1991

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PRISONERS OF THEIR OWN JURISPRUDENCE: FOURTH AND FIFTH AMENDMENT CASES IN THE SUPREME COURT

DANIEL J. CAPRA*

I. INTRODUCTION

AFTER the breakthroughs of the Warren Court and the partial retrenchment of the Burger Court, the Rehnquist Court appears to have grown weary of pursuing any doctrinal developments in fourth and fifth amendment jurisprudence. The Supreme Court’s recent fourth and fifth amendment decisions consist of generally tame applications of fact to law.

This situation is, in part, a result of the unique interplay between the Warren Court and its successors. The current Court has conservative instincts. It is clear that this Court would never have handed down many of the decisions rendered by the Warren Court. Yet to a conservative Court, the effect of stare decisis is to avoid a head-on re-examination of Warren Court case law. Recognizing this limitation, the Burger Court resigned itself to imposing minor limitations which, in the aggregate, did somewhat cut back on the Warren Court positions. However, this also resulted in confusing and unanalytical doctrinal development.1 Much of this confusion must be attributed to the Burger Court’s attempts to put a different “spin” on Warren Court precedent while ostensibly remaining true to structure.2

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2. For example, the Burger Court gutted the exclusionary rule, but retained its structure as deterrence-based—even though as limited by the Burger Court

(1267)
The Burger Court’s case-by-case sniping was abandoned by the Rehnquist Court. The latter has apparently found itself with doctrine it finds not entirely acceptable but nonetheless workable and with which it may decide fourth and fifth amendment cases to its own satisfaction. In many cases, the Rehnquist Court appears to use whatever precedent is at hand, without concern for future doctrinal development. Thus, in recent years, the Court has become less like a Supreme Court and more like a lower court. In only a few cases has the current Court tried to investigate, clarify or advance fourth or fifth amendment law. Hence, the unsatisfactory amalgam of Warren Court advancement and Burger Court tinkering remains the law. Indeed, with the occasional exception of Justice Scalia, the Court appears willing to remain a prisoner of its own fourth and fifth amendment jurisprudence.

the exclusionary rule has little deterrent effect. See Arenella, Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts’ Competing Ideologies, 72 Geo. L.J. 185, 192 (1983) (Burger Court held that exclusionary rule was judicially created remedy and not personal constitutional right; therefore Court applied rule only when deterrent benefits outweighed costs of excluding evidence).

3. The Court’s unreasoned and unexamined application of fact to law is apparent in the recent case County of Riverside v. McLaughlin, 111 S. Ct. 1661 (1991). In McLaughlin, the Court held that the state’s failure to make a probable cause determination until 48 hours after the suspect was arrested was not per se unreasonable. Id. at 1670. In reaching this conclusion the Court relied on Gerstein v. Pugh, 420 U.S. 103 (1975), which held that any probable cause determination must be made promptly after arrest. McLaughlin, 111 S. Ct. at 1669. The McLaughlin Court relied on Gerstein and its “prompt” terminology as if it provided some talismanic solution. In so doing, the Court failed to consider the historical underpinnings of the fourth amendment, the reasons for having a prompt post-arrest hearing, or the individual interests at stake. McLaughlin, 111 S. Ct. at 1674-75 (Scalia, J., dissenting). See Green, “Power Not Reason”: Justice Marshall’s Valedictory and the Fourth Amendment in the Supreme Court’s 1990 Term, 70 No. CAR. L. REV. 373, 407-09 (1992) (comparing decision in McLaughlin with other fourth amendment decisions of the term and suggesting a preference for post hoc reasoning rather than principled decisionmaking).

4. Lower courts routinely provide more analysis of fourth and fifth amendment jurisprudence than provided by the Supreme Court. See, e.g., Weidner v. Thieret, 866 F.2d 958 (7th Cir. 1989) (providing justification and recharacterization of confusing Supreme Court jurisprudence concerning involuntary confessions).

5. See generally Saltzburg, supra note 1 (criticizing both Warren and Burger Courts for failing to maintain doctrinal consistency).

6. Unlike his counterparts, who seem content to fit the case before them into unexamined precedent, Justice Scalia appears prepared to analyze fourth and fifth amendment questions on the basis of first principles. For example, Justice Scalia has recently rethought the fourth amendment law pertaining to seizure. Rather than adhering to the mechanical test of whether a reasonable person would feel free to walk away from an officer, Justice Scalia has reasoned that the fourth amendment prohibition of unreasonable seizures “preserves for our citizens the traditional protections against unlawful arrest afforded by the common law.” McLaughlin, 111 S. Ct. at 1672 (Scalia, J., dissenting); see also
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Of course, I do not contend that the Court should engage in a wholesale overruling of fourth and fifth amendment precedent. Overruling precedent obviously can be as unreasoned and result-oriented as slavish adherence. I merely contend that the Court should not blindly follow existing precedent when confronted with fourth and fifth amendment issues. The present Court should not allow the patchwork quilt of Warren and Burger Court jurisprudence to tie its hands in the name of stare decisis, unless that jurisprudence withstands critical examination. More importantly, the Court should revisit these foundational precedents continually to provide fresh explanation of the law and its application to the fact situation before it. It should revitalize, not simply adhere to, its precedents. In other words, the Rehnquist Court must provide guidance, rather than votes on a certain specific fact situation.

This Article examines the United States Supreme Court’s fourth and fifth amendment jurisprudence by focusing on cases decided during the 1989-90 term. My intent is to demonstrate that the Court has abdicated its responsibility to do more than apply fact to unquestioned law. This Article also briefly visits the 1990-91 term, and finds that the Court’s lackadaisical decision-making has continued largely unabated.

II. FOURTH AMENDMENT CASES

A. Constitutionality of Sobriety Checkpoint Stops

1. Discussion of Michigan Department of State Police v. Sitz

Ordinarily, a search or seizure requires a warrant and probable cause. The Court has held that the warrant clause is the predominant clause of the fourth amendment. However, where

California v. Hodari D., 111 S. Ct. 1547 (1991) (fourth amendment “seizure” requires either some application of physical force or a show of authority to which the subject yields).

7. See Payne v. Tennessee, 111 S. Ct. 2597, 2619 (1991) (Marshall, J., dissenting). Dismayed by the majority’s decision to overrule Booth v. Maryland, 482 U.S. 496 (1987), Justice Marshall noted: “Power, not reason, is the new currency of this Court’s decisionmaking.” Payne, 111 S. Ct. at 2618 (Marshall, J., dissenting). See also Green, supra note 3, at 378 (Court’s recent fourth amendment decisions based largely on majority’s shared personal preferences favoring law enforcement over privacy interests and majority’s recognition of power to enact preferences into law).

8. See U.S. CONST. amend IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .”).

9. See generally T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION
the needs effectuated by the intrusion are special needs beyond mere law enforcement, the Court has dispensed with the warrant and probable cause requirements in favor of a balancing of interests test in which the Court focuses on the reasonableness of the search and seizure.\textsuperscript{10}

\textit{Michigan Department of State Police v. Sitz}\textsuperscript{11} is useful as a clarification of when special needs beyond law enforcement are necessary to justify suspicionless intrusions. It also clarifies the majority’s approach to balancing interests under the reasonableness clause of the fourth amendment.\textsuperscript{12} Yet these clarifications fail to break new ground, and the Court’s opinion is a simple application of fact to law. The Court neither examines, nor questions, the underlying law itself.

At issue was a Michigan sobriety checkpoint program that allowed police to set up checkpoints along state roads. These checkpoints were set up according to a list of considerations, including “safety of the location,” “minimum inconvenience for the driver,” and available space “to pull the vehicle off the traveled portion of the roadway for further inquiry if necessary.”\textsuperscript{13} Then, any motorists passing through the checkpoint would be stopped by police and briefly examined for signs of intoxication. If such signs were detected, the officers would direct the motorist to another area where they would check the motorist’s license and registration, and conduct further sobriety tests if warranted.\textsuperscript{14} The only checkpoint operated under the program resulted in a stop of 126 vehicles, and one arrest for drunk driving.\textsuperscript{15}

The Court in \textit{Sitz} focused solely on the constitutionality of the initial stop of motorists and any preliminary investigation incident to detention.\textsuperscript{16} Writing for the majority, Chief Justice Rehn-
quist relied heavily on the reasonableness balancing approach used in *United States v. Martinez-Fuerte*, in which the Court upheld suspicionless stops of motorists at permanent fixed checkpoints to check for illegal aliens.

The respondents in *Sitz* argued that the reasonableness balancing approach did not apply to sobriety checkpoints, because there was no special interest at stake beyond law enforcement as sobriety checkpoints are merely a means to enforce the criminal laws prohibiting drunk driving.

The majority rejected this argument, holding that it was not necessary to find a special need beyond mere law enforcement in order to engage in reasonableness balancing. The Court relied on *Martinez-Fuerte*, which in turn relied on *Terry v. Ohio*. *Terry* also employed reasonableness balancing, but on grounds different from those employed in the "special needs" cases: *Terry* allowed a police officer to stop persons based on reasonable suspicion of criminal behavior provided that the nature of the intrusion was limited; *Terry* also allowed a concomitant limited search for self-protection of the officer. *Martinez-Fuerte* took *Terry* one step further and allowed a stop without suspicion, given the nature of fixed checkpoints. In contrast, the line of "special needs" cases allows a seizure and search for evidence, provided the motive of the search is to effectuate a special need beyond criminal law enforcement.

Having found it allowable under *Terry* to balance the nature of the intrusion against the state interest at stake, the *Sitz* Court proceeded to downplay the intrusiveness of a stop occurring at a fixed checkpoint. The Court relied upon the fixed (albeit temporary) nature of the checkpoint to conclude that there was no risk of arbitrariness or abuse of authority, no surprise or humiliation in the stop itself and no long-term seizure. The Court empha-

19. *Id.* In Naugle v. Witney, 755 F. Supp. 1504, 1520 (C.D. Utah 1990), the court said *Sitz* allowed it to use reasonableness balancing when scrutinizing a suspicionless stop to inform the driver that the police had a search warrant for his home and to ask his help in getting past the electric fence, surveillance system and guard dogs. 755 F. Supp. at 1520. Balancing "the inconvenience and intrusion of the stop against [the driver]'s interest in learning of the Warrant and police concerns about entry to the premises," the court held that the stop was reasonable and did not violate the fourth amendment. *Id.*
21. *Id.* at 30-31.
23. *Sitz*, 110 S. Ct. at 2486-87. The Court asserted that "[a]t traffic check-
sized that checkpoints were selected pursuant to set guidelines and that uniformed police officers stopped every car. The Court concluded that "the intrusion resulting from the brief stop at the sobriety checkpoint [was] for constitutional purposes indistinguishable from the checkpoint stops we upheld in Martinez-Fuerte." Crucially, the Sitz Court found the temporary sobriety check points no more intrusive than the permanent ones upheld in Martinez-Fuerte.

Against this limited intrusion, the Court balanced the state's heavy interest in eradicating drunken driving. It addressed the lower court's contention that sobriety checkpoints did not effectively advance this undeniable state interest. Specifically, the Court recognized that earlier cases considered whether the search or seizure would actually effectuate the state interest in evaluating the legitimacy of the challenged conduct. For instance, in Delaware v. Prouse, the Court prohibited random, suspicionless vehicle safety and registration checks in part because they were not effective in assuring compliance with safety and registration

points the motorist can see that other vehicles are being stopped, he can see visible signs of the officers' authority, and he is much less likely to be frightened or annoyed by the intrusion." Id. (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1975)).

In Sitz, the stops lasted 25 seconds on average. Id. at 2484. In People v. Rister, 803 P.2d 483 (Colo. 1990), the Colorado Supreme Court upheld a sobriety checkpoint, one which was arguably less efficient than the checkpoint in Sitz, where the stops averaged three minutes. The Colorado checkpoint also was found not to violate the state constitution. Rister, 803 P.2d at 490-91; see also Orr v. People, 803 P.2d 509 (Colo. 1990) (same).

24. Sitz, 110 S. Ct. at 2487.

25. Id. Professor Strosser gives a different estimation of the intrusiveness of the sobriety checkpoint. See Strosser, Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Judicial Enforcement of Constitutional Rights, 42 Hastings L.J. 285 (1991). According to Professor Strosser, "these searches are intensely personal in nature, involving a police officer's close-range examination of the driver's face, breath, voice, clothing, hands, and movements." Id. at 287. During the initial stop, the multiple examinations included "looking at the driver's face and eyes to see whether they were, respectively, flushed or bloodshot, smelling the driver's breath to determine whether it bore an odor of alcohol; engaging the driver in conversation to hear whether his voice was slurred; and inspecting the driver's shirt to see whether it was unbuttoned." Id. at 295.

