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## Much Sound, Not Too Much Fury: The Supreme Court's Criminal Law Decisions During the 1997 Term

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**MUCH SOUND, NOT TOO MUCH FURY:  
THE SUPREME COURT'S CRIMINAL LAW  
DECISIONS DURING THE 1997 TERM**

*William E. Hellerstein\**

*Hon. Leon D. Lazer:*

Our next speaker is Professor William Hellerstein of Brooklyn Law School. I have known Professor Hellerstein for a long time. Indeed, he argued before me when he was Chief of the Appeals Bureau of the Legal Aid Society and I sat on the Appellate Division, Second Department. It was always a very interesting and stimulating experience. Professor Hellerstein was nominated by the New York State Commission on Nominations for the position of Court of Appeals four times. You will note he does not wear robes, but I think it was a great honor and a great recognition of his talent that the state nominating commission sent his name to the governor that number of times. He will speak to us about the criminal law cases that have come out of the Supreme Court in the last term.

*Prof. William E. Hellerstein:*

The 1997 Term saw the Supreme Court heavily engaged in the criminal law. Of the Court's 91 decisions, 31 resolved criminal law issues. However, among these many rulings, there were but a few with broad implications. Indeed, many held minimal interest for practitioners who do not have cases involving similar issues. A partial explanation for this phenomenon is the fact that the Court has the task, perhaps an onerous one, of construing a multiplicity of federal statutes which, because hastily drawn by a Congress bent on expanding federal criminal jurisdiction, are also poorly drawn. Nonetheless, there is plenty left for discussion and, even after vetting the list of 31, I will be hard pressed to do justice to those cases which do have substantial significance. Consequently, I will first discuss the constitutionally based cases of greatest significance and then I will close with one of the Court's most noteworthy statutory cases.

## DOUBLE JEOPARDY

The Court decided two important double jeopardy cases. In both, the government came out a big winner. In *Hudson v. United States*,<sup>1</sup> the Court overruled its nine-year old decision in *United States v. Halper*;<sup>2</sup> in *Monge v. California*,<sup>3</sup> it confined its decision in *Bullington v. Missouri*,<sup>4</sup> to capital cases. Let's look at *Hudson* first, and let me refresh your recollection as to *Halper*.

*Halper* was a Medicare fraud case.<sup>5</sup> The defendant had already been punished criminally by both imprisonment and a small fine of \$600 for overcharging the government on claims.<sup>6</sup> The government then sued him under the False Claims Act, pursuant to which he was liable for a penalty of \$130,000.<sup>7</sup> The Court held that this sanction can constitute "punishment" under double jeopardy jurisprudence if it is sufficiently "divorced from any remedial goal" and, instead, serves the traditional retributive and deterrent goals of punishment.<sup>8</sup> In this sense, said the *Halper* Court, a sanction is punishment if it is "overwhelmingly disproportionate to the injury caused by the defendant's conduct."<sup>9</sup> The Court held that the disproportion between the amount of harm suffered by the government and the amount of the fine imposed on Halper compelled the conclusion that the fine could not "fairly be

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<sup>1</sup> 118 S. Ct. 488 (1997).

<sup>2</sup> 490 U.S. 435 (1989).

<sup>3</sup> 118 S. Ct. 2246 (1998).

<sup>4</sup> 451 U.S. 430 (1981).

<sup>5</sup> *Halper*, 490 U.S. at 437.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 438; see also False Claims Act, 31 U.S.C. §§ 3729–3731. Section 3729 provides in pertinent part:

a person not a member of an armed force of the United States is liable to the United States Government for a civil penalty . . . if the person . . . knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved.

*Id.*

<sup>8</sup> *Id.* at 452.

<sup>9</sup> *Id.* at 449.

characterized as remedial, but only as a deterrent or retribution.”<sup>10</sup> Since it was decided, *Halper* has been invoked by all types of individuals who had suffered an assortment of sanctions such as license revocations,<sup>11</sup> prison discipline,<sup>12</sup> sex offender registration,<sup>13</sup> and various kinds of debarments.<sup>14</sup> Not surprisingly, it has caused lower courts and administrative agencies to grapple with its application.<sup>15</sup> It was narrowed in *United States v. Ursery*,<sup>16</sup> and seriously criticized by many, none more vocally than by Justice Scalia who, in *Department of Revenue of Montana v. Kurth Ranch*,<sup>17</sup> urged the Court to overrule it.<sup>18</sup> In *Hudson*, a majority of the Court acceded to Justice Scalia’s invitation.<sup>19</sup>

Hudson and two other men, former officers in two Oklahoma federally-chartered banks, violated federal banking law by

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<sup>10</sup> *Id.*

<sup>11</sup> *Zukas v. Hinson*, 124 F.3d 1407 (11th Cir. 1997) (challenge to FAA revocation of a commercial pilot’s license).

<sup>12</sup> *United States v. Galan*, 82 F.3d 639 (5th Cir.), *cert. denied*, 117 S. Ct. 179 (1996) (challenge, on double jeopardy grounds, to prosecution for prison escape following prison disciplinary proceeding).

<sup>13</sup> *E.B. v. Verniero*, 119 F.3d 1077 (3d Cir. 1997) (challenge to “Megan’s Law” as violative of double jeopardy).

<sup>14</sup> *See, e.g., Jones v. Securities & Exchange Comm’n*, 115 F.3d 1173 (4th Cir. 1997) (challenge to SEC debarment proceeding as violative of double jeopardy); *United States v. Hatfield*, 108 F.3d 67 (4th Cir. 1997) (challenge to criminal fraud prosecution as foreclosed by previous debarment from government contracting); *Taylor v. Cisneros*, 102 F.3d 1334 (3d Cir. 1996) (challenge to eviction from federally subsidized housing based on guilty plea to possession of drug paraphernalia).

<sup>15</sup> *See generally* David S. Rudstein, *Civil Penalties and Multiple Punishment Under the Double Jeopardy Clause: Some Unanswered Questions*, 46 Okla. L. Rev. 587 (1993); Gregory Y. Porter, *Uncivil Punishment: The Supreme Court’s On Going Struggle with Constitutional Limits on Punitive Civil Sanctions*, 70 S.CAL. L. REV. 517 (1997).

<sup>16</sup> 518 U.S. 267 (1996). In this case, the government brought civil forfeiture proceedings against the defendant’s property that was used for drug transactions. Subsequently, the defendant was convicted of manufacturing marijuana. The Supreme Court held that civil forfeitures did not constitute additional punishment for the purpose of invoking the Double Jeopardy Clause. *Id.*

<sup>17</sup> 511 U.S. 767 (1994).

<sup>18</sup> *Id.* at 800-08 (Scalia, J., dissenting).

<sup>19</sup> 118 S. Ct. 488 (1997).

arranging a series of bank loans in the names of others but intended to funnel funds to Hudson so that he could redeem bank stock he had pledged as collateral on loans on which he had defaulted.<sup>20</sup> After discovering the scheme, the Comptroller of the Currency imposed civil sanctions on all three. Hudson was fined \$16,500, the others, \$15,000 and \$12,500 respectively. In addition, all three were barred from engaging in the banking business without the Comptroller's written consent.<sup>21</sup>

Three years after the Comptroller imposed civil sanctions, the government indicted the three on charges of conspiracy, misapplication of bank funds, and making false record entries. The indictments were based on the same facts that resulted in the civil sanctions.<sup>22</sup> The district court granted the defendants' motions to dismiss on double jeopardy grounds, but the Tenth Circuit reversed on the ground that, under *Halper*, the Comptroller's sanctions were not punishment because they were not grossly disproportionate to the harm sustained by the Government as a result of the defendants' misconduct.<sup>23</sup>

Writing for the majority, Chief Justice Rehnquist stated that *Halper* deviated from the Court's traditional double jeopardy doctrine in two respects. First, it bypassed what had been the threshold question in this kind of case by applying the Double Jeopardy Clause without first determining that the sanction in question was "criminal in nature."<sup>24</sup> Second, *Halper* departed from past practice in that, instead of examining the face of the statute authorizing the sanction, it took a case-by-case approach, assessing the sanction actually imposed.<sup>25</sup> This, the Chief Justice observed, made it impossible to decide the double jeopardy issue until the case has proceeded to judgment -- even though the Double

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<sup>20</sup> *Id.* at 492.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 494. The Chief Justice pointed out that the proportionality issue on which *Halper* focused had been listed in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), but only as one of seven factors to be considered in determining whether a sanction is a criminal penalty despite a civil label. However, under the pre-*Halper* approach, no single factor was controlling.

<sup>25</sup> *Id.*

Jeopardy Clause forbids the government from even attempting to start a second round of criminal punishment.<sup>26</sup>

Lastly, the Chief Justice noted that other constitutional provisions protect against “some of the ills at which *Halper* was directed:” the Due Process and Equal Protection Clauses protect against “downright irrational” sanctions, and the Eighth Amendment protects against excessive civil fines.<sup>27</sup> Applying a cost-benefit analysis, he concluded that “[t]he additional protection afforded by extending double jeopardy protections to proceedings heretofore thought to be civil is more than offset by the confusion created by attempting to distinguish between ‘punitive’ and ‘nonpunitive’ penalties.”<sup>28</sup>

Having turned away from *Halper*, the majority repaired to the two-part test of *United States v. Ward*, decided in 1980.<sup>29</sup> The first part requires a court to determine whether, as a matter of statutory construction, a particular punishment is criminal or civil.<sup>30</sup> The second part requires a determination that the evidence clearly establishes that the sanctions imposed are “so punitive in form and effect as to render them criminal despite Congress’ clear intent to the contrary.”<sup>31</sup> Applying these factors, the majority concluded that the sanctions imposed by the Comptroller were intended by Congress to be civil in nature, and that they were not so punitive in purpose or effect as to be criminal, despite Congress’ intent. In applying the second part, the majority noted that “neither monetary penalties nor debarment have historically been viewed as punishment.”<sup>32</sup> Moreover, the majority said, they do not involve an “affirmative disability or restraint” in the required sense and they do not require scienter. Although the conduct for which these sanctions may be imposed also may be criminal and that they may

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<sup>26</sup> *Id.* at 495.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> 448 U.S. 242 (1980).

<sup>30</sup> *Hudson*, 118 S. Ct. at 493.

<sup>31</sup> *Id.* at 495 (citing *United States v. Ursery*, 518 U.S. 267 (1996)).

<sup>32</sup> *Id.*

serve a deterrent purpose does not, ipso facto, render them “criminal” under *Ward*.<sup>33</sup>

Justice Scalia, joined by Justice Thomas, was delighted to have *Halper* interred. However, he reiterated his view that the Double Jeopardy Clause “prohibits successive prosecution, not successive punishment.”<sup>34</sup> Consequently, because the majority opinion returns the law to its pre-*Halper* state, “which acknowledged a constitutional prohibition against multiple punishments but required successive criminal prosecutions,” he was happy to “put the *Halper* genie back in the bottle.”<sup>35</sup>

Justice Stevens concurred only in the judgment. He saw no reason to reevaluate *Halper* because the case at bar could be easily resolved under traditional double jeopardy principles since the civil and criminal proceedings did not involve the “same offense,” as required by the *Blockburger*<sup>36</sup> overlapping principle test.<sup>37</sup> He saw nothing disruptive about the manner in which *Halper* was being handled by the lower courts, which, with one exception, had rejected every double jeopardy claim asserted under it.<sup>38</sup>

While agreeing with “much” of the majority’s opinion, Justice Souter urged caution about the requirement that a sanction can be found to be criminal only on the “clearest proof.” He stated that courts should read that requirement contextually and, given current enforcement trends, should not be surprised if more defendants overcome this hurdle than in the past.<sup>39</sup>

Justice Breyer, joined by Justice Ginsburg, suggested abandoning the “clearest proof” requirement and said the Court should not have decided in this case whether a sanction statute should be evaluated on its face or as applied.<sup>40</sup>

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<sup>33</sup> *Id.* at 496.

