491, 472 N.E.2d 1009, 483 N.Y.S.2d 181 (1984).

400. *People v. Johnson*, 66 N.Y.2d 398, 408, 488 N.E.2d 439, 446, 497 N.Y.S.2d 618, 625 (1985).

401. *People v. Class*, 67 N.Y.2d 431, 494 N.E.2d 1009, 503 N.Y.S.2d 313 (1986).

ever find it out. It certainly would be a lot easier if the state court would tell us what they were doing.

*Judge George Pratt:*

Professor Hellerstein, I have one other question. The cases you selected to review with us are largely reviewed state court decisions. Have you taken any look at how the review of the state court decisions by the Supreme Court compares with their review of similar issues that come out of the circuit courts?

*Professor William Hellerstein:*

What you see is what you get today. There are no other fourth amendment decisions in this Term that came from the circuits other than the *United States v. Vergudo Urquidez*<sup>402</sup> and a Title VIII case, *United States v. Ojeda Rios*.<sup>403</sup>

*Judge George Pratt:*

From a purely subjective scanning of my recollection of my own work over the past year or so, every time I sit, which involves probably twenty-five to thirty cases, there must be close to ten fourth amendment issues that we have to pass on, virtually all of them in the drug area. I am somewhat uncomfortable in having to admit that rarely, if ever, does the defendant succeed.

*Professor William Hellerstein:*

That probably explains why there are so few cases to the Supreme Court from the circuits.

*Judge George Pratt:*

I am very uncomfortable with the doctrinal implications of what we are now doing, and wonder whether there is really anything left in the fourth amendment in drug cases. You wonder if you were to read fourth amendment cases of twenty

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402. 110 S. Ct. 1056 (1990) (fourth amendment protections did not apply to the search of a Mexican citizen with no voluntary ties to the United States).

403. 110 S. Ct. 1845 (1990) (in order to avoid violations of Title VIII, government must show a reasonable excuse of delay in sealing surveillance tapes).

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years ago and compare them with what we are doing today in terms of results rather than how we talk about them, you might say that we are talking about two entirely different legal systems. Of course, we have two entirely different societies to deal with as well.