26. Sitz, 110 S. Ct. at 2486. However, in his dissent, Justice Stevens finds a "critical difference" between temporary checkpoints and permanent and fixed checkpoints. Id. at 2492 (Stevens, J., dissenting).

27. Id. at 2485 ("No one can seriously dispute the magnitude of the drunken driving problem or the State's interest in eradicating it.").

28. Id. at 2487.

requirements.\textsuperscript{30}

The majority responded that cases such as \textit{Prouse} were not intended "to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed to deal with a serious public danger."\textsuperscript{31} The Court concluded that "the choice among such reasonable alternatives remains with the government officials who have a unique understanding of, and a responsibility for, limited public resources."\textsuperscript{32} Accordingly, the majority faulted the lower court for its "searching examination" of the effectiveness of sobriety checkpoints.\textsuperscript{33}

After \textit{Sitz}, when a state's interest is balanced under the reasonableness clause, the court must take a hands off approach, and give extreme deference to the state's choice of how best to effectuate its asserted interest. That is, once the state's asserted interest is deemed to be significant, the court must assume that the state has chosen a plan which will adequately effectuate that interest. Hence, it must allow the intrusion.

In a dissenting opinion joined by Justice Marshall, Justice Brennan "searche[d] . . . in vain for any acknowledgment that the reason for employing the balancing test is that the seizure is minimally intrusive."\textsuperscript{34} He said that suspicionless detentions were the antithesis of fourth amendment principles as they would subject the public to arbitrary and harassing police conduct.\textsuperscript{35} Justice Brennan contended that the limited controls on officer discretion imposed by fixed checkpoints were no substitute for a standard of articulable suspicion.

Justice Stevens wrote a dissenting opinion joined in large part by Justices Brennan and Marshall in which he argued that the majority misapplied the reasonableness balancing test, by overvaluing the law enforcement interest at stake and undervaluing the citizen's interest in privacy.\textsuperscript{36} Furthermore, Justice Stevens found the majority's reliance on \textit{Martinez-Fuerte} unpersuasive. He argued that unlike the permanent, fixed checkpoint, the police operating a sobriety checkpoint "have extremely broad discretion

\begin{itemize}
  \item \textsuperscript{30} \textit{Sitz}, 110 S. Ct. at 2487 (construing Delaware v. Prouse, 440 U.S. 648 (1979)).
  \item \textsuperscript{31} 110 S. Ct. at 2487.
  \item \textsuperscript{32} \textit{id.}
  \item \textsuperscript{33} \textit{id.}
  \item \textsuperscript{34} \textit{id.} at 2489 (Brennan, J., dissenting).
  \item \textsuperscript{35} \textit{id.} at 2490 (Brennan, J., dissenting).
  \item \textsuperscript{36} \textit{id.} at 2492 (Stevens, J., dissenting).
\end{itemize}
in determining the exact timing and placement of the roadblock.” 37 That is, while the fixed checkpoint controls the discretion of whether to make a stop, the nature of the checkpoint does not control the discretion as to where the checkpoint should be placed. Moreover, a temporary checkpoint is more intrusive because of the element of surprise that it presents.38

Finally, Justice Stevens criticized the majority’s determination that the sobriety checkpoint was sufficiently effective to outweigh its intrusiveness. He argued that the majority ignored the fact that other police methods, such as roving patrols that stop cars based on reasonable suspicion, would be far more effective in combatting the drunk driving problem. 39 Yet, Justice Stevens did not directly address the majority’s assertion that the courts should not second-guess the state’s choice among reasonable alternatives.

2. Implications of Sitz

*Sitz* suggests that the state interest is likely to prevail when balanced against individual interests under the reasonableness clause of the fourth amendment.40 The majority’s analysis shows considerable deference both to the state interest and to the state’s chosen methods for effectuating that interest.

For example, the Court imposed no time, place or manner restrictions on the use of a temporary checkpoint. The guidelines set forth in the Michigan plan, which the Court approved without

37. *Id.* (Stevens, J., dissenting).
38. *Id.* (Stevens, J., dissenting). Justice Stevens argued: A driver who discovers an unexpected checkpoint on a familiar local road will be startled and distressed. She may infer, correctly, that the checkpoint is not simply “business as usual,” and may likewise infer, again correctly, that the police have made a discretionary decision to focus their law enforcement efforts upon her and others who pass the chosen point.

*Id.* (Stevens, J., dissenting).
39. *Id.* at 2495 (Stevens, J., dissenting). Specifically, Justice Steven noted: The Court’s analysis of this issue resembles a business decision that measures profits by counting gross receipts and ignoring expenses. . . . [S]obriety checkpoints result in the arrest of a fraction of one percent of the drivers who are stopped, but there is absolutely no evidence that this figure represents an increase over the number of arrests that would have been made by using the same law enforcement resources in conventional patrols.

*Id.* (Stevens, J., dissenting).
40. See *Skinner v. Railway Labor Executives Ass’n*, 489 U.S. 602, 639 (1989) (Marshall, J., dissenting) (noting that whenever reasonableness balancing has been employed, the state interest has been held to outweigh the individual interest).
much consideration, do not regulate how often authorities may use checkpoints, or the neighborhoods in which they may use them. While the stops themselves are free from police discretion, the decision where and how to place the checkpoints to make the stops is subject to considerable discretion. As far as the Court was concerned, officers who have a hunch that a driver is up to something can speed ahead of the driver and set up a special checkpoint just for him, so long as others are stopped as well.

Most importantly, the effectiveness of the plan is basically irrelevant to the fourth amendment reasonableness analysis. Apparently, if one person is arrested out of two thousand stopped, the balance of state and individual interests remains the same. This is the next step from the Court’s analysis in *National Treasury Employees Union v. Von Raab*, where the Court considered the effectiveness of a drug testing plan in conjectural terms: it is not the degree of incidence that is relevant, but the gravity of harm that can occur if a problem arises. The Court in *Sitz* took that view, but added an extra caution to lower courts not to second guess the state in determining whether the plan effectuates its own interest.

It is important to note that *Sitz* is a seizure case. It does not allow a search for law enforcement purposes on less than probable cause. The Court has allowed searches on less than probable cause in only two circumstances: 1) to search for weapons for the self-protection of police-officers as allowed in *Terry*, and 2) to search for evidence, where there are special needs beyond mere law enforcement as allowed in *Von Raab*. In contrast, a search by law enforcement officers for evidence of criminal activity has been held not subject to reasonableness balancing and must be supported by probable cause. In *Arizona v. Hicks*, the Court rejected a reasonableness balancing approach to a search of a dwelling for evidence by law enforcement officials, arguing that the dissent’s characterization of the conduct as a mere “cursory inspection” rather than a “full blown search” was inaccurate. Likewise, in *United States v. Winsor*, the United States Court of Appeals for

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42. Id. at 1395.
43. *See Sitz*, 110 S. Ct. at 2487.
45. Id. at 328.
46. 846 F.2d 1569, 1579 (9th Cir. 1988) (en banc) (holding limited visual intrusion into hotel room by law enforcement officers, upon reasonable suspicion, cannot be justified under reasonableness clause). The *Winsor* court stated:
In the Ninth Circuit held en banc that probable cause was required for a cursory inspection of a hotel room to look for arrestees.

In *Horton v. Goose Creek Independent School District*, the United States Court of Appeals for the Fifth Circuit implied that reasonable suspicion could justify limited law enforcement searches. The court allowed dog sniffs of students upon reasonable suspicion, reasoning that while a search, this is a limited intrusion. *Horton* was decided before *Hicks*, which limits the *Terry* analysis to seizures, so *Horton* cannot be said to state the far-ranging proposition that a law enforcement search can be done on reasonable suspicion. Another intervening case, however, lends support to the result in *Horton*. In *New Jersey v. T.L.O.*, the Court upheld searches of students upon reasonable suspicion on the ground that such searches serve special needs beyond law enforcement. More fundamentally, *Horton* involved a canine sniff and under the intervening case of *United States v. Place*, the United States Supreme Court held that a canine sniff does not constitute a search because it can only determine whether contraband is present, and there is no legitimate expectation of privacy in contraband.

In *Place*, the dog sniffed the defendant’s luggage. The lower courts that have allowed limited searches on reasonable suspicion

"[W]e refuse the government’s invitation to decide this case by balancing the competing interests at stake. Instead, we adhere to the bright line rule that *Hicks* appears to have announced . . ."; *see also* United States v. Colyer, 878 F.2d 469 (D.C. Cir. 1989) (dog sniff of train sleeper compartment not justified as limited intrusion supported by reasonable suspicion, but justified as no search at all). Other circuit courts have upheld searches based on reasonable suspicion on the ground that the search in issue was a limited intrusion. *Cf.* United States v. Whitehead, 849 F.2d 849 (4th Cir.) (sufficiently substantial law enforcement interest in curtailing narcotics smuggling and minimal intrusion of search permits search on less than probable cause), *cert. denied*, 488 U.S. 983 (1988), United States v. Concepcion, 942 F.2d 1170 (7th Cir. 1991) (insertion of key into lock is search, but is permissible upon reasonable suspicion).

47. 690 F.2d 470 (5th Cir. 1982).
48. *Id.* at 481-82. The Fifth Circuit cited with approval a standard of “reasonable individualized suspicion.” *Id.*
49. *Id.* at 479. The Fifth Circuit said that the use of dogs to sniff students for drugs is clearly a search for fourth amendment purposes. *Id.* at 478. However, the court said that a dog sniffing a student to discover contraband, “particularly where the dogs actually touch the person . . . may be analogous to the warrantless ‘stop and frisk’ upheld by the Supreme Court on the basis of a suspicion that fell short of probable cause.” *Id.* at 479 (citing *Terry v. Ohio*, 392 U.S. 1 (1968)).
51. *Id.* (search of student by school official).
53. *Id.* at 707.
have generally done so in dog sniff cases where the dog sniffed a house or its equivalent, such as a sleeper compartment of a train. These lower courts have sought to limit *Place* by distinguishing dog sniffs of more private areas than those at stake in *Place*. But this distinction is misguided in two respects. First, the rationale of *Place* is that a person has no legitimate expectation of privacy in contraband, and therefore a law enforcement technique that can only determine whether contraband is present cannot be a search. The logic of *Place* extends to a dog sniff of any area. Second, and more importantly, an attempt to limit *Place* in these cases has created the perverse result of abrogating the Hicks probable cause requirement. After holding the dog sniff a search, these courts then proceed to justify the search as a limited intrusion, supportable by reasonable suspicion. It makes no sense to limit the discrete intrusion of dog searches by invoking the much broader principle that if a law enforcement search is a limited intrusion, it can be supported by a standard of proof less than probable cause.

The Court's permissive attitude toward fixed checkpoints can have significant implications in federal drug cases. First, a checkpoint to stop all cars to examine drivers for signs of drug use would be permissible under *Sitz*, given the state interest is high and the intrusion is limited. Second, a checkpoint for another limited reason, such as to check licenses and registrations, can lead to evidence of drug activity. For instance, the United States Court of Appeals for the Tenth Circuit in *United States v. Morales-Zamora* recently upheld a dog sniff of a car which resulted in a positive alert while the car was being checked for registration at a temporary checkpoint. The seizure was permissible under

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54. *Id.*; see United States *v.* Jacobsen, 466 U.S. 109, 137 (Brennan, J., dissenting) ("[I]mplicit in *Place* [is the idea] that individuals in our society have no reasonable expectation of privacy in the fact that they have contraband in their possession . . . .").

55. See United States *v.* Colyer, 878 F.2d 469 (D.C. Cir. 1989) (dog sniff of train sleeper compartment cannot be justified as limited intrusion supported by reasonable suspicion, but can be justified as no search at all).

56. United States *v.* Whitehead, 849 F.2d 849, 853, 855-57 (4th Cir. 1988) (because train sleeper compartment is not temporary home, defendant has diminished expectation of privacy; thus, fourth amendment did not require police to have more than reasonable suspicion before they could bring trained dogs into defendant's train compartment to sniff his luggage).

57. 914 F.2d 200 (10th Cir. 1990).