<sup>34</sup> *Id.* at 497 (Scalia, J., concurring).

<sup>35</sup> *Id.* (Scalia, J., concurring) (quoting *Department of Revenue of Mont. v. Kurth Ranch*, 511 U.S. at 803-05).

<sup>36</sup> *Blockburger v. United States*, 284 U.S. 299 (1932).

<sup>37</sup> *Hudson*, 118 S. Ct. at 497 (Stevens, J., concurring).

<sup>38</sup> *Id.* at 498 (Stevens, J., concurring).

<sup>39</sup> *Id.* at 500-01 (Souter, J., concurring).

<sup>40</sup> *Id.* at 501-02 (Breyer, J., concurring).

The Court's abandonment of *Halper* should come as no surprise. In *Ursery*, the Court had already held that very large forfeiture orders did not constitute punishment for double jeopardy purposes even though they were followed by criminal prosecution for the same offense. *Halper*, despite Justice Stevens' view that it was a rare case, was the real surprise and it produced some troubling results in the lower courts. For example, in *S.A. Healy v. OSHRC*,<sup>41</sup> the Seventh Circuit reversed, on double jeopardy grounds, the imposition of a \$318,500 fine imposed by the Occupational Safety and Health Review Commission on a company whose workplace safety violations led to the deaths of three of its employees because a criminal court had previously ordered the company to pay \$750,000. The Supreme Court ordered the Seventh Circuit to reconsider its decision in light of *Hudson*.<sup>42</sup> In short, the *Hudson* case is very bad news for white-collar defendants and it will also take with it challenges on double jeopardy grounds to Megan's Laws.

In *Monge v. California*,<sup>43</sup> the Court held that the Double Jeopardy Clause does not protect convicted criminals from a second sentencing proceeding in non-capital cases. Five Justices, with Justice O'Connor writing for the majority, refused to extend to non-capital cases the Court's decision in *Bullington v. Missouri*,<sup>44</sup> which precluded the prosecution from having two bites at the apple in a capital case. *Bullington* held that a capital defendant who received a life sentence during a sentencing proceeding that featured trial-like protections could not be sentenced to death upon retrial following an appeal.

*Monge* arose under California's "three strikes" law.<sup>45</sup> *Monge* was charged with various marijuana offenses and the prosecution gave notice of its intention to seek enhancement of any punishment

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<sup>41</sup> 96 F.3d 906 (7th Cir. 1996).

<sup>42</sup> 118 S. Ct. 623 (1997). On remand, the Seventh Circuit, in an opinion by Judge Frank Easterbrook, found that under *Hudson*, sanctions imposed for violation of OSHA standards was a civil penalty. 138 F.3d 686 (7th Cir. 1998). Therefore, the Double Jeopardy Clause does not forbid sanctions following a criminal punishment for the same offense. *Id.* at 688.

<sup>43</sup> 118 S. Ct. 2246 (1998).

<sup>44</sup> 451 U.S. 430 (1981).

<sup>45</sup> Cal. Penal Code Ann. § 667(d)(e) (West Supp. 1998).



because Monge was a serious felon under that law. Monge's prior felony conviction was for assault. If the assault either inflicted great bodily harm or was perpetrated with a dangerous weapon, it would qualify as a serious felony and any sentence imposed on the marijuana convictions would be doubled.<sup>46</sup>

A jury found Monge guilty on the three marijuana offenses with which he had been charged. At his sentencing hearing, Monge waived his right to a jury trial. In addition to the right to a jury trial, the three strikes law offers a number of other trial-type protections, including the right of confrontation, the reasonable doubt standard of proof and the application of the rules of evidence. The prosecution introduced evidence of Monge's prior assault conviction and evidence that he had served time in prison on the conviction. Although the prosecution alleged that Monge had used a stick in the assault, it did not introduce evidence of that fact. The sentencing judge found both allegations true -- that Monge had been convicted of assault and had served a prison sentence on the conviction -- and imposed a five year sentence for using a minor to sell marijuana. He then doubled the sentence to 10 years, as required by California's three strikes law. In addition, a one-year sentence was added for Monge's prior prison sentence, bringing his total sentence to 11 years.<sup>47</sup>

On Monge's appeal to the California Court of Appeals, the State conceded that it had not proven beyond a reasonable doubt (as required by the three strikes law) that Monge had inflicted great bodily harm or used a deadly weapon in the prior assault. Nonetheless, the State asked that the case be remanded and that it be given another opportunity to sustain its burden of proof. The Court of Appeals refused, holding that to do so would violate the Double Jeopardy Clause. A divided California Supreme Court reversed, holding that the Double Jeopardy Clause does not apply to noncapital sentencing proceedings.<sup>48</sup>

The Supreme Court affirmed. Justice O'Connor noted the Court's historical reluctance to apply the Double Jeopardy Clause to sentencing proceedings and stated that the traditional rationale

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<sup>46</sup> *Monge*, 118 S. Ct. at 2248.

<sup>47</sup> *Id.* at 2248-49.

<sup>48</sup> *Id.* at 2249.

that sentencing proceedings do not place a defendant in jeopardy for an “offense” applies here even though the enhancement provision raises the defendant’s sentence beyond the otherwise applicable statutory maximum.<sup>49</sup> Acknowledging that an appellate reversal of a conviction on grounds of insufficient evidence is tantamount to an acquittal for double jeopardy purposes, she maintained that the same is not true in the sentencing context except for the exception created by *Bullington* for capital cases.<sup>50</sup>

Monge argued that California’s three strikes law afforded procedural protections that were similar to those in *Bullington*. However, Justice O’Connor stated that *Bullington* did not rest exclusively on the capital sentencing proceedings resemblance to a trial of guilt or innocence; it also depended on the fact that the case was a capital case. She pointed to the *Bullington* Court’s explanation in regard to the embarrassment, expense, anxiety, and insecurity that a capital defendant confronts – which are at least equal to those faced by a defendant at a criminal trial. Also relevant was the *Bullington* Court’s concern that allowing repeated efforts to persuade a jury to impose a death sentence would create an unacceptably high risk of an erroneous capital sentence.<sup>51</sup> In short, *Bullington* turned on the “death is different” reality.

Justice O’Connor also disposed of the significance of the presence of procedural safeguards in the California scheme by rendering them, in a noncapital case, a matter of “legislative grace,” not a constitutional necessity.<sup>52</sup> That some states have chosen to implement procedural safeguards for the protection of defendants facing “dramatic increases in their sentences” does not compel extension of the double jeopardy prohibition. To do so, Justice O’Connor said, could create disincentives for the states to provide such protections.<sup>53</sup>

Of the four dissenters, Justice Stevens was the only member of the Court who believed that the Double Jeopardy Clause bars resentencing whenever the evidence in the first proceeding is

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<sup>49</sup> *Id.* at 2250.

<sup>50</sup> *Id.* at 2251.

<sup>51</sup> *Id.* at 2251-52.

<sup>52</sup> *Id.* at 2253.

<sup>53</sup> *Id.*

insufficient.<sup>54</sup> He based his position on Chief Justice Burger's opinion for a unanimous Court in *Burks v. United States*,<sup>55</sup> which emphasized the critical differences "between insufficiency of the evidence and *legal* errors that infect the first proceeding."<sup>56</sup>

Justice Scalia's dissent, joined by Justices Ginsburg and Breyer, was the most interesting. He referred to his dissent earlier in the Term in *Almendarez-Torres v. United States*,<sup>57</sup> in which he suggested that "it was a grave and doubtful question whether the Constitution permits a fact that increases the maximum sentence to which a defendant is exposed to be treated as a sentencing enhancement rather than an element of a criminal offense."<sup>58</sup> Although he did not answer that question in *Almendarez-Torres*, he now felt compelled to state that the Court's holding in *Almendarez-Torres* that "recidivism" findings do not have to be treated as elements of the offense, "*even if* they increase the maximum punishment to which the defendant is exposed . . . was . . . a grave constitutional error affecting the most fundamental of rights."<sup>59</sup> The majority's position, he asserted, would allow a legislature to convert most elements of crimes to sentencing factors and commit them to judges for determination without the protections of the Bill of Rights.<sup>60</sup> Although California's scheme was not "sinister," he hypothesized that a State "could repeal all of the violent crimes in its criminal code and replace them with only one offense, 'knowingly causing injury to another,' bearing a penalty of 30 days in prison." It could then subject that offense "to a series of 'sentencing enhancements' authorizing additional punishment, up to life imprisonment or death, on the basis of various levels of *mens rea*, severity of injury, and other surrounding circumstances," and leave it to a judge to decide by a preponderance of evidence whether the defendant committed those enhancing factors.<sup>61</sup>

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<sup>54</sup> *Id.* at 2253-54 (Stevens, J., dissenting).

<sup>55</sup> 437 U.S. 1 (1978).

<sup>56</sup> *Monge*, 118 S. Ct. at 2254 (Stevens, J., dissenting).

<sup>57</sup> 118 S. Ct. 1219 (1998).

<sup>58</sup> *Monge*, 118 S. Ct. at 2256 (Scalia, J., dissenting).

<sup>59</sup> *Id.* at 2257 (Scalia, J., dissenting).

<sup>60</sup> *Id.* at 2255 (Scalia, J., dissenting).

<sup>61</sup> *Id.* at 2255-56 (Scalia, J., dissenting).

Certainly, I have no quarrel with the majority's reliance on the fact that death is different. I have greater difficulty with the majority's reasoning that this fact requires that the double jeopardy principle established in *Bullington* should be limited to capital cases. First, as Justice Stevens pointed out, the Court bypasses the critical distinction between reversals based on insufficient evidence and those based on legal error. A defendant whose sentence has been enhanced considerably, despite the insufficiency of the evidence, can suffer from serious anxieties, albeit of a lesser degree than if faced with the possibility of execution. Giving the prosecution a second chance to correct its original failure of proof thus can prolong a noncapital defendant's agony through no fault of his own. The distinction, which the Court has drawn, between a capital and non-capital case in this circumstance seems illogical.

### EXCESSIVE FINES

The 5-4 decision in *United States v. Bajakajian*<sup>62</sup> was arguably the most surprising of the entire Term. In 1993, the Court held that the Excessive Fines Clause of the Eighth Amendment applies to both civil and criminal forfeitures.<sup>63</sup> However, the Court did not furnish a test for applying the clause. In *Bajakajian*, the Court held that a forfeiture that is punitive in nature is unconstitutional if it is "grossly disproportional" to the underlying crime. The result surprised many and it produced a severe dissent. The outcome came about only because Justice Thomas abandoned his usual constitutional companions and, indeed, wrote the majority opinion. In fact, this was the first time, I believe, that Justice Thomas has ever been found in the company of Justices Stevens, Souter, Ginsburg, and Breyer in a 5-4 decision.