58. *Id.* at 205 (individualized reasonable suspicion not required for dog sniff once vehicle has been lawfully detained).
Sitz and the dog sniff was not a search under Place. It could be argued that a registration checkpoint is a pretext when there just happens to be a drug-sniffing dog at the checkpoint. But in most lower courts, the possibility of pretext makes no difference as long as the police had the right under the fourth amendment to act as they did.

Sitz breaks no new analytical ground. It does clarify the distinction between special needs searches and Terry seizures, but in the end it is a simple application of Terry principles. While the Court upholds suspicionless seizures, as distinct from Terry stops based upon reasonable suspicion, the fact is that suspicionless Terry seizures had already been allowed in Martinez-Fuerte. Nor does Sitz answer any of the more complex analytical questions, such as whether a limited search for evidence of drunk driving at a fixed checkpoint can be upheld on the basis of reasonable suspicion. The answer, after Hicks, would appear to be no, but the Court avoids this question in Sitz. Additionally, Sitz fails to address whether a driver can be shuttled to a secondary inspection area in the absence of suspicion. Applying Martinez-Fuerte, the answer would appear to be yes, but the Court avoids this question in Sitz. Acting much like a lower court, the Supreme Court in Sitz applied settled precedent to an unambiguous fact pattern, and left these more difficult questions for another day.

Even more disturbing, the Court in Sitz made no attempt to evaluate the merit of the precedent on which it so heavily relied. We may legitimately ask whether the balancing approach of Terry and Martinez-Fuerte should be applied to wholesale stops as op-

59. Id. at 203. The Morales-Zamora court said a brief roadblock set up for the valid purpose of checking driver's licenses and registrations did not require individualized reasonable suspicion of criminal activity. Id.

60. Id. at 205 ("We find the factual circumstances of the [search] at issue to be legally indistinguishable from the facts of Place."). The Court said that the intrusion here was minimal—"the sniffs did not inconvenience the defendants in any manner," and there is no legitimate expectation of privacy to concealed contraband anyway. Id. at 204-05.

61. See, e.g., United States v. Cummins, 920 F.2d 498, 501 (8th Cir. 1990) (applying majority rule that pretext is irrelevant and collecting cases); United States v. Trigg, 878 F.2d 1037, 1041 (7th Cir. 1989) ("[S]o long as the police are doing no more than they are legally permitted and objectively authorized to do, an arrest is constitutional."); United States v. Causey, 834 F.2d 1179, 1184 (5th Cir. 1987) (en banc) ("[S]o long as police do no more than they are objectively authorized and legally permitted to do, their motives in doing so are irrelevant . . . ."). The Eleventh Circuit will invalidate an intrusion as pretextual where a reasonable officer would not have made the intrusion if not for the pretext of investigating a more serious crime. See United States v. Smith, 799 F.2d 704, 708 (11th Cir. 1986).
posed to discrete ones. It can even be questioned whether Terry itself makes sense. And it certainly is open to discussion whether the Court should extend the reasonableness balancing approach of Terry so as to swallow the probable cause requirement for all seizures. The Court makes no attempt to deal with any of these difficult questions.

B. Anonymous Informant’s Tip with Corroboration Creates Reasonable Suspicion

1. Discussion of Alabama v. White

In Alabama v. White, the Rehnquist Court, consistent with prior Burger Court precedent, allowed an anonymous tip that was partially corroborated to constitute reasonable suspicion to support a Terry stop. In White, police received an anonymous tip that White would be leaving a particular apartment in a brown Plymouth station wagon with the right tail-light lens broken, and would be driving to Dobey’s Motel with a brown attaché case containing cocaine. The officers went to the apartment, and saw White enter a brown Plymouth station wagon with a broken right tail-light. She was not carrying an attaché case. The police followed the station wagon as it took the most direct route to Dobey’s Motel. They stopped White just short of Dobey’s Motel, and she consented to the search of a brown attaché case that had been in the car before she entered it. The officers found marijuana in the attaché case, and three milligrams of cocaine in White’s purse, which was searched during processing at the station. The issue for the Court was whether there was reasonable suspicion to make the stop, given that the tip was from an anonymous informant and that none of the activity corroborated was in any way suspicious.

Justice White, writing for a six-person majority, held that the

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64. 110 S. Ct. 2412 (1990).
65. Id. at 2415 (informant’s tip, while insufficient to support arrest or search warrant may have sufficient “indicia of reliability” to justify forcible stop).
66. Id. at 2414.
67. Id.
68. Id.
69. Id.
70. Id. at 2414-15.
71. Id. at 2414.
stop was supported by reasonable suspicion. The Court's analysis was an amalgam of two lines of authority. First, the Court relied heavily on the totality of circumstances approach to informant's tips as supporting probable cause, originally established in Illinois v. Gates.

In Gates, the Court made a minor inroad on the Warren Court's rigorous scrutiny of informants' tips announced in Spinelli v. United States. The Spinelli Court had held that for a tip to be credited toward probable cause, the magistrate must be assured that the informant was reliable and that there was a sufficient basis of knowledge. A defect on either prong would invalidate the tip, unless independent police investigation substantially corroborated the tip as to material details. Gates overruled Spinelli's rigid requirements, but in typical Burger Court fashion, the Gates Court retained the Spinelli structure, and merely loosened it at the margins. Thus, the Court still looks to the two prongs of veracity and basis of knowledge, and to the possibility of corroboration, but the impact of corroboration is viewed more flexibly and expansively under Gates than previously.

The second established line of cases used in White is that proceeding from Adams v. Williams where the Court upheld a stop based on a known informant's tip, even though the tip was not enough to satisfy the then-applicable Spinelli standards. The Court in Adams concluded that Spinelli's requirements for probable cause were unnecessarily rigorous for the lesser standard of reasonable suspicion. In other words, reasonable suspicion is

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72. Id.
75. Id. at 415-16.
77. For an analysis of the effect of Gates, see Grano, Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates, 17 U. MICH. J.L. REV. 465 (1984). See also Saltzburg, supra note 1, at 153 ("The differences between the Warren and the Burger decisions tend to be more at the margin than at the heart of the constitutional principles for which the Warren Court is remembered.").
78. Also, a defect in one prong can be compensated by a particularly strong showing on the other. This is unlike Spinelli, where an informant's tip had to satisfy both prongs to be counted toward probable cause.
80. Id. at 147. The Court concedes that "the informant's unverified tip may have been insufficient for a narcotics arrest or search warrant" under Spinelli. Id. However, the information did have sufficient "indicia of reliability to justify the officer's forcible stop of [the defendant]." Id.
81. Id.
not only a lesser standard of proof, it is also less rigorous in the types of information that can be used as proof.

The majority opinion in *White* simply applies the reasoning of *Adams* to the post-*Gates* era. The majority found that the factors of basis of knowledge and veracity are also relevant in the reasonable suspicion context. But Justice White reasoned that these factors must be applied even more permissively than under the *Gates* approach, since reasonable suspicion is a less rigorous standard of proof than probable cause.

Even given the lesser showing required, Justice White acknowledged that the anonymous tip in the instant case did not itself provide reasonable suspicion, because it did not show that the informant was reliable, nor did it give any indication of the informant's basis for predicting White's activities. However, that did not end the analysis. While the tip did not stand on its own, even for reasonable suspicion, the majority found that, as with probable cause, corroboration of the tip could lead to a finding of reasonable suspicion. The crucial question in *White*, then, was the strength of corroboration that would be required to support a defective tip.

Justice White determined that the corroboration in *White* was not as substantial as that in *Gates*. In *Gates*, for instance, the officers corroborated relatively unique travel plans, with more details than those given by the informant in *White*. Also, the defendants in *Gates* were observed to engage in somewhat suspi-

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83. *Id.*
84. *Id.* However, Justice White said, "[I]t is not to say that an anonymous caller could never provide the reasonable suspicion necessary for a *Terry* stop." *Id.*
85. *Id.* at 2417.
86. *Id.* at 2416. Note that the reliability of an anonymous tip can become irrelevant if the investigation that is made to corroborate the tip uncovers articulable facts which themselves support a reasonable suspicion of criminal activity. In United States v. Lane, 909 F.2d 895 (6th Cir. 1990), *cert. denied*, 111 S. Ct. 977 (1991), the police received an anonymous tip that drug dealing was going on in an apartment hallway in a building known to police for drug activity. When uniformed officers entered the building, the defendant fled at the sight of them. *Id.* at 898. The flight of the defendant along with officers' prior knowledge that the building had problems with drug trafficking provided the officers with a reasonable basis for conducting an investigative stop and made it "unnecessary to decide whether the anonymous tip in this case was sufficiently corroborated ..." *Id.* The fact that the police carried out the stop with drawn guns did not convert it into an arrest. *Id.* at 899.
87. *White*, 110 S. Ct. at 2416 ("[Here], the tip was not as detailed and the corroboration was not as complete, as *Gates* ... ").
cious travel activity. There was nothing unique, suspicious or detailed about the travel activity in White.88

However, the fact that the corroboration was less than that necessary to satisfy probable cause was held not fatal in White. The Court reasoned that because reasonable suspicion is a less stringent standard than probable cause, the degree of corroboration required to support reasonable suspicion could be correspondingly less.89 The lesser standard is a reduction in both quantity and quality of proof.90 This reasoning is straight out of Adams v. Williams.

The Court found that the stop of White was based on reasonable suspicion, even though the corroboration of the tip was not complete, and in fact the tip was not correct in some details.91 Justice White acknowledged that corroboration of the mere existence of the car was insignificant, because "anyone could have predicted that fact because it was a condition presumably existing at the time of the call."92 What was important was the caller's ability

88. Cf. United States v. Alvarez, 899 F.2d 833 (9th Cir. 1990), cert. denied, 111 S. Ct. 671 (1991). In Alvarez, after an anonymous tip that a man who "looks kinda Mexican" in a white Mustang GT, was going to rob a bank, and was "probably in back of the bank," police drove to the bank and observed an Hispanic looking man parked in a white Mustang across from the bank, who drove away after a marked police car passed by. Id. at 835. This was held to be enough corroboration to provide reasonable suspicion to justify an investigatory stop. Id. at 836-37.

89. White, 110 S. Ct. at 2416 (reasonable suspicion established with information different in quantity or content than that required for probable cause and reasonable suspicion can arise from less reliable information than that required for probable cause). See Note, Fourth Amendment—Protections Against Unreasonable Search and Seizure: The Inadequacies of Using an Anonymous Tip to Provide Reasonable Suspicion for an Investigatory Stop, 81 J. CRIMINOLOGY L. & CRIM. 760 (1991).

90. As the Court explained in White:

Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. Adams v. Williams, [407 U.S. 143 (1972),] demonstrates as much. We there assumed that the unverified tip from the known informant might not have been reliable enough to establish probable cause, but nevertheless found it sufficiently reliable to justify a Terry stop.... Both factors—quantity and quality—are considered in the "totality of the circumstances..." that must be taken into account when evaluating whether there is reasonable suspicion.


91. Id. at 2417.

92. Id.

https://digitalcommons.law.villanova.edu/vlr/vol36/iss6/1
to predict White's future behavior, i.e. the travel plans. According to the Court, the correct prediction of itinerary (incomplete though the itinerary was at the time of the stop) demonstrated inside knowledge. Unlike the facts about the car, "the general public would have had no way of knowing [White's future travel plans]." The Court said "it [is] reasonable for police to believe that a person with access to [an individual's itinerary] is likely to also have access to reliable information about that individual's illegal activities"—at least it is reasonable enough to support the minimal, lesser standards of reasonable suspicion.

Justice Stevens wrote a short dissenting opinion, joined by Justices Brennan and Marshall, in which he argued that the activity predicted by the informant and corroborated by the police—leaving an apartment and driving toward a motel—was completely innocent, and any prediction as to criminal activity was a leap of faith. Justice Stevens found it especially dangerous that an anonymous informant, with the barest knowledge of a person's innocent future activity, could generate a police intrusion. After White, an officer can draw a reasonable inference that the tipster's actually false conclusion of criminal activity was in fact

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93. Id.
94. Id.
95. Id.
96. Id. In United States v. Campbell, 920 F.2d 793 (11th Cir. 1991), the court interpreted the facts of White as an absolute minimum showing of reasonable suspicion, so that cases similar to White would clearly not satisfy the more rigorous standard of probable cause. Id. at 797. Campbell dealt with a tip that a woman named "Yoli," accompanied by three armed Mexican males, would bring marijuana to Montgomery in a white and green Chevrolet pickup truck with a camper shell and Texas license plates and would arrive at a particular truck stop between 11:30 p.m. and 1:00 a.m. Id. at 794. The police observed a truck matching the description arrive at the place and time described, but, instead of conducting an investigatory stop, they searched and arrested the occupants of the truck. Id. At first, no marijuana was found. Id. Then the truck and defendants were taken to the police station. Id. The defendants were separated and questioned, and the owner of the truck signed a consent to search the truck. Id. A marijuana sniffing dog then detected marijuana in the truck. Id. The district court held that under Gates the corroboration of the tip was sufficient for probable cause to search and arrest. Id. at 795. However, noting the similarity of the facts to those of White (and noting that the Supreme Court acknowledged that White was a "close case"), the Eleventh Circuit held that under White "the most that the Montgomery police had [at the initial arrest and fruitless search] was a reasonable suspicion of illegal activity." Id. at 797. Hence, the marijuana was excluded as tainted by the illegal arrest. Id. at 797-98.
97. White, 110 S. Ct. at 2417-18 (Stevens, J., dissenting).
98. Id. (Stevens, J., dissenting). Moreover, Justice Stevens recognized the potential for abuse. For example, an unscrupulous police officer can seize and question someone at will; if the officer discovers any contraband, he could claim he was acting on an anonymous tip. Id. (Stevens, J., dissenting).
reliable.  

2. Implications of White

White is a re-affirmation of Adams v. Williams, where the Court found under the totality of the circumstances, a minimally corroborated informant's tip sufficient to satisfy reasonable suspicion. Adams v. Williams was decided in the Spinelli era, however, and White clears up any ambiguity as to how the lesser standards of reasonable suspicion are to be evaluated under the totality of circumstances approach. White holds that reasonable suspicion can be found through anonymous tips. That question was left open in Adams, which concerned a tip from an informant known personally to the officer.

Still, White is a simple application of fact to law; no attempt is made to evaluate the underlying premise of the usefulness of an informant's tip. White relies blindly on the same premise as Adams—that because reasonable suspicion is a lesser standard of proof, it can be met on a less reliable showing of proof. The reasonable suspicion standard is less demanding as to both quantity and quality of information. Apparently, certain information may be too unreliable to satisfy probable cause, but reliable enough to satisfy reasonable suspicion. But the Court in White did little or nothing to develop, explain or concretize this point for lower court guidance.

After White, a very important form of corroboration will be evidence showing an informant's substantially correct prediction.

99. Id. (Stevens, J., dissenting). Justice Stevens noted:

Millions of people leave their apartments at about the same time every day carrying an attaché case and heading for a destination known to their neighbors. Usually, however, the neighbors do not know what the briefcase contains. An anonymous neighbor's prediction about somebody's time of departure and probable destination is anything but a reliable basis for assuming that the commuter is in possession of an illegal substance—particularly when the person is not even carrying the attaché case described by the tipster.

Id. (Stevens, J., dissenting).

100. 407 U.S. 143 (1972).

101. Id. at 146 (where informant is known to policeman and had provided tips in past, there is "stronger case than . . . in the case of an anonymous telephone tip").

102. For a criticism of the Adams reasoning, see The Supreme Court, 1971 Term, 86 HARV. L. REV. 1, 178 (1972) ("[T]he standard of cause to stop should be less than probable cause only in the sense that the officer may stop on less or different information than probable cause would require and not in the sense that he may act on information that is received in a manner less reliable than probable cause would require.").
of future activity.\textsuperscript{103} It need only be substantially correct, because reasonable suspicion is such a minimal standard.\textsuperscript{104} Moreover, the activity corroborated can be completely innocent, again because the minimal reasonable suspicion standard allows an inference to be drawn that an informant's prediction of innocent activity makes it sufficiently likely that the prediction of criminal activity is true.\textsuperscript{105} It should be noted that the central proposition of \textit{White} and \textit{Adams}—that a prediction of innocent activity can create an inference that a conclusion concerning criminal activity is reliable—is inconsistent with Justice White's concurring opinion in \textit{Spinelli v. United States}.\textsuperscript{106} In \textit{Spinelli}, Justice White argued that an informant's correct prediction of innocent activity cannot cre-

\textsuperscript{103} See Minnesota v. Albrecht, 465 N.W.2d 107, 109 (Minn. Ct. App. 1991). In \textit{Albrecht}, the police received an anonymous tip stating that the defendant was a drug dealer. \textit{Id.} at 108. The informant provided general directions to defendant's house, and said that defendant had a red and white pickup truck. \textit{Id.} Further, the informant claimed to have personal knowledge of defendant's drug use and drug selling. \textit{Id.} The \textit{Albrecht} court decided that this was insufficient to establish the requisite probable cause required for a search warrant. \textit{Id.} at 109. The court said that the facts corroborated by the police—location of house and defendant's ownership of a pick-up truck—were easily obtained facts. \textit{Id.} Moreover, the court cited \textit{Alabama v. White} as supporting the proposition that the anonymous informant's ability to predict defendant's future behavior is significantly more probative than merely a recital of "easily obtained facts and conditions." \textit{Id.}

\textsuperscript{104} See, e.g., United States v. Thompson, 906 F.2d 1292 (8th Cir.) (where informant predicted defendant would be robbing certain banks, and defendant was parked outside one of the banks, there was reasonable suspicion to make investigatory stop, even though informant's description of car and license plate were wrong), \textit{cert. denied}, 111 S. Ct. 530 (1990).

\textsuperscript{105} See, e.g., Maryland v. Williams, 84 Md. App. 738, 581 A.2d 864 (1990). In \textit{Williams}, there were three tips, one from a reliable, confidential informant predicting that a drug deal would take place at a certain location, naming some of the participants, and describing the vehicle that would be driven, the second, from an anonymous citizen, confirming the information in the first tip, and the third, from the same anonymous citizen, stating that the location had been changed. \textit{Id.} at 740. At the location named in the third tip, police saw the vehicle described drive up, saw the driver get out of his car and run over to a woman standing at the location of the predicted deal. \textit{Id.} at 741. After speaking to her the defendant ran back to his car. \textit{Id.} No exchange or other illegal activity was observed. \textit{Id.} The police stopped the driver and searched the car. \textit{Id.} The court held that there was reasonable suspicion to justify the stop because the anonymous citizen's first tip was corroborated by the fact that it was identical to the reliable informant's tip, his second tip also gained reliability. \textit{Id.} at 747-48. The accurate prediction of the car at the location also corroborated the tip regarding the changed location. \textit{Id.} at 748. And, significantly, the fact that the predicted transaction did not take place did not dissipate the reasonable suspicion. \textit{Id.} It was reasonable for the officer to believe that, although the deal was for some reason aborted, there was contraband at the scene ready to be delivered. \textit{Id.}

\textsuperscript{106} 393 U.S. 410, 427 (1969) (White, J., concurring).
ate an inference that he is correct about criminal activity.\textsuperscript{107}

On the issue of corroboration and reliability, there is an inconsistency between the Supreme Court's fourth and sixth amendment jurisprudence. In \textit{Idaho v. Wright},\textsuperscript{108} the Court held that corroboration was irrelevant to the reliability of a hearsay statement under the confrontation clause.\textsuperscript{109} The \textit{Wright} Court reasoned that allowing corroborative evidence to be considered would allow an unreliable statement to be bootstrapped into admissibility by the trustworthiness of other evidence.\textsuperscript{110} Yet when considering the reliability of an informant's hearsay statement as to probable cause or reasonable suspicion, the Court has found it crucial that the police have corroborated the tip with independent investigation. It is unclear why an informant's hearsay statement can be considered reliable because corroborated, while that same corroboration would be irrelevant to the reliability of a hearsay statement offered at trial. Again, the Court has done little to explain or synthesize the various strands of its own jurisprudence. It is busy applying discrete facts to discrete law.

As Justice Stevens points out in his dissent, the majority's ruling in \textit{White} allows officers to create anonymous informants to justify stops.\textsuperscript{111} However, it is not the decision in \textit{White} that created this possibility but rather the decisions in \textit{Adams} and \textit{Gates}, which are applied mechanically in \textit{White}.

\section{C. Rejection of the Inadvertence Requirement for Plain View Seizures}

\subsection{1. Discussion of Horton v. California}

Unlike most of its other ventures into criminal procedure, the

\begin{footnotesize}
\textsuperscript{107} Id. (White, J., concurring). To illustrate his point, Justice White explains: "[Suppose] a reliable informant states there is gambling equipment in Apartment 607 and then proceeds to describe in detail Apartment 201, a description which is verified before applying for the warrant. He was right about 201, but that hardly makes him more believable about the equipment in 607." \textit{Id.} (White, J., concurring).

\textsuperscript{108} 110 S. Ct. 3139 (1990).

\textsuperscript{109} Id. at 3150. Writing for the majority, Justice O'Connor said: "To be admissible under the Confrontation Clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial." \textit{Id.}

\textsuperscript{110} Id.

\textsuperscript{111} Alabama v. White, 110 S. Ct. 2412, 2418 (Stevens, J., dissenting). "[U]nder the court's holding, every citizen is subject to being seized and questioned by any officer who is prepared to testify that the warrantless stop was based on an anonymous tip predicting whatever conduct the officer just observed." \textit{Id.} (Stevens, J., dissenting).
\end{footnotesize}
Court in *Horton v. California* \(^{119}\) reinvestigated the validity of prior authority. *Horton* substantially changes the law on the exception for plain view seizures. The warrant in *Horton* authorized the seizure of the proceeds of a robbery. \(^{113}\) The officer had probable cause to believe that the weapons used in the robbery would be found in the search, but he did not seek a warrant for the weapons, and the warrant he obtained therefore did not authorize their seizure. \(^{114}\) In the course of the search for the proceeds, the unsurprised officer saw the weapons in plain view. \(^{115}\) The state admitted that this discovery was not inadvertent. \(^{116}\)

In *Coolidge v. New Hampshire*, \(^{117}\) a plurality of Warren Court justices held that a seizure could not be justified under the plain view doctrine unless it was "inadvertent." \(^{118}\) In *Horton*, the Supreme Court rejected the plurality view in *Coolidge* and held that "even though inadvertence is a characteristic of most legitimate 'plain view' seizures, it is not a necessary condition." \(^{119}\)

Justice Stevens wrote the opinion for seven members of the Court. The majority began its discussion by restating the parameters of the plain view doctrine that are well accepted. First, the doctrine authorizes warrantless seizures, but not warrantless searches. \(^{120}\) For instance, just because a briefcase is in plain view does not mean it can be searched. But it can be seized under the plain view doctrine if there is probable cause to believe it is or contains evidence of criminal activity. The term "seizure" refers to a deprivation of dominion or control over property while the term "search" refers to an invasion of privacy. \(^{121}\) Justice Stevens explained that the plain view justification for an exception to the warrant requirement "is addressed to the concerns implicated by seizures rather than by searches." \(^{122}\)

Second, the plain view doctrine can apply to seizures in the course of both warranted and warrantless searches. \(^{123}\) However, "the officer must be lawfully located in a place from which the

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113. Id. at 2304.
114. Id.
115. Id. at 2304-05.
116. Id.
117. 403 U.S. 443 (1971).
118. Id. at 469.
119. Horton, 110 S. Ct. at 2304.
120. Id. at 2306.
121. Id.
122. Id.
123. Id. at 2307.
object can be plainly seen, [and] ... must also have a lawful right of access to the object." So even though an officer sees contraband through a house window, he is not allowed to enter the house to seize it, unless there is an independent lawful means of access into the house.

Third, probable cause to seize the item must be immediately apparent. If the item must be searched and investigated in order to determine whether there is probable cause to seize it, such an investigation is itself a search which requires probable cause. After setting forth these basic principles of the plain view doctrine, Justice Stevens turned to Coolidge’s inadvertence requirement. He took pains not to "overrule" Coolidge, and rejected the proposition that a plurality opinion is not entitled to stare decisis effect. Justice Stevens contended instead that while Coolidge was a “binding precedent,” the discussion of inadvertence in the plurality opinion was not necessary to the decision. Rather, the decision was based primarily on the fact that probable cause to seize Coolidge’s car was not immediately apparent—its “probative value remained uncertain until the interior [was] swept and examined microscopically.” At best, however, the Coolidge plurality’s holding that probable cause was not immediately apparent was an alternative holding, entitled to equal weight with the holding that the seizure was not inadvertent. Justice Stevens’ painful and unpersuasive attempt to rewrite the holding in Coolidge is indicative of the Burger-Rehnquist Court’s attempt to tinker here and there, but to avoid confronting a prior decision head-on.