Bajakajian and his wife attempted to leave the United States with \$357,144 in cash without reporting their plans to the government as required by the federal currency reporting statute-mandating disclosure of sums over \$10,000.<sup>64</sup> The money, however, had been

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<sup>62</sup> 118 S. Ct. 2028 (1998).

<sup>63</sup> *Austin v. United States*, 509 U.S. 602 (1993); *Alexander v. United States*, 509 U.S. 544 (1993).

<sup>64</sup> 1 U.S.C. §§ 5316(a)(1)(A), 5322(a) (1994).

obtained lawfully and was being taken abroad to repay a lawful debt. Bajakajian pled guilty to willfully violating the reporting requirement but went to trial on the forfeiture issue.<sup>65</sup> The district court held that the entire amount was subject to forfeiture under the statute but that to do so would be grossly disproportionate to Bajakajian's offense and thus would violate the Excessive Fines Clause. The Ninth Circuit affirmed.<sup>66</sup>

Writing for the majority, Justice Thomas first stated that forfeitures are "fines" if they constitute punishment for an offense and, in this case, it qualified because it was imposed at the end of a criminal proceeding, required a conviction, and could not be imposed on an innocent owner.<sup>67</sup> He observed that the government's only loss from the failure to report is the loss of information, which cannot be rectified by the government's confiscation of the defendant's money.<sup>68</sup>

Justice Thomas distinguished the forfeiture at issue from remedial forfeitures, which compensate the government for lost revenues, and from traditional civil in rem forfeitures. He emphasized that precedents related to civil in rem forfeitures of property tainted by crime are inapposite because such forfeitures were historically considered non-punitive and thus outside the Excessive Fines Clause.<sup>69</sup> Here, the government proceeded not against the property but against the defendant himself which rendered irrelevant the issue of whether the money was the instrumentality of the offense. The forfeiture is punitive, Justice Thomas observed, "and the test for excessiveness of a punitive forfeiture involves solely a proportionality determination."<sup>70</sup>

Justice Thomas then adopted the grossly disproportionate test applied by the district court. In accepting that test, he deemed

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<sup>65</sup> 18 U.S.C. § 982(a)(1) provides for forfeiture of "any property . . . involved in" an offense under Section 5316.

<sup>66</sup> *Bajakajian*, 118 S. Ct. at 2032-33.

<sup>67</sup> *Id.* at 2035.

<sup>68</sup> *Id.* at 2034.

<sup>69</sup> *Id.* at 2034-35. Justice Thomas cautioned against reading the decision as implying that "modern" civil in rem forfeiture statutes are necessarily non-punitive and thus unreachable by the Excessive Fines Clause; the clause is triggered by both remedial and punitive elements, he said. *Id.* at 2035 n.6.

<sup>70</sup> *Id.* at 2036.

relevant two factors: "that judgments about the appropriate punishment for an offense belong in the first instance to the legislature," and that "any judicial determination regarding the gravity of a particular criminal offense will be inherently imprecise."<sup>71</sup> He pointed out that these factors point away from a requirement of "strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense" and toward the "gross disproportionality" standard that the Court had followed in interpreting the Cruel and Unusual Punishment Clause.<sup>72</sup>

Applying this standard, Justice Thomas determined that forfeiture of the entire \$357,144 was grossly disproportionate. Bajakajian's only crime was a failure to report the money that was lawfully obtained and was intended to be used for a lawful purpose. Moreover, the defendant himself was not the type of person the law was intended to snare -- drug traffickers, money launderers, and tax evaders.<sup>73</sup>

Justice Kennedy, joined by the Chief Justice and Justices O'Connor and Scalia, dissented, stating that money launderers will "rejoice" at the Court's decision.<sup>74</sup> He maintained that "the decision is disturbing both for its specific holding and for the broader upheaval it foreshadows."<sup>75</sup> Apart from a departure from a long line of precedent, Justice Kennedy accused the majority of ignoring Congress' intent to require total forfeiture in recognition of the difficulty of proving the relationship of unreported cash to other crimes.<sup>76</sup> He acknowledged that the majority's gross disproportionality test was "a proper way" to enforce the Excessive Fines Clause. He argued, however, that the majority had misapplied it by treating Bajakajian's crime as much less serious than it actually was. He would have held that the forfeiture of the entire amount of unreported monies is justifiable as long as the

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<sup>71</sup> *Id.* at 2037.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 2038.

<sup>74</sup> *Id.* at 2046 (Kennedy, J., dissenting).

<sup>75</sup> *Id.* at 2041 (Kennedy, J., dissenting).

<sup>76</sup> *Id.* at 2044 (Kennedy, J., dissenting).

government can prove the non-reporting was willful.<sup>77</sup> Justice Kennedy also opined that the majority's holding could have the long-term effect of undermining the Excessive Fines Clause. By suggesting that in rem forfeitures are not subject to excessiveness analysis, the majority has invited Congress and legislatures generally to create exceedingly harsh in rem forfeitures.<sup>78</sup>

This decision again signifies the Court's involvement with, and concern about, the Government's use of its forfeiture and civil remedy powers that supplement criminal statutes. The past decade has witnessed a backing and filling of doctrinal effort, as evidenced by the overruling of the *Halper* case in *Hudson* of which I spoke earlier. The decision in *Bajakajian* reflects the Court's concern with the government's heavy-handed approach in the use of the forfeiture mechanism. The open question is whether the decision extends no further than application of the reporting requirement statutes at issue or whether it portends greater scrutiny by the Court of the entire instrumentalities doctrine. Here, the government argued that Bajakajian's \$357,144 was the instrumentality of the crime itself -- the failure to report it. But Justice Thomas responded not only that Bajakajian's cash was not an instrumentality because it did not directly facilitate the commission of his offense, but that a fine is excessive regardless of whether the cash to be forfeited can be called an instrumentality.<sup>79</sup> It is this rejection of the mere label "instrumentality" which suggests this case may have a reach beyond the issue that it resolved.

### THE RIGHT TO PRESENT A DEFENSE: POLYGRAPH EVIDENCE

In *United States v. Scheffer*,<sup>80</sup> Justice Thomas returned to form as he authored the Court's opinion holding that Military Rule of Evidence 707(a), which prohibits the admission at trial of polygraph evidence under any circumstance, does not violate a

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<sup>77</sup> *Id.* at 2045 (Kennedy, J., dissenting).

<sup>78</sup> *Id.* at 2046-47 (Kennedy, J., dissenting).

<sup>79</sup> *Id.* at 2038-39.

<sup>80</sup> 118 S. Ct. 1261 (1998).

defendant's constitutional right to present a defense.<sup>81</sup> The case is of considerable significance because, by upholding the validity of a per se rule of exclusion, it ends the constitutional discussion as to the admissibility of polygraph evidence. The decision also runs counter to the trend, signified by the Court's landmark ruling in *Daubert v. Merrill Dow Pharmaceuticals*,<sup>82</sup> in favor of allowing scientific evidence into evidence even if the methodologies involved are not universally accepted in the relevant scientific community.

Scheffer, an airman in the United States Air Force, sought to introduce the favorable results of a polygraph at his court martial for, among other things, using methamphetamine. According to the polygraph examiner, the results indicated no deception when Scheffer answered questions denying he had used the drug. Understandably, Scheffer wanted to introduce the polygraph results to counter a positive drug test the prosecution had introduced against him and to bolster his defense of innocent ingestion. Invoking Rule 707, the court-martial judge ruled the polygraph results inadmissible. Scheffer testified in his own defense and denied using any drugs. He was convicted of all charges.<sup>83</sup> The Air Force Court of Criminal Appeals affirmed. However, the United States Court of Appeals for the Armed Forces, in a 3-2 vote, held that Rule 707's per se preclusion of polygraph evidence violates an accused's constitutional right to present a defense and reversed Scheffer's conviction.<sup>84</sup>

In reversing, Justice Thomas made three principle points: (1) a defendant's right to present relevant evidence is subject to reasonable restrictions so long as such restrictions are not arbitrary;<sup>85</sup> (2) the Court has found arbitrariness or disproportionality in the exclusion of evidence only where it

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<sup>81</sup> The rule states: "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence." *Id.*

<sup>82</sup> 509 U.S. 579 (1993).

<sup>83</sup> *Scheffer*, 118 S. Ct. at 1263-64.

<sup>84</sup> 44 M.J. 442 (C.A.A.F. 1996).

<sup>85</sup> *Scheffer*, 118 S. Ct. at 1264.



infringed on a weighty interest of the defendant;<sup>86</sup> and (3) Rule 707, due to the lack of consensus that polygraph evidence is reliable, “is a rational and proportional means of advancing the legitimate interest in barring unreliable evidence.”<sup>87</sup>

Scheffer relied on three prior Supreme Court decisions: (1) *Rock v. Arkansas*,<sup>88</sup> in which the Court held that the exclusion of the defendant’s hypnotically induced testimony violated the defendant’s right to present a defense, (2) *Washington v. Texas*,<sup>89</sup> in which the Court struck down, as violative of the Compulsory Process Clause, statutes which prevented co-defendants or co-participants in a crime from testifying for one another, and (3) *Chambers v. Mississippi*,<sup>90</sup> where the Court found a due process violation in application of the state’s voucher rule which prevented the defendant from impeaching his own witness, and the hearsay rule, which prevented the defendant from introducing the testimony of three persons to whom that witness had confessed. Justice Thomas distinguished all three cases on their facts and concluded that “unlike the evidentiary rules at issue in those cases, Rule 707 does not implicate any significant interest of the accused.”<sup>91</sup> He pointed out that Rule 707 did not keep Scheffer from presenting the jury with evidence and details of the crime from his perspective, but instead merely prevented Scheffer “from introducing expert testimony to bolster his own credibility.”<sup>92</sup>

Chief Justice Rehnquist and Justices Scalia and Souter joined those parts of Justice Thomas’ opinion which made two additional points – that Rule 707 also serves legitimate interests in preventing mini-trials on collateral matters such as credibility, and in protecting the jury’s “core function” as the arbiter of credibility.<sup>93</sup>

Justice Kennedy, joined by Justices O’Connor, Ginsburg, and Breyer, concurred in an opinion which expressed doubt about the

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<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 1266.

<sup>88</sup> 483 U.S. 44 (1987).

<sup>89</sup> 388 U.S. 14 (1967).

<sup>90</sup> 410 U.S. 284 (1973).

<sup>91</sup> *Scheffer*, 118 S. Ct. at 1268.

<sup>92</sup> *Id.* at 1268-69.

<sup>93</sup> *Id.* at 1263, 1266-67.

wisdom of a per se rule of exclusion.<sup>94</sup> Nonetheless, Kennedy concluded that the “ongoing debate about polygraphs” saved the rule from condemnation as arbitrary or disproportionate.<sup>95</sup> However, he was critical of Justice Thomas’ idea that jurors should be shielded from witnesses’ opinions on the ultimate issue, which he viewed as outmoded and one that the drafters of the Federal Rules of Evidence had abandoned.<sup>96</sup>

Justice Stevens wrote a lengthy dissent in which he argued that the majority struck the wrong balance between the defendant’s constitutional right to present a defense and the interests served by Rule 707.<sup>97</sup> He pointed out that many studies put the reliability of polygraphs at 85 to 90 percent and that exculpatory polygraphs are more likely to be accurate than inculpatory ones.<sup>98</sup> Given this reality, a per se exclusion is unjustified, he concluded. Instead, he said, doubts about reliability in individual cases should be resolved through the usual adversary method, and that the problem of collateral litigation is no worse in this context than in cases involving other kinds of expert testimony.<sup>99</sup>

I find myself troubled by the Court’s sledgehammer approach to the issue of polygraph evidence. While the *Scheffer* decision leaves the States and the Congress free to provide for the admission of such evidence, the Court’s ruling is not structured to serve as a catalyst for further movement in that direction. Also, the decision seems counter-intuitive to contemporary thinking about the admissibility of scientific evidence at trial and to the Court’s own decision in *Daubert*.

*Daubert* is willing to trust to the wisdom of trial judges’ with regard to the reliability of scientific evidence whose techniques have not yet received universal acceptance. Yet in a case in which a defendant’s ability to demonstrate his innocence is at stake, the Court is not willing to do so. What is gained by a constitutional ruling which upholds a per se ban on *all* polygraph evidence eludes

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<sup>94</sup> *Id.* 1269 (Kennedy, J., concurring).

<sup>95</sup> *Id.* (Kennedy, J., concurring).

<sup>96</sup> *Id.* at 1269-70 (Kennedy, J., concurring).

<sup>97</sup> *Id.* at 1275-76 (Stevens, J., dissenting).

<sup>98</sup> *Id.* at 1276 (Stevens, J., dissenting).

<sup>99</sup> *Id.* at 1277-79 (Stevens, J., dissenting).

me. As Justice Stevens pointed out in his dissent, “[b]etween 1981 and 1997, the Department of Defense conducted over 400,000 polygraph examinations to resolve issues arising in counterintelligence, security, and criminal investigations.”<sup>100</sup> In other words, on a daily basis the government makes critical decisions, which affect our national security by relying to some degree on the accuracy of the polygraph. Yet the Court can find nothing in the Constitution’s guarantee of the right to present a defense (which, despite Justice Thomas’ less than enthusiastic embrace is still there), to secure to a defendant the right to at least proffer a favorable polygraph in evidence against the same government which seeks to deprive him of his freedom. I find such ironies difficult to overcome.

### THE RIGHT TO CONFRONTATION

In *Gray v. Maryland*,<sup>101</sup> a closely divided Court decided an important Sixth Amendment Confrontation Clause question in the *Bruton*<sup>102</sup> line of cases. It held that editing a non-testifying co-defendant’s confession by replacing inculpatory references to a jointly tried defendant with a blank space or the word “deleted” is insufficient to protect the defendant’s rights.

As you may recall, *Bruton* involved the robbery trial of two defendants, Evans and Bruton. Evans confessed to the police and inculpated Bruton as well. The prosecution introduced Evans’ confession against both defendants. Bruton objected, claiming that because Evans did not testify at trial, he was deprived of his right of confrontation. The court overruled the objection and Evans’ confession implicating Bruton was read into evidence. The Supreme Court reversed Bruton’s conviction on the ground that, notwithstanding the trial judge’s limiting instruction introducing that portion of Evans’ confession implicating Bruton without affording Bruton the right to cross examine him, violated the Sixth Amendment.

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<sup>100</sup> *Id.* at 1272 n.7 (Stevens, J., dissenting).

<sup>101</sup> 118 S. Ct. 1151 (1998).

<sup>102</sup> *Bruton v. United States*, 391 U.S. 123 (1968).

However, in *Richardson v. Marsh*,<sup>103</sup> the Court considered a redacted confession and held that a confession edited so as to omit any reference to the non-confessing defendant was not within the *Bruton* rule, even though the confession could be read, in the light of other evidence, to incriminate the defendant.

Since *Bruton* was decided, and as was the case in *Richardson*, the general practice surrounding the introduction of statements of non-testifying co-defendants has been to redact the statement to eliminate all mention of the other defendant. In *Gray*, the prosecutor substituted the word "DELETED" or blank spaces for Gray's name every time the co-defendant's confession implicated Gray. Consequently, the *Gray* case fell into something of a no-man's land between *Bruton* and *Richardson* in that it presented the Court with the issue, left open in *Richardson*, of whether redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word "deleted," or a similar symbol, still falls with *Bruton*'s ambit. By a 5-4 vote, with Justice Breyer writing for the majority, the Court tilted toward *Bruton* and held that the admission of a confession redacted in such manner is equivalent to admission of the confession in unredacted form, which *Bruton* precludes.

Gray and Bell were tried jointly for beating to death Stacy Williams. Bell, who did not testify at trial, had given the police a confession which inculpated Gray by name. When Bell's confession was read to the jury, it stated that the victim was beaten by "me, DELETED, DELETED, and a few other guys." The jury was also provided with a written version of the confession containing blanks where the names had been. At trial, the prosecutor also elicited from a police detective that after Bell gave him the confession, the detective was able to arrest Gray. The judge instructed the jury to consider the confession only against the declarant, Bell.<sup>104</sup>

In holding that this redaction was constitutionally unacceptable, Justice Breyer emphasized that Bell's confession, like that in *Bruton*, originally referred to and directly implicated Gray. Unlike *Richardson*'s redacted confession, Bell's confession as redacted

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<sup>103</sup> 481 U.S. 200 (1987).

<sup>104</sup> *Gray*, 118 S. Ct. at 1153.

referred directly to the “existence” of the non-confessing defendant.<sup>105</sup> Justice Breyer explained that a jury will often react similarly to an unredacted confession and a confession redacted with “deleted” or with a blank space because the jury will often realize that the confession refers specifically to the defendant. He emphasized that, in this case, the prosecutor made that leap very easy by following the police officer’s recitation of the redacted confession with a question that suggested a link between the confession and Gray’s arrest.<sup>106</sup>

Justice Breyer conceded that, as in *Richardson*, the jury had to make an inference to conclude that the confession incriminated the defendant. However, he distinguished *Richardson* in that the statements in that case did not refer directly to the defendant and required evidentiary linkage for their incriminating effect, i.e., Richardson’s own testimony at trial that he was in car mentioned in his co-defendant’s confession. In Gray’s case, however, Bell’s statements obviously referred to Gray and no additional evidence was required before that inference could be drawn.<sup>107</sup>

Justice Breyer acknowledged that the *Richardson* Court feared that the application of *Bruton* to confessions that are incriminating by connection would force prosecutors either not to use such confessions or to abandon joint trials. He pointed out, however, that confessions may be edited rather freely in order to cure the *Bruton* problem; in Gray’s case, he could not understand why the confession could not have been redacted to state that the victim was beaten by “me and a few other guys.”<sup>108</sup>

Justice Scalia, joined by Chief Justice Rehnquist and Justices Kennedy and Thomas, dissented, and viewed the case closer to *Richardson* than *Bruton*.<sup>109</sup> He believed that as long as a jury must rely on other trial evidence to conclude that the word “deleted” or some other substitute refers to the defendant, the incriminating inference is not so powerful as to require departing from the normal rule that juries are presumed to follow the trial court’s

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<sup>105</sup> *Id.* at 1155.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 1156-57.

<sup>108</sup> *Id.* at 1157.

<sup>109</sup> *Id.* at 1159 (Scalia, J., dissenting).

instructions. He conceded “that confessions redacted to omit the defendant’s name are more likely to incriminate than confessions redacted to omit any reference to his existence.”<sup>110</sup> He thought it more important, however, that “confessions redacted to omit the defendant’s name are *less* likely to incriminate than confessions that expressly state it.”<sup>111</sup> He concluded that “the Court’s extension of *Bruton* to name-redacted confessions ‘as a class’ will seriously compromise ‘society’s compelling interest in finding, convicting, and punishing those who violate the law.’”<sup>112</sup>

I find it hard to quarrel with the correctness of the majority decision. Two features underlie Justice Scalia’s dissent: his reliance on the jury’s capacity to follow a court’s instruction to consider the co-defendant’s confession as applicable only to him, and his concern about making it more difficult for the prosecution to secure a conviction. Although Justice Scalia is correct that courts generally emphasize the ability of jurors to follow instructions, where co-defendant’s confessions are concerned, it must be remembered that *Bruton* itself specifically overruled *DelliPaoli v. United States*,<sup>113</sup> which also had accepted the proposition that juries could abide by an instruction that a co-defendant’s confession should be applied only to the confessing defendant. *Bruton* itself held that the general assumption that juries follow instructions was not adequate in the case of co-defendant’s confessions at a joint trial. Therefore, Justice Scalia’s reliance on the general proposition is not persuasive. Secondly, I fail to see how the prosecutor’s task is rendered more difficult by prohibiting use of the term “deleted” or use of blank spaces in a printed version. This can be done easily before trial and, as the majority pointed out, the confession could have said that “I beat the victim along with some other guys.”<sup>114</sup>

*Gray* is significant because it establishes a rule that goes beyond the specific facts of the case. The Court could have reached the

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<sup>110</sup> *Id.* at 1160 (Scalia, J., dissenting).

<sup>111</sup> *Id.* (Scalia, J., dissenting).

<sup>112</sup> *Id.* (Scalia, J., dissenting). (citing *Moran v. Burbine*, 475 U.S. 412, 426 (1986)).

<sup>113</sup> 352 U.S. 232 (1957).

<sup>114</sup> *Gray*, 118 S. Ct. at 1157.

same result by relying exclusively on the fact that the prosecutor's questioning of the police officer conveyed to the jury the obvious suggestion that Gray had been implicated because his arrest followed closely upon Bell's confession, thus giving it the same effect as an entirely unredacted confession. And, some may choose to read the opinion as limited to the Court's precise holding "that the confession here at issue, which substituted blanks and the word 'delete' for the respondent's proper name, falls within the class of statements to which *Bruton's* protections apply."<sup>115</sup> However, though on many occasions dissenting opinions overstate the reach a majority opinion, I do not think that is the case here. Thus, I agree with Justice Scalia's view that the Court's decision establishes a broad rule of preclusion.<sup>116</sup> As Justice Breyer stated: "we believe that, *considered as a class*, redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton's* unredacted confessions as to warrant the same legal results."<sup>117</sup> In this statement lies the importance of the case.

### JURY DISCRIMINATION

In *Campbell v. Louisiana*,<sup>118</sup> the Court extended a white defendant's ability to challenge the exclusion from petit juries of persons not of his race, to the grand jury. As you may recall, seven years ago, in *Powers v. Ohio*,<sup>119</sup> the Court held that a defendant may raise an equal protection challenge to the prosecution's exercise of peremptory jury challenges even if the defendant is not of the same race as the excluded venirepersons. In *Campbell*, the Court held that the defendant, who is white, had third-party standing to challenge the exclusion of blacks from service as grand jury forepersons.

Campbell, who was convicted of murder, claimed that in the Louisiana Parish where he was indicted, no black had served as

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1160-1161 (Scalia, J., dissenting).

<sup>117</sup> *Id.* at 1156.

<sup>118</sup> 118 S. Ct. 1419 (1998).