On the merits, however, Justice Stevens conducted a vigorous analysis of the policies behind the inadvertence requirement. The Court in Horton found the inadvertence requirement to be unsound on two grounds. First, the standard of inadvertence was impermissibly subjective. It invalidated the seizure based on the state of mind of the officer, which had little to do with fourth

124. Id. at 2308.
126. Horton, 110 S. Ct. at 2308.
129. Id. at 2305, 2308 n.2.
130. Id. at 2308.
131. Id.
132. Id. at 2307.
amendment standards of reasonableness.\textsuperscript{133} It could be argued in response that the inadvertence requirement did not depend on a subjective state of mind, but rather on pre-existing probable cause—that is, if the officer had probable cause to seize an item before obtaining a warrant, and failed to include that item in the warrant application, then the subsequent discovery of the item could not be inadvertent. Yet this objective pre-existing probable cause standard has its own problems. For one thing, it has the strange effect of turning an adversarial argument on its head: the defendant must argue that there was pre-existing probable cause to seize an item, while the state must argue that there was not.

Moreover, if there is pre-existing probable cause to seize an item, there seems to be little reason for the officer to exclude it from the warrant application. Inclusion can only increase the scope and intensity of the warranted search. The majority in \textit{Horton} recognized and emphasized this point.\textsuperscript{134}

As a second ground, the Court found unpersuasive Justice Stewart's reasoning in \textit{Coolidge} that an inadvertence requirement was necessary to prevent warrantless general searches.\textsuperscript{135} Justice Stevens reasoned that an inadvertence requirement would do nothing to reduce the scope of a search or the number of places in which the officer may look.\textsuperscript{136} In order to trigger the plain view doctrine, the officer must be in a lawful place to find the items that are described in a warrant or in the proper scope of warrantless activity.\textsuperscript{137} So rejecting the inadvertence requirement would not allow the officer to look in any more places or with any more intensity than he would otherwise be able to do.\textsuperscript{138} In fact, the officer would want to include all seizable materials in a warrant,

\begin{footnote}{133}{\textit{Id.} at 2308-09. Specifically, Justice Stevens opined: "(E)venhanded law enforcement is best achieved by the application of objective standards of conduct, rather than standards that depend on the subjective state of mind of the officer." \textit{Id.; see also Scott v. United States, 436 U.S. 128 (1978)} (evaluation of fourth amendment violations should be based on reasonableness, not subjective bad faith of officer).}
\end{footnote}

\begin{footnote}{134}{110 S. Ct. at 2309. Justice Stevens noted:
If the officer has knowledge approaching certainty that the item will be found, we see no reason why he or she would deliberately omit a particular description of the item to be seized from the application for a search warrant. Specification of the additional item could only permit the officer to expand the scope of the search.}
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\begin{footnote}{135}{\textit{Id.}}
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\begin{footnote}{136}{\textit{Id.}}
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\begin{footnote}{137}{\textit{Id.} at 2309-10.}
\end{footnote}

\begin{footnote}{138}{\textit{Id.}}
\end{footnote}
since that could serve to expand the scope of a lawful search.\textsuperscript{139}

Justice Brennan, joined by Justice Marshall, dissented. Justice Brennan noted that the inadvertence requirement had become widely accepted, with no apparent deleterious effect on law enforcement.\textsuperscript{140}

Justice Brennan also argued that the inadvertence requirement was necessary to guarantee that a warrant describe the things to be seized.\textsuperscript{141} Otherwise, an officer could deliberately omit certain items from the warrant application, secure in the knowledge that they would be found in plain view.\textsuperscript{142} Essentially, Justice Brennan thought that the warrant process would be made too easy if the officer only had to justify the seizure of one item as opposed to many.\textsuperscript{143} This concern is unfounded, however. Even if the magistrate finds no probable cause to include an item in the warrant, there will still be probable cause to seize that item if found in plain view during a warranted search. Thus, making the warrant process "harder" will not prevent warrantless seizures under the plain view doctrine.

Justice Brennan also contended that the inadvertence requirement was necessary because otherwise the officer, rather than the magistrate, will determine whether there is probable cause to seize an item.\textsuperscript{144} According to Justice Brennan, the majority was asking the wrong question.\textsuperscript{145} The inadvertence requirement was never intended to limit general searches, rather it

\textsuperscript{139} In a case dealing with a plain view seizure in a warrantless situation, a New York Court rejected \textit{Horton} under state law and held that evidence seized in a purposeful visual search of the interior of an occupied automobile without cause was not admissible under the plain view doctrine. The court held that a police officer in New York may not purposefully conduct a visual search of the interior of an occupied automobile without some objective credible reason justifying police interest in the vehicle. Although the reason need not necessarily be indicative of criminality, it may not be the product of an intent to harass nor may it be based upon mere whim, caprice or idle curiosity. People v. Manganaro, 148 Misc. 2d 616, 624, 561 N.Y.S.2d 379, 385 (Sup. Ct. 1990).

\textsuperscript{140} See Horton, 110 S. Ct. at 2314-15 app. A (Brennan, J., dissenting) (listing states that have adopted inadvertent discovery requirement); \textit{id.} at 2315-16 app. B (Brennan, J., dissenting) (listing federal courts of appeals that have adopted inadvertent discovery requirement).

\textsuperscript{141} \textit{Id.} at 2313 (Brennan, J., dissenting) (fourth amendment requires warrant "particularly describe . . . things to be seized").

\textsuperscript{142} \textit{Id.} (Brennan, J., dissenting).

\textsuperscript{143} \textit{Id.} at 2312-13 (Brennan, J., dissenting).

\textsuperscript{144} \textit{Id.} at 2312 (Brennan, J., dissenting).

\textsuperscript{145} \textit{Id.} at 2313 (Brennan, J., dissenting).
was intended to limit wholesale warrantless seizures. While the inadvertence requirement does not limit the scope of a search, it does limit the scope of a seizure. But again, a prior denial by a magistrate of a warrant to seize a certain item does not preclude its later warrantless seizure under the plain view doctrine. There is little utility and a good deal of mischief in the inadvertence requirement.

2. Implications of Horton

_Horton_ is an admirable return to first principles. In _Horton_, the Court refused to allow its own jurisprudence to paint it into a corner. The virtues of a true investigation of precedent are clear—an unnecessary, burdensome and confusing legal doctrine may be eradicated. It is unlikely that this would have occurred, however, if the Court had to meet _Coolidge_ head-on. The result in _Horton_ was only possible because the majority could argue, without being too uncomfortable, that the inadvertence requirement was dictum in _Coolidge_.

Now, if there is probable cause to seize the items listed in the warrant, all items within plain view while the search is being conducted are seizable upon probable cause—even if the officer expected to find them there, had probable cause, and deliberately bypassed the magistrate.

D. Third Party Consent and Apparent Authority

1. Discussion of Illinois v. Rodriguez

In _Illinois v. Rodriguez_, the Court considered the issue it left open in _United States v. Matlock_, and decided it in a very predictable way. In _Matlock_, the Court held that a warrantless entry and search of the defendant's property does not violate the fourth amendment where the officers obtain voluntary consent from a third party with common authority over the premises. The Court in _Matlock_ found it unnecessary to determine whether a search is valid when based on the consent of a third party who has appar-

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146. Id. (Brennan, J., dissenting).
147. Id. (Brennan, J., dissenting).
ent but not actual authority over the premises.\textsuperscript{151}

The third party in \textit{Rodriguez} was Rodriguez’s woman friend, who had, unknown to the officers, moved out of his apartment a month before the search and retained a key without permission.\textsuperscript{152} When speaking to the officers, she referred to the premises as “our apartment.”\textsuperscript{153}

Justice Scalia, writing for a six-person majority, agreed with the lower courts that the friend did not have actual authority to consent to a search of the apartment, in that she had no joint access or control of the premises after moving out.\textsuperscript{154} According to the majority, however, the officers’ reasonable belief that the friend had authority to consent would validate the entry.\textsuperscript{155}

Rodriguez argued that if a reasonable belief of common authority could validate a search, the third party would in effect be making an unauthorized waiver of defendant’s fourth amendment rights.\textsuperscript{156} As Justice Scalia noted, this argument confused the standard of waiver of constitutional rights with the standard for voluntary consent to searches established by \textit{Schneckloth v. Bustamonte}.\textsuperscript{157} In \textit{Bustamonte}, the Court held that a defendant could voluntarily consent to a search, even though he did not know that he had a right to refuse.\textsuperscript{158} Following \textit{Bustamonte}, Justice Scalia explained, while a waiver of a constitutional right must be personal, the validity of a consent search is determined by whether the search is reasonable.\textsuperscript{159} Consent does not constitute a waiver of fourth amendment rights, but rather satisfies the fourth

\textsuperscript{151} Id. at 177.
\textsuperscript{152} \textit{Rodriguez}, 110 S. Ct. at 2798.
\textsuperscript{153} Id. at 2797.
\textsuperscript{154} Id. at 2797-98.
\textsuperscript{155} Id. at 2797 (“The burden of establishing . . . common authority rests upon the State. On the basis of this record, it is clear that burden was not sustained.”).
\textsuperscript{156} Id. at 2798-99. Specifically, Justice Scalia argues that there is a significant distinction between waiving “trial” rights and waiving “constitutional” rights in terms of the standard of scrutiny. \textit{Id}.
\textsuperscript{157} 412 U.S. 218 (1973).
\textsuperscript{158} Id. at 224-25.
\textsuperscript{159} \textit{Rodriguez}, 110 S. Ct. at 2799. Justice Scalia argued: We would assuredly not permit . . . evidence seized in violation of the Fourth Amendment to be introduced on the basis of a trial court’s mere “reasonable belief”—derived from statements by unauthorized persons—that the defendant has waived his objection. But one must make a distinction between, on the one hand, trial rights that \textit{derive} from the violation of constitutional guarantees and, on the other hand, the nature of those constitutional guarantees themselves. \textit{Id}. at 2798.
amendment requirement that a search be reasonable; it is reasonable because there is voluntary consent. Because all that is required by Bustamonte is reasonableness, it follows ineluctably that the officers who obtain consent from a third party are entitled to make reasonable mistakes concerning that party’s authority to consent. The fourth amendment does not require perfection.

Justice Scalia concluded that the question of authority to consent should be governed by the same standard of reasonableness—and allowance for reasonable mistakes—as had been applied in other areas of fourth amendment jurisprudence, such as probable cause, the execution of a warrant, and the existence of exigent circumstances. According to the Court, it would be anomalous to allow for a reasonable mistake of fact to support probable cause or exigent circumstances, but not to allow for such a mistake to determine consent. All these cases are governed by the fourth amendment’s requirement that searches must be reasonable.

One problem for Justice Scalia was the Warren Court case of Stoner v. California, where the Court held that a hotel desk clerk could not validly consent to the warrantless search of the defendant’s hotel room. The Stoner Court had stated broadly that “the rights protected by the fourth amendment are not to be

160. Id. Justice Scalia said:

What Rodriguez is assured by the trial right of the exclusionary rule, where it applies, is that no evidence seized in violation of the Fourth Amendment will be introduced at his trial unless he consents. What he is assured by the Fourth Amendment itself, however, is not that no government search of his house will occur unless he consents; but that no such search will occur that is “unreasonable.” There are various elements, of course, that can make a search of a person’s house “reasonable”—one of which is the consent of the person or his cotenant.

Id. at 2799 (citation omitted).

161. Id. In rejecting the defendant’s argument, the majority said, “The essence of respondent’s argument is that we should impose upon this element a requirement that we have not imposed upon other elements that regularly compel government officers to exercise judgment regarding the facts: namely, the requirement that their judgment be not only responsible but correct.” Id.

162. Id. at 2800. Such, Justice Scalia explains, is “the cost of living in a safe society.” Id.; see also Hill v. California, 401 U.S. 797, 802 (1971) (“[W]hen police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.” (quoting California v. Hill, 446 P.2d 521, 523 (1968), aff’d 401 U.S. 797 (1971))).