<sup>119</sup> 499 U.S. 400 (1991).

grand jury foreperson from 1976 to 1993, even though blacks constituted 20 percent of registered voters. The Louisiana Supreme Court held that Campbell had no standing to raise the challenge because he was not a member of the racial group that suffered the alleged discrimination. The Court also rejected Campbell's due process claim because the foreperson's duties were purely ministerial.<sup>120</sup> Justice Kennedy, who has been in the forefront on jury discrimination issues, wrote the Court's opinion. Justice Thomas dissented in part and called for the overruling of *Powers*. He was joined by Justice Scalia, who had dissented in *Powers*.

Justice Kennedy first noted that whatever the functions of the foreperson of the grand jury in Louisiana, he or she has the same full voting powers as other grand jury members. Secondly, that the judge selects the foreperson from the grand jury venire before the remaining members of the grand jury have been chosen by lot means that the judge has selected one member of the grand jury outside the drawing system used to compose the rest of the grand jury. These considerations, Justice Kennedy concluded, required the Court to treat the case as one alleging discriminatory selection of grand jurors.<sup>121</sup>

In *Powers*, the Court established a three-part test for third-party standing: (1) the defendant must suffer an injury in fact, (2) the defendant must have a close relationship to the excluded jurors, and (3) there must exist some hindrance to the excluded jurors' assertion of their rights on their own. Justice Kennedy concluded that application of these criteria to the instant case required the same result as in *Powers*.<sup>122</sup> First, he pointed out, any defendant suffers a "significant injury in fact" when racial discrimination taints the composition of the grand jury, regardless of whether the defendant is of the same race as the targets of the discrimination.<sup>123</sup> The grand jury, he noted, is a "central component of the criminal justice process" charged with making numerous significant decisions. If discrimination infects the selection process, then

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<sup>120</sup> *Campbell*, 118 S. Ct. at 1421-22.

<sup>121</sup> *Id.* at 1422.

<sup>122</sup> *Id.* at 1422-23.

<sup>123</sup> *Id.* at 1423.



“doubt is cast over the fairness of all subsequent decisions.” It does not matter that the discrimination may not be visible in the particular case.<sup>124</sup> As to the other two conditions, Justice Kennedy stated that, as in *Powers*, a defendant will be an effective advocate for the excluded jurors, and that they face economic disincentives for pursuing legal action to vindicate their own rights.<sup>125</sup>

It is important to appreciate what the Court did not decide. Because it determined that Campbell had third party standing, the Court did not have to decide whether Campbell could claim a violation of his own equal protection rights. It also did not have to decide Campbell’s due process claim. Nonetheless, Justice Kennedy pointed out that the Louisiana Supreme Court had erred in relying on *Hobby v. United States*<sup>126</sup> which had held that discrimination in the selection of a federal grand jury foreperson did not infringe principles of fundamental fairness because the foreperson’s duties were “ministerial.” The difference between this case and *Hobby*, Justice Kennedy emphasized, is that the *Hobby* foreperson “was selected from the existing grand jurors, so the decision to pick one grand juror over another, at least arguably, affected the defendant only if the foreperson was given some significant duties that he would not have had as a regular grand juror.”<sup>127</sup> The critical distinction between *Hobby* and this case, Kennedy pointed out, “is not the foreperson’s performance of its duty to preside, but performance as a grand juror, namely voting to charge Campbell with second-degree murder.”<sup>128</sup>

Akin to Luciano Pavarotti’s signature aria, *Nessun Dorma*, from Puccini’s *Turandot*, Justice Thomas’s penchant for overruling prior precedent<sup>129</sup> again presented itself in *Campbell*. Here, he disputed the majority’s finding of injury in fact and stated that discrimination in the selection of just one member of the grand

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<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 1424.

<sup>126</sup> 468 U.S. 339 (1984).

<sup>127</sup> *Campbell*, 118 S. Ct. at 1425.

<sup>128</sup> *Id.*

<sup>129</sup> See, e.g., *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 117 S. Ct. 1590 (1997) (Thomas, J., dissenting); *United States v. Lopez*, 115 S. Ct. 1624, 1650-1651 (1995) (Thomas, J., concurring).

jury “could hardly constitute an ‘overt’ act that would affect the remainder of the grand jury proceedings, much less the subsequent trial.”<sup>130</sup> That *Campbell* was found guilty, in Justice Thomas’ view, washed out any error that occurred in the grand jury. Justice Thomas also disputed that the other conditions required by *Powers* were met. He maintained that there did not exist a “close relationship” or “common interest” between defendants and venirepersons who are passed over for grand jury service. Justice Thomas could not “understand how the rights of blacks excluded from jury service can be vindicated by letting a white murderer go free.”<sup>131</sup> He then reiterated his previously stated position that the entire line of cases since *Batson*,<sup>132</sup> “is a misguided effort to remedy a general societal wrong by using the Constitution to regulate the traditionally discretionary exercise of peremptory challenges.”<sup>133</sup>

The *Campbell* case is significant primarily as a continuation of the process of protecting the rights of jurors as citizen-participants in the criminal justice system. Justice Kennedy has previously demonstrated a very strong commitment to the eradication of racial discrimination against jurors qua jurors, and his willingness to expand third-party standing in this case evidences that predilection. The Court’s previous decision in *Georgia v. McCollum*,<sup>134</sup> holding *Batson* applicable to racial peremptory challenges utilized by defense counsel, is the high water mark of the Court’s intention to secure the rights of jurors intrinsically. *Campbell* is easily understood as a logical, *a fortiori*, application of that commitment. On the other hand, Justice Thomas’ dissent stems not only from a basic disagreement with that principle, but from Justice Thomas’ broader concern that *Batson* itself was a great mistake. As he argued in his *McCollum* concurrence, “[t]he *Batson* doctrine, rather than helping to ensure the fairness of criminal trial, serves

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<sup>130</sup> *Campbell*, 118 S. Ct. at 1427 (Thomas, J., concurring in part, dissenting in part).

<sup>131</sup> *Id.* at 1426.

<sup>132</sup> *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>133</sup> *Campbell*, 118 S. Ct. at 1426 n.1. (Thomas, J., concurring in part, dissenting in part).

<sup>134</sup> 505 U.S. 42 (1992).

only to undercut that fairness by emphasizing the rights of excluded jurors at the expense of the traditional protections accorded criminal defendants of all races.”<sup>135</sup>

Justice Thomas’ hostility to *Batson* and its progeny is one that many defense attorneys felt about the Court’s extension in *McCullum* of *Batson* to the defense bar. It is also one of those few issues on which Justice Thomas and Justice Marshall shared common ground. The Court, in *McCullum*, could have limited *Batson* to the prosecution and accepted the defense bar’s position that exercise by defense counsel of a peremptory challenge did not constitute state action and thus did not implicate the Fourteenth Amendment. However, the Court found state action, not in the conduct of defense counsel, but in the judicial imprimatur of the defense’s exercise of a peremptory challenge and the effect of such imprimatur on the jurors themselves. The Court’s commitment to jurors in the *Batson* line of cases of which *Campbell* but is the latest word shows that the Court and Justice Thomas are not on the same page. The Court’s purpose since *Batson* has been to cleanse, as best as it can, the entire criminal justice trial process of racial bias. That the defendant’s rights are secondary was a bridge crossed in *McCullum*. If such were not the case, then Justice Thomas’ argument might have considerable weight. But the Court has chosen a more predominant value and its ruling in *Campbell v. Louisiana* is consistent with that choice.

## SEARCHES AND SEIZURES

The Court decided two Fourth Amendment cases this term. In *United States v. Ramirez*,<sup>136</sup> the Court addressed the Fourth Amendment standard to be applied when the police damage property when making an unannounced entry while executing a search warrant. In *Pennsylvania Board of Probation and Parole v. Scott*,<sup>137</sup> the Court was asked to decide whether the exclusionary

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<sup>135</sup> *Campbell*, 118 S. Ct. at 1426 n. 1 (Thomas, J., concurring in part, dissenting in part (quoting *Georgia v. McCollum*, 505 U.S. at 60-62 (Thomas, J., concurring in judgment)).

<sup>136</sup> 118 S. Ct. 992 (1998).

<sup>137</sup> 118 S. Ct. 2014 (1998).

rule applied to state parole revocations. In both cases the government prevailed.

In *Ramirez*, for the third time in four years, the Court addressed the Fourth Amendment's knock and announce rule. As you may recall, in *Wilson v. Arkansas*,<sup>138</sup> decided in 1995, the Court held the Fourth Amendment did include a knock and announce requirement but also held that the requirement was not a rigid one and that the lower courts would have to determine the circumstances under which an unannounced entry is reasonable. Two years later, in *Richards v. Wisconsin*,<sup>139</sup> the Court rejected Wisconsin's per se rule that when making a drug arrest pursuant to a warrant, the police need never follow a knock and announce requirement. Instead, the Court held that no-knock entries are not unreasonable if the police have a "reasonable suspicion" that knocking and announcing their presence would "be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence."<sup>140</sup>

*Ramirez* presented the issue of whether, when the police execute a warrant and destroy property, a higher degree of exigency is required than when police simply dispense with the knock and announce requirement. With Chief Justice Rehnquist writing for a unanimous Court, the Court held that the Fourth Amendment contains no such requirement.

The facts were not propitious for a different outcome. Federal agents obtained a warrant authorizing an unannounced entry to search Ramirez's home for one Shelby, who was a fugitive. Shelby had a violent record, including a previous escape and the agents had been told by their informant that Ramirez may have guns stored in his garage. Executing the warrant, one of the agents broke out a window to the garage and stuck his gun through the opening to keep the occupants of the home from gaining access to the firearms that he believed were stored there. Ramirez, who was asleep with his wife, heard the commotion and thought he was being burglarized. He grabbed a gun and fired a shot into the garage roof. When he realized that he was dealing with police

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<sup>138</sup> 514 U.S. 927 (1995).

<sup>139</sup> 117 S. Ct. 1416 (1997).

<sup>140</sup> *Id.* at 1421.

officers, he surrendered. Shelby was not present but Ramirez was a prior felon and thus was charged with unlawful possession of firearms.<sup>141</sup>

The Ninth Circuit had previously held that a “mild exigency” was sufficient to justify a no-knock entry when no property was damaged,<sup>142</sup> but “more specific inferences of exigency” were required when police damaged property.<sup>143</sup> Applying that principle to this case, the court held that the agents executing the warrant did not meet the higher standard and it affirmed the district court’s suppression of the firearms.<sup>144</sup> The court also held that the entry violated 18 U.S.C. Section 3109.<sup>145</sup>

In reversing, Chief Justice Rehnquist stated that although neither *Wilson* nor *Richards* specifically addressed the issue of how property damage should figure into the determination of the reasonableness of a no-knock entry, it was obvious from those cases, especially *Richards*, that reasonableness does not turn on whether property is damaged; the “reasonable suspicion” standard of *Richards* does not depend on whether the police must destroy property in order to enter.<sup>146</sup>

Rehnquist acknowledged that the reasonableness requirement of the Fourth Amendment does speak to the manner of executing a search warrant. However, the issue of whether an exigency existed to justify a no-knock entry must be viewed separately from whether the entry was effected reasonably. Thus, “[e]xcessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, even though the entry itself is

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<sup>141</sup> *Ramirez*, 118 S. Ct. at 995-96.

<sup>142</sup> *United States v. Von Willie*, 59 F.3d 922, 924 (9th Cir. 1995).