163. Rodriguez, 110 S. Ct. at 2800.
165. Id. at 489.
eroded . . . by unrealistic doctrines of (apparent authority.)"166 Justice Scalia did not attack Stoner head on, even though he is clearly the most likely member of the current Court to have done so.167 Justice Scalia determined that the message of Stoner was ambiguous enough that the question of apparent authority had been left open in that case.168

Unlike Justice Stevens’ attempt to downplay Coolidge in the Horton case, Justice Scalia’s avoidance of Stoner is principled and persuasive. Stoner is not really an apparent authority case.169 In Stoner, there was no factual error that the officers made.170 The officers knew that the third party was a desk clerk and that the room was rented.171 They could not have reasonably believed that the clerk had the authority to allow entry into the room.172 In essence, the officers in Stoner made a mistake of law, and not a mistake of fact. A mistake of law does not come within the apparent authority doctrine, as the Court in both Stoner and Rodriguez recognized.173

The Court in Rodriguez remanded for a determination of whether the officers could have reasonably believed that Rodriguez’s friend had actual authority to consent to a search of his apartment.174 In his dissent, joined by Justices Brennan and Stevens, Justice Marshall contended that third party consent searches are permissible not because they are reasonable, but because a

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166. Id. at 488.
168. Rodriguez, 110 S. Ct. at 2800-01.
169. Id.
171. Id.
172. Rodriguez, 110 S. Ct. at 2801.
173. See 3 W. LaFave, Search and Seizure § 8.3(g), at 266 (2d ed. 1987).
174. 110 S. Ct. at 2801-02. Under this objective standard, the Eighth Circuit in United States v. Englebrecht, 917 F.2d 376, 377-78 (8th Cir. 1990), cert. denied, 111 S. Ct. 1120 (1991), upheld as reasonable a search where "an individual who had been living in the same farmhouse with, as well as working for, Englebrecht consented to the search of the vehicles, which were parked near the farmhouse." Id.; see also United States v. McApline, 919 F.2d 1461 (10th Cir. 1990) (police could have reasonably believed that woman who reported that she was being held against her will by two men who had been sexually assaulting her was qualified to give effective consent to search of entire trailer where she had been held or resided for two months).
person "may voluntarily limit his expectation of privacy by allowing others to exercise authority over his possessions" and thus they are not searches at all.\textsuperscript{175} Justice Marshall concluded that if an individual did not actually voluntarily assume the risk of third party consent, there would then be a "search" and the consent of a third party would not make the search reasonable.\textsuperscript{176} According to the dissenters, the fact that a person "who allows another joint access over his property thereby limits his expectation of privacy does not justify tramping the rights of a person who has not similarly relinquished any of his privacy expectation."\textsuperscript{177}

2. \textit{Implications of Rodriguez}

\textit{Rodriguez} makes clear that a consent search is not a waiver of fourth amendment rights but rather a reasonable search permitted by the fourth amendment.\textsuperscript{178} Yet this was already clear from \textit{Bustamonte}, where an unknowing consent could not possibly have been justified as a waiver of a constitutional right. \textit{Rodriguez} is thus typical of current Rehnquist Court criminal procedure jurisprudence—it re-affirms, it applies established jurisprudence to facts which differ only slightly from prior cases. It does what lower courts do every day. Notably, the Court did not revisit the very questionable assumption of the \textit{Bustamonte} Court—that a voluntary but not knowing consent leads to a reasonable search. Why is that reasonable? Why is the reasonableness clause even applicable to a search for law enforcement purposes? The Court never bothers to consider fundamental issues; it is satisfied to have decided the case before it.

The Court in \textit{Rodriguez} stressed that the police could not presume third party consent merely upon the assertion of the third party that he has common authority.\textsuperscript{179} The surrounding circumstances could be such that a reasonable person would doubt the truth of such an assertion.\textsuperscript{180}

\begin{itemize}
\item \textsuperscript{175} \textit{Rodriguez}, 110 S. Ct. at 2802 (Marshall, J., dissenting).
\item \textsuperscript{176} \textit{Id.} at 2804 (Marshall, J., dissenting). Moreover, Justice Marshall asserts that "[t]his conclusion flows directly from Stoner v. California." \textit{Id.} (Marshall, J., dissenting).
\item \textsuperscript{177} \textit{Id.} at 2806 (Marshall, J., dissenting).
\item \textsuperscript{178} \textit{Id.} at 2801.
\item \textsuperscript{179} \textit{Id.} The Court noted: "[W]hat we hold today does not suggest that law enforcement officers may always accept a person's invitation to enter premises." \textit{Id.}
\item \textsuperscript{180} \textit{Id.; see, e.g., Weinreb, Generalities of the Fourth Amendment, 42 U. Chi. L. Rev. 47, 65 (1974) (babysitter's assertions that she has common authority over premises are not deserving of unquestioned acceptance, because it is contrary to...}
\end{itemize}
Rodriguez does not change the presumption in the lower courts that police officers must make reasonable inquiries as to apparent authority when they find themselves in ambiguous circumstances. Of course, officers do not have to check the legal title of every house. But if the facts cry out for further inquiry, and more facts are reasonably available, then a duty of inquiry will be imposed under the fourth amendment standard of reasonableness.181

Because the issue is reasonableness and not waiver, the Rodriguez analysis should probably change the result in certain courts that have held that police may not obtain third-party consent when the defendant is on the premises and refuses to consent to the search.182 Even where the defendant is present and objecting, the consent of a third party with common authority is likely to be found "reasonable"—the absence of a personal waiver (indeed the presence of a personal objection) is not controlling.183

After Rodriguez a third party consent search can be supported by either actual or apparent authority. The Rodriguez fact situation concerns apparent but not actual authority. But a consent search would be equally reasonable if based upon actual but not apparent authority—that is, the officers could not reasonably believe that the chauffeur had the run of the mansion, but in fact he did.184

E. Reasonableness of a Protective Sweep for Self-Protection

1. Discussion of Maryland v. Buie

A "protective sweep" is a quick and limited search of a prem-

181. Compare United States v. Poole, 307 F. Supp. 1185 (E.D. La. 1969) (duty to inquire whether some of the property searched was owned by person giving consent) with People v. Adams, 53 N.Y.2d 1, 422 N.E.2d 537, 439 N.Y.S.2d 877 (1981) (duty of further inquiry excused given exigencies of situation in which consent was given and search was made).

182. See, e.g., United States v. Impink, 728 F.2d 1228, 1234 (9th Cir. 1984) (third party consent ineffective where defendant is present and objecting).

183. Compare People v. Cosme, 48 N.Y.2d 286, 290-91, 422 N.Y.S.2d 652, 654, 397 N.E.2d 1319, 1322-23 (1979) (search is reasonable upon third party consent even though defendant is present and objecting) with United States v. Baldwin, 644 F.2d 381 (5th Cir. 1981) (though defendant had previously refused consent, his wife could still consent to search where she had common authority; defendant was not on premises at time of search).

184. See, e.g., United States v. Chaidez, 919 F.2d 1193, 1201-02 (7th Cir. 1990) (while it was unreasonable to infer apparent authority when person consenting to search said that she did not live in house and was only there to do laundry; fact that she had actual authority justified search).
prises, incident to an arrest and conducted to protect the safety of police officers or others. In *Maryland v. Buie*, following an armed robbery, police obtained arrest warrants for Buie and his accomplice and went to Buie’s house. Buie was arrested upon emerging from the basement. The officers did a cursory search of the basement to see if anyone else was there, and in the course of that search, they found incriminating evidence in plain view.

Buie argued that police could not conduct such a sweep in the absence of probable cause to believe that there were individuals on the premises who would harm the officers or others. The Court, by a 7-2 vote, rejected his argument, and held that a protective sweep could be conducted on reasonable suspicion of bodily harm to the officers or to others. In doing so, the Court simply applied established jurisprudence following from *Terry v. Ohio*. *Terry* and its progeny allow cursory inspections upon reasonable suspicion, when necessary to protect police officers.

Justice White, writing for the majority, relied most heavily on *Terry* itself and on *Michigan v. Long* which held that in the course of a stop, officers could search accessible areas of an automobile for a weapon upon reasonable suspicion of bodily harm. Thus, *Long* extended the permissible scope of a *Terry* frisk for self-protection beyond the suspect’s person.

According to Justice White, the reasonable suspicion standard was an appropriate balance between the arrestee’s remaining privacy interest in the home and the officer’s interest in safety. The Court noted that while even a cursory inspection of a home was a severe intrusion, the state has a heavy interest in protecting officers who are in the course of making an arrest.

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185. *Maryland v. Buie*, 110 S. Ct. 1093, 1099 (1990) (protective sweep may only extend to cursory inspection of those spaces where person may be found).
187. *Id.* at 1095.
188. *Id.*
189. *Id.*
190. *Id.* at 1095-96.
191. *Id.* at 1099-2000.
195. *Id.* at 1049-50.
197. *Id.* at 1098.
198. *Id.* (rejecting state’s contention that cursory inspection constituted *de minimus* intrusion); see also United States v. Flippin, 924 F.2d 163 (9th Cir. 1991).
This balancing process, and the inevitable state-affirming outcome of the balancing, are straight out of Terry. Various members of the Warren Court have decried the Burger-Rehnquist Court’s use of Terry to open up a generalized balancing approach to the fourth amendment. In Buie itself, Justice Brennan, joined by Justice Marshall, dissented and noted his continuing criticism “of the emerging tendency on the part of the Court to convert the Terry decision from a narrow exception into one that swallows the general rule that searches are ‘reasonable’ only if based upon probable cause.” However, the open-ended invitation to balancing is clearly present in Terry, as Justice Douglas recognized in his dissent in that case. Thus, the Burger-Rehnquist Court is not rejecting Warren Court precedent so much as exploiting it.

If balancing is the fourth amendment benchmark, one wonders how the Court justifies its adherence to probable cause for a search in Arizona v. Hicks. There, the Court specifically rejected a balancing approach, and held that “a search is a search.” In Buie, Justice White distinguished Hicks as involving a search for evidence, rather than a search for safety purposes as in Terry and Long. In line with the roadblock seizure case of Sitz, the Court has drawn a constitutional distinction between a search for protection, which can be justified by reasonable suspicion, and a search for evidence for law enforcement purposes, which requires probable cause.

One may also wonder how the protective sweep pursuant to

In Flippin, the Ninth Circuit considered the seizure and search of a make-up bag following not an arrest, but an entry with defendant’s consent into her motel room. Flippin, 924 F.2d at 164. There was neither probable cause to enter the motel room, nor to search it or the defendant. Id. at 165. However, when the officer turned his back, the defendant grabbed a bag and refused to relinquish it. Id. at 164. Fearing the defendant was attempting to arm herself, the officer forcibly took the bag from her and opened it. Id. The Ninth Circuit upheld the search, rejecting the argument that Buie required an initial entry with arrest warrant and probable cause or exigent circumstances, before a protective search in the home could occur. Id. at 165. The Court held that the opening of the bag was justified as well as the seizure, because the officer’s seizure of it did not dissipate the danger. Id. at 167. The Court reasoned that by struggling to retain possession of the bag, the defendant made it reasonable to suspect she might use force to regain possession of it. Id.

199. Buie, 110 S. Ct. at 1101 (Brennan, J., dissenting).
200. Terry v. Ohio, 392 U.S. 1, 38 (1968) (Douglas, J., dissenting) (warning that majority decision would have effect of embarking society on “totalitarian path”).
202. Id. at 325.
204. For a discussion of Sitz, see supra notes 9-43 and accompanying text.
an arrest can be squared with the spatial limitations imposed on searches incident to arrest in *Chimel v. California*.

In *Chimel*, the Court held that the scope of a search incident to arrest was limited to the grab area of the arrestee; the sweep in *Buie* obviously went beyond the grab area. The majority in *Buie* contended that the spatial limitations of *Chimel* were not undermined by allowing a protective sweep on reasonable suspicion, since one had nothing to do with the other. Specifically, the Court said that unlike a search incident to arrest, the protective sweep is limited to areas where persons may be hidden; it does not allow the police to thoroughly search an area beyond the grab area incident to arrest, as does *Chimel*. Moreover, unlike a search incident to arrest, a protective sweep is not an automatic right of the officer; it is allowed only upon reasonable suspicion of bodily harm.

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206. *Id.* at 763. Writing for the majority, Justice Stewart said that incident to an arrest a police officer is justified in searching "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.* Conversely, the officer would not be justified in searching any area beyond the arrestee's immediate control in the absence of a search warrant. *Id.*

207. *Buie*, 110 S. Ct. at 1099.

208. *Id.*

209. *Id.* The Sixth Circuit applied *Buie* in United States v. Akrawi, 920 F.2d 418 (6th Cir. 1990), and found a protective sweep improper because the agents conducting the sweep "could point to no particular reason to support a reasonable belief that the second floor harbored a dangerous individual. Furthermore, the government has failed to show that the sweep was quick, and occurred at the time of or promptly after the arrest." *Id.* at 421. Here, the court was persuaded by the fact that after the defendant was arrested, the "agents inexplicably remained in the house for forty-five minutes." *Id.* at 419. Likewise, after a proper protective sweep has determined that no one else is in the premises, continued presence or reentry without a warrant is illegal. See United States v. Oguns, 921 F.2d 442, 447 (2d Cir. 1990).

In United States v. Tisdale, 921 F.2d 1095 (10th Cir. 1990), sheriffs went to the defendant's mobile home to execute an arrest warrant. *Id.* at 1096. The defendant was in violation of his parole and had a history of firearm violations. *Id.* at 1097. The sheriffs knocked on the door of the mobile home and announced themselves. *Id.* at 1096. While defendant's wife let a sheriff in the front door, the defendant jumped out of a back window to escape. *Id.* Four sheriffs chased after the defendant. *Id.* The fifth sheriff was standing in the trailer with defendant's wife when he heard gunshots. *Id.* He did not know who was shooting at whom. *Id.* He immediately engaged in a protective search of the trailer and discovered three loaded firearms and contraband. *Id.* at 1096-97. The court held that under these circumstances, the sheriff's protective sweep was fully justified. *Id.* at 1097. It reasoned that "[g]iven defendant's actions and background, it was not unreasonable for [the sheriff in the trailer] to believe that other dangerous people would be present or that defendant would return." *Id.*

In United States v. Oguns, the defendant was arrested while standing outside his apartment. 921 F.2d 442, 445 (2d Cir. 1990). Noticing defendant's door was open, the police entered and conducted a protective search. *Id.*
Therefore, the Court concludes, allowance for a protective sweep does not render meaningless the search incident to arrest doctrine, as to which the spatial limitations on Chimel are retained. Chimel still prohibits routine, automatic searches of the area beyond the arrestee's reach, and Buie is consistent with that prohibition.\[^{210}\]

Justice Stevens concurred to emphasize that a protective sweep could only be conducted to protect police officers, not to prevent the destruction of evidence.\[^{211}\] Justice Stevens' concurrence is consistent with the majority's reliance on Terry. A Terry frisk, of which the protective sweep is just an example, can only be supported by interests in self-protection; it cannot be used to search for evidence.\[^{212}\] Otherwise there would be nothing left of the Court's probable cause requirement in Hicks.

2. Implications of Buie

Buie is another of the cases in the 1989-90 term that is a simple application of fact to law that most lower courts had already resolved. It is hardly a step from Long to Buie.\[^{213}\] In both cases, the self-protection rationale of Terry is fairly applied to an area beyond the suspect's person. But again, the Court does nothing to justify the worth of the underlying precedent itself.

In Buie, the defendant was arrested in the home. Could a protective sweep be conducted if the arrest was made just outside the home? Presuming a reasonable fear of bodily harm from someone within the house, courts both before and after Buie have answered in the affirmative.\[^{214}\]

holding the search, the court explained that "[h]ad third parties been in the apartment, they would likely have been able to hear through the open door the agents arresting [the defendant] and, with that knowledge, would have posed a threat to the police outside." Id. at 447.

210. Buie, 110 S. Ct. at 1097. Justice Brennan, however, found dubious "the Court's implicit assumption . . . that arrestees are likely to sprinkle hidden allies throughout rooms in which they might be arrested." Id. at 1103 n.6 (Brennan, J., dissenting).

211. Id. at 1100 (Stevens, J., concurring).

212. See Sibron v. New York, 392 U.S. 40, 64 (1968) (search for evidence on reasonable suspicion is not allowed by Terry).

213. See Note, Fourth Amendment—Protective Sweep Doctrine: When Does the Fourth Amendment Allow Police Officers to Search the Home Incident to a Lawful Arrest? 81 J. CRIM. L. & CRIMINOLOGY 862 (1990) (Buie, like Long, rejects contention that Terry limited to searches of detained individual).

214. See, e.g., United States v. Oguns, 921 F.2d 442, 447 (2d Cir. 1990); United States v. Tisdale, 921 F.2d 1095 (10th Cir. 1990); United States v. Hoyos, 868 F.2d 1131, 1139 (9th Cir. 1989) ("If the exigencies to support a protective sweep exist, whether the arrest occurred inside or outside the residence does
While the Court in Buie allows a search on less than probable cause, the search remains within the justification of protection of the officer. It is not a search for evidence qua evidence. The absolute probable cause requirement for searches by law enforcement officers for evidence is specifically retained by the Court's reference to Hicks. Accordingly, a protective sweep to neutralize evidence-destroyers—as opposed to officer-destroyers—should not be permissible after Hicks and Buie. Buie expressly justifies protective sweeps as searches for those "posing a danger to those on the arrest scene." Some circuits before Buie had allowed protective sweeps to protect evidence. The rule in these circuits should be changed after Buie. Most courts, even before Buie, allowed protective sweeps only for safety purposes, not to uncover evidence-destroyers.

Finally, it should be noted that while the Court has drawn a line between a search for self-protection which is permissible upon reasonable suspicion and a search for evidence which must be supported by probable cause, this line easily erodes where the crime investigated is one of violence, such as drug crimes are considered today. For example, in United States v. Chaidez, the officer had reasonable suspicion that a driver was involved in a drug transaction. In most courts, as in Chaidez, drug distribution gives per se reasonable suspicion of bodily harm, because the

216. Id. at 1096.
217. Id. at 1100.
218. See, e.g., United States v. Escobar, 805 F.2d 68, 71 (2d Cir. 1986) (protective sweep allowed upon reasonable fear of persons who "are likely to destroy evidence").
219. However, a recent Second Circuit case misreads Buie as consistent with its rule that a reasonable belief that others were in the house and "might destroy evidence, escape or jeopardize the safety of the officers or the public," justifies a protective sweep. See United States v. Oguns, 921 F.2d 442, 446 (2d Cir. 1990).
220. See, e.g., United States v. Koledziej, 706 F.2d 590 (5th Cir. 1983).
221. 906 F.2d 377 (8th Cir. 1990).
222. Id. at 384. The court said that "the torn backing, the loose or missing
courts believe that drug dealers are almost always armed.\textsuperscript{223} Therefore, the Court concludes, reasonable suspicion of a drug transaction allowed the officer to search the accessible areas of the passenger compartment of the car, pursuant to \textit{Long}.\textsuperscript{224} During this inspection, the officer found a brick shaped object with a white residue.\textsuperscript{225} \textit{Chaidez} clearly demonstrates how an illegal search for evidence can survive judicial scrutiny through the \textit{Terry} back door.

F. \textit{Police Discretion in Inventory Searches}

1. Discussion of \textit{Florida v. Wells}

In \textit{Florida v. Wells},\textsuperscript{226} a Florida Highway Trooper arrested Wells for drunk driving.\textsuperscript{227} The trooper impounded the car, and conducted an inventory search.\textsuperscript{228} Marijuana cigarettes were found in the ashtray, and marijuana was found in a locked suitcase in the trunk.\textsuperscript{229} The record contained no evidence of any standard Highway Patrol policy concerning the opening of closed containers found during inventory searches.\textsuperscript{230}

The lower court, relying on some language in \textit{Colorado v. Bertine},\textsuperscript{231} held that an inventory of closed containers is only permissible where police standards take all discretion away from the officer who conducts the inventory.\textsuperscript{232} In other words, the lower court read \textit{Bertine} as mandating standards that either all containers must be opened in an inventory search, or that none can be.\textsuperscript{233}

The Supreme Court unanimously found that the opening of a locked suitcase could not be justified as an inventory search where the Florida Highway Patrol had no policy whatever concerning the opening of closed containers.\textsuperscript{234} Chief Justice Rehn-
quish, writing for the Court, found the search insufficiently regulated and subject to arbitrariness. On this issue, there could not have been an easier Supreme Court case in the last ten years. In several prior cases, the Court had emphasized that an inventory search could only be permitted if the officer’s discretion were controlled by department guidelines.

The import of Wells is that the Chief Justice went out of his way to take issue with the Florida court’s reading of Bertine as prohibiting officers from exercising any discretion in opening containers. According to Chief Justice Rehnquist, the fourth amendment does allow the officer some limited latitude to decide whether a container may be opened in an inventory search. This discretion can be exercised “in light of the nature of the search and the characteristics of the container itself.” As an example of appropriately limited discretion, the Chief Justice stated that it would be permissible to allow the opening of closed containers when the officer is unable to determine their contents from an exterior inspection. Exercising discretion to open a container in such circumstances is consistent with the three interests supporting the inventory search: 1) preservation of property; 2) protection of officers from false claims; and 3) protection from bodily harm. The Chief Justice concluded that “[t]he allowance of the exercise of judgment based on concerns related to the purposes of an inventory search does not violate the Fourth Amendment.”

This dictum prompted sharp responses in opinions by Justice Brennan (joined by Justice Marshall), Justice Blackmun and Justice Stevens, all of whom concurred in the judgment. These Just-
tices argued that to allow the individual officer any discretion in determining whether a container should be opened would create an unacceptable risk of abuse. Justice Brennan noted that the Ber-
tine Court had allowed the officer some discretion as to whether to impound a car, but no discretion as to whether to open a container therein.\textsuperscript{243} He concluded that “[a]tempting to cast doubt on the vitality of the holding in Bertine in this otherwise easy case is not justified.”\textsuperscript{244}

2. \textit{Implications of Wells}

The dictum in \textit{Wells} does not even rise to the level of misapp-
application of precedent performed by the Burger Court. A strict reading of \textit{Bertine} indicates that the majority did not preclude all
discretion in the opening of containers. The majority recognized the lower court’s finding that the regulations at issue required opening, but the majority did not specifically hold that opening the containers was a constitutional requirement.\textsuperscript{245} Certainly, the example of permissible discretion given in \textit{Wells} is tame and is more protective of privacy interests than an “all-or-nothing” re-
quirement. Allowing the officer discretion to open containers whose contents are not evident from an exterior inspection, leaving other containers closed, creates little risk of abuse.

As the United States Court of Appeals for the Fifth Circuit pointed out in \textit{United States v. Judge},\textsuperscript{246} it is impossible to eliminate all exercise of discretion in an inventory search, given the variety and variability of issues that arise. For example, even with an “all-or-nothing” approach to opening containers, discretion would often have to be exercised to determine whether a certain item is in fact a container. The rule of thumb used in \textit{Judge}, distinguishing between “administrative” discretion which is permissible, and “evidentiary” discretion, which is not, is still subject to abuse, because decisions can be justified as administrative which in fact are evidentiary.\textsuperscript{247}

Imposing rigid controls on discretion, which will be ineffective at any rate, makes little sense. Police regulations can be somewhat flexible as to opening closed containers after \textit{Wells}, as

\textsuperscript{243} Id. at 1636 (Brennan, J., concurring in judgment).
\textsuperscript{244} Id. at 1638 (Brennan, J., concurring in judgment).
\textsuperscript{246} 864 F.2d 1144, 1145 (5th Cir. 1989), \textit{cert. denied}, 110 S. Ct. 1946 (1990).
\textsuperscript{247} Id. at 1147.
they no doubt were before Wells. A mandatory opening rule is certainly sufficient, but not required. An example of a policy that will probably pass constitutional muster after Wells is one which allows the opening of containers when they appear to contain valuable personal property. This implicates one of the concerns that supports an inventory search, and setting forth a factual standard for determining whether valuables appear to be present seems a sufficient control upon discretion.

G. Warrantless Arrest of an Overnight Guest is Illegal in Absence of Exigent Circumstances

1. Discussion of Minnesota v. Olson

Minnesota v. Olson248 deals with a previously unresolved issue of standing—whether an overnight guest has standing to object to his own warrantless arrest. The Court's mechanistic resolution of the issue is indicative of its status as a jurisprudential prisoner.