<sup>143</sup> *See United States v. Becker*, 23 F.3d 1537, 1539 (9th Cir. 1994).

<sup>144</sup> *United States v. Ramirez*, 91 F.3d 1297 (9th Cir. 1996).

<sup>145</sup> *Id.* at 1908. 18 U.S.C. § 3109 provides:

The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

*Id.*

<sup>146</sup> *Ramirez*, 118 S. Ct. at 996.

lawful and the fruits of the search not subject to suppression.”<sup>147</sup> In this case, Rehnquist concluded, the agents had reasonable suspicion justifying their no-knock entry and breaking the garage window was reasonable under the circumstances.<sup>148</sup>

Rehnquist also made short shrift of the Section 3109 argument. Ramirez had argued that the language of the statute, by authorizing property damage to free a trapped officer, should be construed as denying the police authority to damage property for other reasons. Rehnquist responded by stating that Section 3109 codifies the exceptions to the common-law requirement, including exigent circumstances, and that the exception’s applicability to particular cases is measured by the same standard the Court articulated in *Richards*.<sup>149</sup>

The primary argument against the Court’s decision is that dispensing with a higher exigency threshold for property damage in no-knock entries can result in less privacy and security and more dangerous in-home confrontations between residents and law enforcement officers. As Ramirez argued, a violent entry invites a violent defensive response, as evidenced by his own belief that he was being burglarized. The problem with the first argument is that the privacy invasion is complete with the dispensation of the knock and announce requirement and is not contingent upon damage to property. The problem with the second is that, on the facts of this case especially, the popping of the garage window did not seem unreasonable as a means to ensure that the occupants of the premises could not grab weapons which the agents believed might be in the garage.

In *Pennsylvania Board of Probation and Parole v. Scott*,<sup>150</sup> the Court held that the exclusionary rule does not apply to evidence introduced at parole revocation hearings. Given the Court’s current composition and the Court’s distaste for the exclusionary rule spanning at least the last 25 years, the outcome is no surprise. But that the vote was 5-4 makes life interesting in that four members of the Court do not share that hostility and one of the

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<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 997.

<sup>149</sup> *Id.* at 997-98.

<sup>150</sup> 118 S. Ct. 2014 (1998).

four, Justice Stevens, continues to believe that the exclusionary rule “‘is constitutionally required, not as a ‘right’ explicitly incorporating the fourth amendment’s prohibitions, but as a remedy necessary to ensure that those prohibitions are observed in fact.’”<sup>151</sup>

Parole officers conducted a search of Scott’s home in which he lived with his parents. The search uncovered several weapons which, under the terms of his parole, Scott was prohibited from possessing. The Pennsylvania Supreme Court affirmed the lower court’s suppression decision, finding that the search was unreasonable because it was based only upon “mere speculation” rather than “a reasonable suspicion” of a parole violation.<sup>152</sup>

Justice Thomas, writing for the majority, applied the cost-benefit analysis that has long been operative as to the exclusionary rule. And once that analysis makes its appearance at the outset of an opinion by the Court, there is little suspense left as to the outcome with respect to how well the exclusionary rule will fare in a discrete context. Thus, the Court’s prior decisions precluding the application of the exclusionary rule to grand jury proceedings,<sup>153</sup> civil tax proceedings,<sup>154</sup> and civil deportation proceedings<sup>155</sup> figured early in Justice Thomas’ opinion and formed the foundational core of his argument.<sup>156</sup> All that remained was for him to demonstrate that parole revocation proceedings were of the same genre and he set out to do so. Although the die was cast, the question remains whether Justice Thomas’ perception of the parole revocation process squares with reality. Justice Souter, speaking for himself and Justices Stevens, Breyer and Ginsburg, offered quite a different view of that process. Let’s take a look at each perspective.

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<sup>151</sup> *Id.* at 2023 (Stevens, J. dissenting) (quoting Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1389 (1963)).

<sup>152</sup> *Id.* at 2018.

<sup>153</sup> *United States v. Calandra*, 414 U.S. 338 (1974).

<sup>154</sup> *United States v. Janis*, 428 U.S. 433 (1976).

<sup>155</sup> *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

<sup>156</sup> *Scott*, 118 S. Ct. at 2019-22.

In Justice Thomas' view, applying the exclusionary rule to parole revocation proceedings "would both hinder the functioning of state parole systems and alter the traditionally flexible, administrative nature of parole revocation proceedings."<sup>157</sup> On other hand, argued Justice Thomas, exclusion "would provide only minimal deterrence benefits in this context, because application of the rule in criminal trial contexts already provides significant deterrence of unconstitutional searches."<sup>158</sup> Justice Thomas also pointed out that the state has a particularly strong interest in ensuring that parolees' violations of their release conditions are brought to light because the costs to society of excluding reliable, probative evidence of such violations are substantial given that parolees, especially those who have already committed parole violations, are more likely than the average person to commit crimes.<sup>159</sup>

Justice Thomas saw the parole revocation process as a non-adversarial, administrative process which was ill-suited to application of the exclusionary rule because of the extensive litigation over the lawfulness of a search that goes with it. Parole revocation proceedings, he pointed out, generally are not conducted by judges, but instead by parole boards, whose members need not be judicial officers or even lawyers. In the long run, he argued, the financial costs of creating a new, more rigid system might reduce the state's incentive to extend parole to prisoners, thus disadvantaging parolees in general.<sup>160</sup> Also, he maintained, the deterrent benefits of applying the rule would not outweigh these costs because in most circumstances a police officer searching for evidence will be unaware that the subject of his search is a parolee and will be adequately deterred by the likelihood that any illegally obtained evidence would be excluded at trial. Even if the illegal search is conducted by a parole officer, the "harsh deterrent of exclusion"; is unwarranted, Thomas insisted, because there exist other deterrents, such as departmental

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<sup>157</sup> *Id.* at 2020.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 2020-21.

<sup>160</sup> *Id.*



training and discipline and the threat of damages actions.<sup>161</sup> Justice Thomas also viewed parole officers, in contrast to police officers, as not “engaged in the often competitive enterprise of ferreting out crime,” but rather as officials whose “primary concern is whether their parolees should remain free on parole.” Thus, he concluded, “their relationship with parolees is more supervisory than adversarial.”<sup>162</sup>

Justice Souter’s take on the parole revocation process was quite different from the majority’s. First, he argued that “[i]n reality a revocation proceeding often serves the same function as a criminal trial, and the revocation hearing may very well present the only forum in which the state will seek to use evidence of a parole violation, even when the evidence would support an independent criminal charge.”<sup>163</sup> Second, while at times a police officer may not know he is dealing with a parolee, that is most frequently not the case and that fact is significant because (a) the police, especially those employed by the state that run the parole system, have a reason for concern with the outcome of a revocation proceeding because they do not want to lose that recommitment any more than they care to lose a trial, (b) the actual likelihood of trial is often far less than the probability of a parole revocation proceeding, and (c) the cooperation between parole and police officers in many cases “casts serious doubt upon the aptness of treating police officers differently from parole officers . . .”<sup>164</sup> That is because “[p]arole officers wear several hats; while they are indeed the parolees’ counselors and social workers, they also ‘often serve as both prosecutors and law enforcement officials in their relationship with probationers and parolees.’” Consequently, Justice Souter pointed out, once the parole officer “has turned from counselor to adversary, there is every reason to expect at least as much competitive zeal from him as from a regular police officer.”<sup>165</sup>

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 2023 (Souter, J., dissenting).

<sup>164</sup> *Id.* at 2025 (Souter, J., dissenting).

<sup>165</sup> *Id.* (Souter, J., dissenting).

With regard to the other deterrents to parole officers of which the majority spoke, such as “departmental training and discipline and the threat of damages actions,” Justice Souter pointed out that the same “might be said of the police, and yet as to them such arguments are not heard, perhaps for the same reason that the Court’s suggestion sounds hollow as to parole officers.”<sup>166</sup> There is no departmental training regulation, there is no evidence of parole officers being disciplined and there is no evidence of a single damage suit being brought by a parolee for an illegal search.<sup>167</sup>

In 1974, as Chief of the Legal Aid Society’s Criminal Appeals Bureau, I created a Parole Revocation Defense Unit which was separately funded and still exists. My perspective of the nature of the parole revocation process is closer to Justice Souter’s than Justice Thomas. Where there was no meaningful factual defense for our client, we made the best case we could for non-revocation based on a social work plan that we put together with our social work staff. In this context, the revocation proceeding was generally mellow and non-adversarial. But where there was a factual defense to a violation charge, the proceedings took an adversarial turn, the parole officers aggressively pressed to have the charges sustained and we were equally aggressive in our cross-examination of witness or presentation of affirmative proof in rebuttal. The parole officer was no longer the counselor or social worker; he or she was the prosecutor. As for the Parole Board itself, its members, lay and otherwise, were capable of making judicial decisions and did so quite formally.

Nonetheless, I doubt that even if the majority and the dissenters were in agreement about the realities of the parole revocation process, the outcome in *Scott* would have been different. As I said earlier, this is a Court that has not had a taste for the exclusionary rule for a very long time. Not only has it limited the rule’s applicability to non-criminal trial proceedings, it has interdicted federal habeas review of any Fourth Amendment issue no matter how grievous the search or seizure,<sup>168</sup> and it has interposed a good

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<sup>166</sup> *Id.* at 2026 (Souter, J., dissenting).

<sup>167</sup> *Id.* (Souter, J., dissenting).

<sup>168</sup> *Stone v. Powell*, 428 U.S. 465 (1976).

faith exception to the warrant requirement that allows searches and seizures to occur regardless of whether the warrant complies with the Fourth Amendment as the Framers contemplated it should.<sup>169</sup> While I believe that *Mapp v. Ohio*<sup>170</sup> has more than earned its keep, I am fully aware that many disagree.<sup>171</sup> Thus, if I were asked to underwrite an insurance policy on *Mapp*, I would do so --- but the premiums would be high.

### THE PRIVILEGE AGAINST SELF- INCRIMINATION

In *United States v. Balsys*,<sup>172</sup> the Court, with Justice Souter writing for the majority, held that the Fifth Amendment's privilege against self-incrimination cannot be invoked based on one's fear of foreign prosecution. Although the holding is easily stated, the manner by which it was reached is quite complex. The Court found itself revisiting history, examining the soundness and scope of language in prior cases, and weighing and rejecting several substantial policy arguments that were tendered by Balsys and embraced by Justice Breyer, joined by Justice Ginsburg, in his dissent.

Balsys is a resident alien living in Woodhaven, New York. He entered the country in 1961 on an immigrant visa and alien registration issued at the American Consulate in Liverpool. In his sworn application, he said that he had served in the Lithuanian Army from 1934 to 1940 and had been in hiding in Lithuania from 1940 to 1944. He also signed a statement of understanding that if his application contained any false or misleading statements, or concealed any material fact, he would be subject to criminal prosecution and deportation.<sup>173</sup>

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<sup>169</sup> *United States v. Leon*, 468 U.S. 897 (1984).

<sup>170</sup> 367 U.S. 643 (1961).

<sup>171</sup> See William E. Hellerstein, *The Prince of Darkness and the Shortness of Memory: Harold Rothwax's Guilty: The Collapse of Criminal Justice*, 62 BROOKLYN L. REV. 1137, 1140-45 (1996).

<sup>172</sup> 118 S. Ct. 2218 (1998).

<sup>173</sup> *Id.* at 2221-22.

The Justice Department's Office of Special Investigation (OSI) suspected Balsys was a Nazi War Criminal. If the case could be made, Balsys would face deportation as such and also for lying on his visa application. As part of its investigation, OSI subpoenaed Balsys to testify at a deposition. He asserted his Fifth Amendment privilege and refused to answer any questions about his wartime activities or in connection with his immigration to the United States in 1961. He based his claim of privilege on the ground that his answers could subject him to criminal prosecution by Lithuania, Israel and Germany.<sup>174</sup>

In a lengthy and scholarly opinion written by Judge Calabresi, the Second Circuit ruled in Balsys' favor.<sup>175</sup> In a lengthy and equally scholarly opinion, Justice Souter's opinion for the Supreme Court made Balsys a loser. Though I would love to do it, time does not allow me to walk you through the numerous and complex issues that the majority and dissenting opinions traverse. But I think that I can point you to the heart of the case which, I believe, resides in two main segments of Justice Souter's opinion, those dealing with the meaning of the Court's 1964 decision in *Murphy v. Waterfront Commission*,<sup>176</sup> and the relationship of a governmental grant of immunity to the privilege against self-incrimination, as articulated by the Court in *Kastigar v. United States*.<sup>177</sup>

*Murphy*, as you may recall, held that the Fifth Amendment protects a witness in any American court from incriminating himself under either federal or state laws. Recall also that *Murphy* was decided on the same day as *Malloy v. Hogan*,<sup>178</sup> which held that the Fifth Amendment privilege was applicable to the states through the Due Process Clause of the Fourteenth Amendment. *Murphy* overruled *United States v. Murdock*,<sup>179</sup> which held that a witness in a federal proceeding could not invoke the Fifth Amendment privilege on the basis of probable incrimination under

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<sup>174</sup> *Id.*

<sup>175</sup> *United States v. Balsys*, 119 F.3d 122 (2d Cir. 1997).

<sup>176</sup> *Murphy v. Waterfront Commission of N.Y. Harbor*, 378 U.S. 52 (1964).

<sup>177</sup> 406 U.S. 441 (1972).

<sup>178</sup> 378 U.S. 1 (1974).

<sup>179</sup> 284 U.S. 141 (1931), *aff'd*, *U.S. v. Burdock*, 290 U.S. 389 (1933).

state law. In reaching that result, the *Murdock* Court stated that the English evidentiary rule on which the Fifth Amendment was based embodied a "same sovereign" principle, which meant that it did not protect a witness from answering questions that could be used to convict him in other countries.<sup>180</sup> As Justice Souter stated, *Murdock* stood for "the unqualified proposition that fear of prosecution outside the jurisdiction seeking to compel testimony did not implicate a Fifth or Fourteenth Amendment privilege . . ."<sup>181</sup>

The critical issue in *Balsys* was what was the true nature of the Court's holding in *Murphy*. Did *Murphy* hold, as Justice Goldberg speaking for the Court argued, that *Murdock* had been premised on a misreading of English law which properly understood, did not adhere to a "single sovereign" rule?<sup>182</sup> Or, was it based on the fact after *Malloy v. Hogan*, retention of *Murdock* would undermine the applicability of the Fifth Amendment to both federal and state prosecutions because a State, now bound by the Fifth Amendment, could use self-incriminating testimony that had been compelled by the federal government, and vice versa?

Well, Justice Goldberg's opinion held both and Judge Calabresi's opinion for the Second Circuit concluded that Goldberg's historically based assault on *Murdock's* "single sovereignty rule" would extend to cover situations in which a witness could face prosecution in a foreign country. Justice Souter attacked Judge Calabresi's assumption by attacking the premise on which it rested -- namely Justice Goldberg's understanding of English law, which Justice Souter concluded was flawed. In a word, Justice Souter argued that Justice Goldberg misread the English cases that predated the Constitution and had inappropriately relied on later English cases that were decided 50 years after the Fifth Amendment had been adopted.<sup>183</sup> For the detail of the battle as to whose reading of English law is correct, you will have to compare Justice Souter's opinion with Justice Breyer's dissent.

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<sup>180</sup> *Id.* at 149-50.

<sup>181</sup> *Balsas*, 118 S. Ct. at 2226.

<sup>182</sup> *Murphy*, 378 U.S. at 67.

<sup>183</sup> *Balsas*, 118 S. Ct. at 2230.

Having resolved the *Murphy-Murdock* historical battle against *Murphy*, Justice Souter found *Murphy's* true holding grounded in the practical effect, in our federal system, of the decision in *Malloy v. Hogan*. Justice Souter explained that in light of *Malloy* and the ability of prosecutors to overcome the privilege with grants of immunity, it would be "intolerable" to permit what *Murphy* described as "whipsawing," in which a state or federal prosecutor could "eliminate the privilege by offering immunity less complete than the privilege's dual jurisdictional reach."<sup>184</sup> *Murphy's* holding means that prosecutors' immunity powers may only be exercised "on the understanding that the state and federal jurisdictions [are] as one," and that if state immunity statutes do not provide the required protection, a federally mandated exclusionary rule comes into play.<sup>185</sup>

Justice Souter recognized that the *Murphy* opinion spoke very expansively about the values which underlay the Fifth Amendment privilege. He noted that Justice Goldberg had identified a number of "fundamental values and . . . noble aspirations" as being reflected in the privilege including "our respect for the inviolability of the human personality and of the right of each individual to a private enclave where he may lead a private life . . . ."<sup>186</sup> However, Justice Souter concluded that Justice Goldberg's "comparatively ambitious conceptualization of personal privacy underlying the Clause" was flawed. The policies *Murphy* listed in its catalog of values, Justice Souter argued, do not support an expansion of the scope of the privilege.<sup>187</sup> For example, the absolutist view suggested by Justice Goldberg's word "inviolability" is inconsistent with the recognized power of prosecutors to compel testimony as long as immunity is granted consistent with the extent of the privilege. In other words, because the privilege is inextricably entwined with incrimination, it is hard to argue that it functions to protect privacy or the inviolability of the human personality because, as Justice Souter noted, "when a witness's response will raise no fear of criminal penalty, there is no

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<sup>184</sup> *Id.* at 2227-28.

<sup>185</sup> *Id.*

<sup>186</sup> *Id.* at 2232.

<sup>187</sup> *Id.*

protection for testimonial privacy at all.”<sup>188</sup> This is what I meant when I spoke earlier about the centrality of *Kastigar* to the *Balsys* decision. As Justice Souter explained further, the privilege does not serve as the protector “of personal testimonial inviolability, but as a conditional protection of testimonial privacy subject to basic limits recognized before the framing and refined through immunity doctrine in the intervening years.”<sup>189</sup>

From this vantage point, Justice Souter proceeded to deliver the coup de grace to *Balsys*’ entire constitutional argument. To accept the proposition that the Fifth Amendment protected against the risk of foreign prosecution, the government would not be in a position to exchange immunity for testimony since a domestic grant of immunity would not be binding in a foreign prosecution, and therefore the government could not demand the testimony. “Extending protection as *Balsys* requests,” Souter pointed out, “would change the balance of private and governmental interests that has seemingly been accepted for as long as there has been Fifth Amendment doctrine.”<sup>190</sup>

Justice Souter also rejected *Balsys*’ argument that *Murphy*’s policy catalogue supports application of the privilege in order to prevent the Government from overreaching to facilitate foreign criminal prosecutions in a spirit of “cooperative internationalism.”<sup>191</sup> He observed that *Murphy* recognized “cooperative federalism” -- the teamwork of state and federal officials to fight interstate crime but this only explained the significance of *Murphy*’s holding that a federal court could no longer ignore fear of state prosecution when ruling on a privilege claim. In *Balsys*, he noted, there is no counterpart to *Malloy*, that could impose the Fifth Amendment beyond the National Government.<sup>192</sup> Consequently there is no premise in *Murphy*, Souter concluded, for appealing to “cooperative internationalism” by analogy to “cooperative federalism.”<sup>193</sup> Souter also added that

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<sup>188</sup> *Id.* at 2232-33.

<sup>189</sup> *Id.* at 2232.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.* at 2233.

<sup>192</sup> *Id.* at 2234.

<sup>193</sup> *Id.*

it was unlikely that the benefits of applying the privilege because of fear of foreign prosecution would outweigh the costs: a foreign government might well allow use of the witness' silence in an American court to be used against the witness so the witness would gain nothing from the privilege, whereas the American court would have lost the benefit of the testimony the witness could have provided.<sup>194</sup>

Justice Stevens concurred briefly and emphasized that the costs of extending the privilege to protect against the risk of foreign prosecutions were too great. If a person could refuse to testify because of a risk of foreign prosecution, "we would confer power on foreign governments to impair the administration of justice in this country. A law enacted by a foreign power making it a crime for one of its citizens to testify in an American proceeding against another citizen of that country would immunize those citizens from being compelled to testify in our courts."<sup>195</sup>

Justice Ginsburg wrote a brief dissent, arguing that the "fundamental decency" embodied in the Fifth Amendment requires respect for the privilege in this country regardless of the identity of the sovereign the witness fears will prosecute him.<sup>196</sup>

Justice Breyer argued in dissent that *Murphy's* rejection of *Murdock's* same sovereign rule was correct both in its historical analysis and in the Court's understanding of the privilege, and that both, not federalism, constituted the basis for the Court's decision in *Murphy*.<sup>197</sup> He also took issue with Justice Souter's argument that applying the privilege to claims of foreign incrimination would impair law enforcement. He reasoned that "foreign application" of the privilege would be consequential only in cases where a person could not be prosecuted domestically but the threat of foreign prosecution is substantial. He also argued that the list of policies and purposes *Murphy* said the privilege serves are "all well served by applying the privilege when a witness legitimately fears foreign prosecution . . . ." The practical problems that might result could be overcome through "de facto immunity," which

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<sup>194</sup> *Id.* at 2235.

<sup>195</sup> *Id.* at 2236 (Stevens, J., concurring).

<sup>196</sup> *Id.* at 2236-37 (Ginsburg, J., dissenting).

<sup>197</sup> *Id.* at 2237-44 (Breyer, J., dissenting).



could be achieved by promising the witness that he will not be deported to a country he fears will prosecute him.<sup>198</sup>

*Balsys* is both a difficult case to parse briefly and to conclude who has the better of the argument. If one is sympathetic to a broad reading of the Fifth Amendment because one shares the types of sentiments expressed by Justice Ginsburg and reflected in Justice Breyer's reading of *Murphy*, then the decision is painful. Because I share those sentiments, I was pleased with the approach taken by Judge Calabresi for the Second Circuit. But I doubted that despite the erudition of his opinion, it would survive. That is because I have long harbored the belief that many of the broadly stated values underlying the Fifth Amendment, as set forth in *Murphy*, are not necessarily consistent with the way the privilege actually works. Thus I find myself constrained to agree with the heart of Justice Souter's analysis--that the privilege affords only a "conditional protection of testimonial privacy" that comes undone in the face of an immunity grant.

There are also some pragmatic arguments that may give the majority the edge. My colleague, Professor Dan Capra of Fordham Law School, has argued that "[e]xtension of the privilege to foreign prosecutions would mean that the government could not obtain incriminating testimony about *domestic* crimes when the information could also be relevant to a foreign prosecution."<sup>199</sup> This would matter, he states, "in a case where an individual *could* be prosecuted domestically as well as in a foreign country." He points out that "[t]he government might in such a case decide that it is worth it to give the individual immunity in order to obtain information to aid in the prosecution of others. But if the Fifth Amendment protected against the risk of foreign prosecution, the government could never get the information from the individual--even if it would be essential in the prosecution of other people."<sup>200</sup> In an era of rapid, ever-increasing globalization of criminal and terrorist activity, Professor Capra's point is a powerful one.

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<sup>198</sup> *Id.* at 2244-45 (Breyer, J., dissenting).

<sup>199</sup> Daniel J. Capra, *The Fifth Amendment and the Risk of Foreign Prosecution*, N.Y. L.J., July 10, 1998, at 3.

<sup>200</sup> *Id.*

## THE “EXCULPATORY NO” DOCTRINE

The last case I want to discuss with you is *Brogan v. United States*.<sup>201</sup> It was one of the several decisions handed down in which the Court interpreted a federal criminal statute, not the Constitution, although the “spirit” of the Fifth Amendment privilege against self-incrimination hovered about the case until the Court blew it off.

At issue in *Brogan* was whether there is an exception to criminal liability under the federal false statement statute, 18 U.S.C. §1001,<sup>202</sup> that consists of the mere denial of wrongdoing. A number of federal courts, with varying rationales, had carved into the statute a defense that came to be known as the “exculpatory no” doctrine. This meant that Section 1001 did not make it a crime, when asked by a federal agent if you robbed the First National Bank, to answer “No.” I believe many lay people and a goodly number of lawyers and judges thought that, in a land with the privilege against self-incrimination in its firmament, such a response could not possibly be and certainly should not be punishable. They were wrong.

Federal agents had evidence that Brogan, a union officer, had received money from the JRD Management Corporation, a real estate company whose employees were represented by the union. The agents paid a surprise visit to Brogan’s home and asked him if had received gifts from the company. He answered “no.” This single syllable response led to his conviction for making a false statement within the jurisdiction of a federal agency, in violation of Section 1001.<sup>203</sup> The Second Circuit, in an opinion by Judge

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<sup>201</sup> 118 S. Ct. 805 (1998).

<sup>202</sup> 28 U.S.C. § 1001 provides:

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned no more than five years or both.

*Id.*

Winter, rejected the exculpatory-no doctrine and affirmed Brogan's conviction.<sup>204</sup>

With Justice Scalia writing for the majority, the Supreme Court affirmed. In a word, Justice Scalia said "read the statute." He pointed out that no one, including petitioner, contended that the exculpatory no doctrine is supported by a literal reading of the statute, which says "any false statement."<sup>205</sup> The main argument presented by Brogan for avoiding the literal reading was that simple false denials do not implicate the harm sought to be prevented by the statute: the "perverting of governmental functions."<sup>206</sup> The argument was based on the Court's decision in *United States v. Gilliland*,<sup>207</sup> which interpreted a predecessor of the false statements statute and identified Congress' intent as preventing the "perversion" of governmental functions by deceitful practices.<sup>208</sup> Justice Scalia pointed out that *Gilliland's* dicta should not be read as a limitation on the statute's reach. In fact, he stressed that *Gilliland's* holding rejected an implied limit on the statute's reach. Moreover, he could not "imagine how it could be true that falsely denying guilt does not pervert a governmental function."<sup>209</sup>

Justice Scalia also rejected Brogan's argument that a literal reading of the statute violates the "spirit" of the Fifth Amendment privilege by placing a suspect "in the 'cruel trilemma' of admitting guilt, remaining silent, or falsely denying guilt."<sup>210</sup> He pointed out that the privilege does not confer a privilege to lie but instead permits a person to remain silent. He noted that the "cruel trilemma" concept first appeared in Justice Goldberg's opinion in *Murphy v. Waterfront Commission*,<sup>211</sup> where it was used to explain the importance of the right to remain silent. However, he stated

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<sup>203</sup> *Brogan*, 118 S. Ct. at 807-08.

<sup>204</sup> *United States v. Brogan*, 96 F.3d 35 (2d Cir. 1996).

<sup>205</sup> *Brogan*, 118 S. Ct. at 808.

<sup>206</sup> *Id.* at 808-09.

<sup>207</sup> 312 U.S. 86 (1941).

<sup>208</sup> *Brogan*, 118 S. Ct. at 808-09.

<sup>209</sup> *Id.*

<sup>210</sup> *Id.* at 809-10.

<sup>211</sup> 378 U.S. 52, 55 (1964).

that “[i]n order to validate the ‘exculpatory no,’ the elements of this ‘cruel trilemma’ have now been altered – ratcheted up as it were, so that the right to remain silent, which was the *liberation* from the original trilemma, is now *itself* a cruelty.”<sup>212</sup> Scalia also rejected Brogan’s argument that abolishing the doctrine would lead to overzealous prosecutors punishing the mere denial of a crime more severely than the actual crime. He stated that this argument should be addressed to Congress.<sup>213</sup>

Justice Ginsburg concurred but stated that she was concerned about the broad authority that the statute grants prosecutors and which creates the risk that they will manufacture section 1001 violations because they are much easier to prove than the offenses being investigated.<sup>214</sup> Justice Souter joined most of the majority opinion but shared Justice Ginsburg’s concerns.<sup>215</sup>

Justice Stevens, joined by Justice Breyer, dissented and argued that the Court should not abolish what he considered a well-settled interpretation of section 1001 simply because of the literal reading of the statute.<sup>216</sup> He believed that Justice Ginsburg was correct in pointing out that Congress did not intend to make every “exculpatory no” a felony. “Even if that were not clear,” he stated, “I believe that Court should show greater respect for the virtually uniform understanding of the bench and bar that persisted for decades . . . .”<sup>217</sup>

The *Brogan* case is a law professor’s dream. While not rising to the ranks of Melville’s *Billy Budd*, it is an excellent example of how a Court approaches a statute whose language literally commands one result but one that is counter-intuitive to what many believe and which may be far beyond what Congress intended.

Although Justice Ginsburg, unlike Justice Stevens and Breyer, could not bring herself to ignore the sweeping generality of section 1001’s language,<sup>218</sup> she made a number of significant points to

<sup>212</sup> *Brogan*, 118 S. Ct. at 810.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* at 812-13 (Ginsburg, J., concurring).

<sup>215</sup> *Id.* at 812 (Souter, J., concurring).

<sup>216</sup> *Id.* at 817 (Stevens, J., dissenting).

<sup>217</sup> *Id.* (Stevens, J., dissenting).

<sup>218</sup> *Id.* at 812 (Ginsburg, J., concurring).

which Congress would do well to attend. First, is that the function of law enforcement is the “prevention of crime and the apprehension of criminals,” not “the manufacturing of crime.”<sup>219</sup> Indeed, Justice Ginsburg reminded us that the Department of Justice has long maintained a policy against bring 1001 prosecutions for statements amounting to an “exculpatory no.” In fact, she noted that even after the Fifth Circuit abandoned the exculpatory no doctrine, the Justice Department adhered to its non-prosecution policy. She noted further that at the very time that charges were filed against Brogan, the United States Attorney’s Manual stated that “Where the statement takes the form of an ‘exculpatory no’, 18 U.S.C. Section 1001 does not apply regardless who asks the question.”<sup>220</sup> Second, she pointed out that the Sentencing Guidelines evince a similar policy judgment. Although Section 3C1.1 of the Guidelines Manual “establishes a two-level increase for obstruction of justice, the application notes provide that a ‘defendant’s denial of guilt (other than a denial of guilt under oath that constitutes perjury) . . . is not a basis for application of this provision.’”<sup>221</sup> Whether Congress will act to bring section 1001 in conformity with the widely held sense that government should not be prosecuting individuals who answer “no” to a government agent when asked if they are guilty of a crime remains to be seen.

Well, I’ll end where I began. There was much sound in this year’s criminal cases but not much fury. The constitutional cases that I have discussed do not reach landmark status and do not, as a generality, have enormous reach. Even the 5-4 decisions seemed relative to prior terms lacking in acerbity between the majority and dissent.

With the exception of *Brogan*, time did not allow for me to take you through the Court’s statutory work in criminal cases this past Term but you should be aware that it was extensive. Indeed, it could be said that it was a Term in which Congress did not, so the Supreme Court did. In the criminal field alone, the Court decided

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<sup>219</sup> *Id.* at 814 (Ginsburg, J., concurring) (quoting *Sherman v. United States*, 356 U.S. 369, 372 (1958)).

<sup>220</sup> *Id.* at 815 (Ginsburg, J., concurring).

<sup>221</sup> *Id.* at 815 n.7 (Ginsburg, J., concurring).

cases involving interpretations of several firearms statutes,<sup>222</sup> the substantive and conspiracy provisions of the RICO statute,<sup>223</sup> the federal bribery statute,<sup>224</sup> and the Assimilative Crimes Act.<sup>225</sup>

I would like to close with a personal note about the *Brogan* case. The case was argued on Brogan's behalf by Stuart Holtzman. Stuart was my colleague for several years at the Criminal Appeals Bureau of the Legal Aid Society and a friend for more than 30 years. At Stuart's request, I convened a moot court of several of my faculty colleagues and others at Brooklyn Law School shortly before Stuart's argument in the Supreme Court. Several weeks after the argument, out of nowhere, Stuart was fatally stricken with a rare disease. He died without ever knowing the outcome of his argument, his first before the Supreme Court. Stuart was highly respected by the judges in the Southern and Eastern Districts before whom he regularly appeared. Although he lost the case, I would like the record to reflect that his work on behalf of Mr. Brogan was, as it always had been for any client, of the highest quality. Thank you.

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<sup>222</sup> See *Bryan v. United States*, 118 S. Ct. 1939 (1998) (The term "willfully" in § 924 (a)(1)(D) of the Firearms Owners's Protection Act, 18 U.S.C.A. § 922 *et seq.*, requires proof only that the defendant knew his conduct was unlawful, not that he also knew of the federal licensing requirement). *Id.* at 1944-47; *Caron v. United States*, 118 S. Ct. 2007 (1998) (Massachusetts law that permitted convicted felon whose civil rights had been restored to possess rifles but not handguns activated the "unless" clause of 18 U.S.C. § 921(a)(20) excluding previous conviction as predicate offense for sentence enhancement for a three-time violent felon who violates federal weapons possession statute, if the offender's civil rights have been restored, "unless such . . . restoration . . . expressly provides that the person may not . . . possess . . . firearms," even though the case involved rifles and shotguns). *Id.* at 2010-12; *Muscarello v. United States*, 118 S. Ct. 1911 (1998). The phrase "carries a firearm"[during and in relation to a drug trafficking crime] in 18 U.S.C. § 924(c)(1) applies to a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car, which the person accompanies. *Id.* at 1914-16.

<sup>223</sup> *Salinas v. United States*, 118 S. Ct. 469 (1997).

<sup>224</sup> *Id.*

<sup>225</sup> *Lewis v. United States*, 118 S. Ct. 1135 (1998). The child victim provision of Louisiana's first degree murder statute was not assimilated into federal law under the Assimilative Crimes Act. *Id.* at 1142-45.