Probable cause existed to arrest Olson. There was also probable cause to believe that Olson was located in the home of a friend where he had been staying. Without a warrant, the police entered the friend's home, found Olson and arrested him. Less than an hour after his arrest, Olson made an inculpatory statement.249 In Payton v. New York,250 the Court held that a warrantless arrest of a person in his home was illegal in the absence of exigent circumstances. It would appear, therefore, that if Olson were "home" at the time of his arrest, the arrest would have been illegal; but if he was not arrested in his "home" then the arrest would appear legal.251

Justice White, writing for seven members of the Court in Olson, held that Payton required an arrest warrant to arrest an overnight guest in the home of a third person.252 Chief Justice Rehnquist and Justice Blackmun dissented without opinion.253

249. Id. at 1686-87.
251. One's own body is not the fruit of a poisonous arrest. See United States v. Crews, 445 U.S. 463 (1980) (illegal arrest does not prevent prosecution). However, the Minnesota Supreme Court in Olson found that the inculpatory statement made by the defendant after his Payton defective arrest was poisonous fruit. Olson, 110 S. Ct. at 1687. Even assuming that Payton is violated, this argument that a confession can be the fruit of a warrantless in-home arrest can no longer be advanced if the confession is made outside the home. For a discussion of this argument, see infra note 295 and accompanying text.
252. Olson, 110 S. Ct. at 1687.
253. Id. at 1686.
Unaccountably, the Court approached the case as if it were one of standing. The Burger Court had revised the all but automatic standing rules of the Warren Court and had held that standing to assert a fourth amendment violation would be determined by substantive fourth amendment principles. The test used by the Burger Court was whether the defendant had a reasonable expectation of privacy that had been invaded. 254 Thus, the test for whether an intrusion is a search, derived from the benchmark case of Katz v. United States, 255 is also the test for whether defendant has standing to assert a violation of the fourth amendment.

Because the Court in Olson treated the case as one of standing, the question for the Court was whether Olson had a legitimate expectation of privacy in the third party’s home. Justice White stressed that a person’s “status as an overnight guest is alone enough to show that he had an expectation of privacy in the home that society is prepared to recognize as reasonable.” 256  The Court noted that overnight guests are unlikely to be confined to certain areas of the house, and are likely to have a measure of control over the premises. 257  The Court found that the privacy interest of an overnight guest was at least as great as Katz had in a public telephone booth, when he made calls that were protected by the fourth amendment. 258  The Court specifically rejected the state’s argument that a place must be one’s home in order to have a legitimate expectation of privacy there. 259

2. Implications of Olson

Olson shows the peril of a mechanistic application of prece-

254. See, e.g., Rakas v. Illinois, 439 U.S. 128, 143 (1978) (“[C]apacity to claim the protection of the Fourth Amendment depends . . . upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place.” (citing Katz v. United States, 389 U.S. 347, 363 (1967))). The Rakas Court rejected the Warren Court’s view that standing could be found simply by being legitimately at the premises searched. Id. In typical Burger Court fashion, however, the Rakas Court found that the Warren Court precedent did not really provide for standing for all those legitimately present; rather, the facts of the Warren Court cases involved defendants who in fact had a legitimate expectation of privacy in the areas invaded. Id.; see also Jones v. United States, 362 U.S. 257 (1960).


256. Olson, 110 S. Ct. at 1688.

257. Id. at 1689.

258. See id. (citing Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (telephone booth is “a temporarily private place whose momentary occupants’ expectations of freedom from intrusion are recognized as reasonable”).

259. Id.
Prisoners of Their Own Jurisprudence

It is of course true that one can have a legitimate expectation of privacy outside one's own home. But is that the true issue in a case like Olson? The question in Payton was not whether the defendant had an expectation of privacy, but whether he was arrested in his home. If so, an arrest warrant was required. Olson also had a legitimate expectation of privacy in his car, or his office if he had one, but that does not mean that the police needed a warrant to arrest him there. Payton was designed to protect a person's home, not merely an expectation of privacy. The Court in Olson confused the Payton rule with the threshold standing requirements of the fourth amendment. It never considered what the true implications of Payton were, and as a result, the Court never converged the Payton and Rakas lines of authority. Confusion reigns.

For example, let us consider the privacy interests of Olson's friend, the homeowner. It would appear that the premises could not be searched for Olson without a search warrant, following a magistrate's determination of probable cause that Olson could be found there. This is a result of the Burger Court's opinion in Steagald v. United States, which held that a search warrant is required to arrest a visitor in someone else's home. When Olson and Steagald are put together, an anomaly results: Olson provides a right to an arrest warrant reserved for homeowners under Payton, whereas Steagald gives the guest the right to a search warrant because the police are arresting someone besides the homeowner. The homeowner is entitled to greater rights than the arrestee, who must also be at “home” to trigger Payton rights. This confusion occurs because the Court evaluated Olson as a standing case and Steagald as a Payton case.

261. 451 U.S. 204 (1981) (search warrant required for entry into premises of person other than arrestee).
262. See 2 W. LAFAVE, supra note 173, § 6.1, at 566.
263. Another example of the confusion resulting from Olson is the Tenth Circuit opinion in United States v. Jefferson, 925 F.2d 1242 (10th Cir.), cert. denied, 112 S. Ct. 238 (1991). Jefferson argued that he had standing to object to the search of the trunk of a car he was driving. Id. at 1248 n.1. The Court rejected his contention on the ground that the owner of the car was present at the time. Id. at 1249. Jefferson pointed out that the owner of the house was present at the time Olson was arrested. Id. The Court responded, however, that standing issues concerning homes would be treated differently from standing issues in cars. Id. at 1251. Because standing is based upon a reasonable expectation of privacy, the Court reasoned that a home scenario, where there was a greater expectation of privacy, would be more likely to support standing even if the homeowner was present. Id. The problem with this analysis is that while
It has been held that the right to a search warrant under Steagald is personal to the homeowner, and the guest-arrestee has no standing to object to a violation of Steagald. But after Olson, if the overnight guest has an expectation of privacy in the home, it seems anomalous to find standing to object to the lack of an arrest warrant but no standing to object to the lack of a search warrant.

Of course, neither a search nor an arrest warrant is required if there are exigent circumstances. The lower court in Olson found that exigent circumstances did not exist. That court reasoned that Olson was not dangerous, that police squads had surrounded the house, and that it was evident that Olson was not going anywhere. The Supreme Court did not "disturb" the state court's judgment. The Court's decision does not add much, if anything, to the case law on exigent circumstances. However, the offhand resolution of this issue may indicate that the Court is getting away from micromanagement of state court decisions finding illegal searches—at least where the state court uses the proper fourth amendment standards.

H. Confession Made Outside the Home is Not the Fruit of a Payton Violation

1. Discussion of New York v. Harris

The Court considered in New York v. Harris whether a Payton violation rendered a defendant's confession inadmissible. However, the Court held that the confession was admissible because there is a greater expectation of privacy in homes, the degree of privacy reasonably expected depends on whether it is your home or not. The proper distinction between Olson and Jefferson is that Olson really dealt not with standing at all but with the substantive Payton right, which applies only to homeowners. Because that was not the rationale that the Court used in Olson the Jefferson Court was sent off to make meaningless distinctions concerning standing.


265. The Nebraska Supreme Court considered a search warrant under Olson and concluded that an occasional overnight guest who was not present at the time of the search, who kept no clothing or personal belongings in the house searched and who had no key, had not established a privacy interest and, therefore, did not have standing to attack the sufficiency of the search warrant. See Nebraska v. Cortis, 237 Neb. 97, 465 N.W.2d 132 (1991). The Court did not discuss whether the defendant was entitled to the protection of an arrest warrant. Id.

266. State v. Olson, 436 N.W.2d 92 (Minn. 1989).

267. Olson, 110 S. Ct. at 1684.


Prisoners of Their Own Jurisprudence

A violation should result in the exclusion of a confession later obtained outside the home. In Brown v. Illinois, Dunaway v. New York, and Taylor v. Alabama, the Court excluded confessions as the fruits of arrests unsupported by probable cause. In each case, the Court rejected arguments of attenuation on the facts of those cases. In Harris, the Court went back to analyze the underlying rights and policies involved, for a change, and accordingly reached a logically and analytically satisfying result.

In contrast to the prior cases of arrest without probable cause, Harris confessed after an arrest made with probable cause, but without a warrant. Because Harris was in his home, his warrantless arrest violated Payton. The challenged confession was made at the station an hour after the illegal entry into Harris's home. Harris argued that under the previous cases, the confession was not attenuated from the illegal arrest. For example, in Brown, the Court held statements made two hours after an arrest without probable cause were fruit of the poisonous tree, despite the intervening fact of Miranda warnings.

Justice White, writing for five members of the Court, held that a confession made outside the home cannot be the fruit of a Payton violation, and thus Harris's confession was not tainted. The majority reasoned that unlike the prior cases, Harris was not unlawfully in custody when he made the confession. Justice White argued that "the rule in Payton was designed to protect the physical integrity of the home; it was not intended to grant criminal suspects . . . protection for statements made outside their premises where the police have probable cause to arrest the suspect . . . ."

Thus, the violation of Payton constitutes an illegal search of

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270. Id. at 1642. On remand, the Court of Appeals suppressed the confession under the New York State Constitution. See People v. Harris, 77 N.Y.2d 434, 568 N.Y.S.2d 702, 570 N.E.2d 1051 (1991).
274. Taylor, 457 U.S. at 690; Dunaway, 442 U.S. at 217; Brown, 422 U.S. at 602.
275. Harris, 110 S. Ct. at 1642.
277. Harris, 110 S. Ct. at 1643.
278. Brown, 422 U.S. at 604-05.
279. Harris, 110 S. Ct. at 1644-45.
280. Id. at 1644.
281. Id. at 1643.
the home, but not an illegal arrest; and while evidence obtained in the search of the home is subject to exclusion, there is no necessary connection between that search and a subsequent confession outside the home.\textsuperscript{282}

The \textit{Harris} majority further noted that exclusion of the confession was not necessary to serve the deterrent function of the exclusionary rule.\textsuperscript{283} Justice White argued that sufficient deterrence flows from the exclusion of any evidence found in the home during the arrest. The incremental deterrence of excluding a subsequent confession would be minimal because police in this situation have probable cause to arrest outside the home, and “it is doubtful therefore that the desire to secure a statement from a criminal suspect would motivate the police to violate \textit{Payton}.”\textsuperscript{284} The police do not need to violate \textit{Payton} to arrest and interrogate a suspect (thus there is no need for deterrence), whereas they may need to violate \textit{Payton} to obtain evidence in the home that they could not otherwise obtain (thus there is need for deterrence). This one-dimensional view—that sufficient deterrence flows as to one type of evidence, so that another may be admitted—is typical of the Burger and Rehnquist Court’s interpretation of the deterrence basis of the exclusionary rule.\textsuperscript{285}

Justice Marshall, in a dissenting opinion joined by Justices Brennan, Blackmun and Stevens, contended that the rule adopted by the majority would give the police an incentive to violate \textit{Payton}.\textsuperscript{286} He reasoned that the officer would enter illegally to save time, and perhaps exploit the in-home nature of the arrest to rattle the suspect and increase the likelihood of a confession.\textsuperscript{287} Ex-

\textsuperscript{282} Cf. United States v. McCraw, 920 F.2d 224 (4th Cir. 1990). In \textit{McCraw}, a warrantless arrest in a hotel room in violation of \textit{Payton} was followed by incriminating statements and a consent to search, which defendant gave immediately after the arrest while still in the hotel room. \textit{Id.} at 226. Citing \textit{Harris}, the court suppressed the statements and the evidence, stating:

Assuming that the consent to search and hotel room statements were voluntary by fifth amendment standards, the proximity in time and place between the arrest and the search and statements and the absence of intervening circumstances nevertheless require suppression of this evidence to protect the physical integrity of the home and to vindicate the purpose of the fourth amendment.

\textit{Id.} at 230.

\textsuperscript{283} \textit{Harris}, 110 S. Ct. at 1644.

\textsuperscript{284} \textit{Id.}


\textsuperscript{286} \textit{Harris}, 110 S. Ct. at 1651 (Marshall, J., dissenting).

\textsuperscript{287} \textit{Id.} at 1650 (Marshall, J., dissenting).
including evidence found in the house would be no deterrent, because the officer would be no worse off as a result of suppression than if he had waited outside to make the arrest. Justice Marshall’s argument is weakened, however, by the Warren Court’s own justification of the deterrence value of the exclusionary rule: it is not designed to punish the officer, but rather to deprive the government of the benefit of having violated the law. Making the officer and state worse off is inconsistent with the notion that the exclusionary rule is not punitive.

2. Implications of Harris

Harris is one of the few cases of the 1989-90 term in which the Court bothers to analyze the basis of prior precedent. By doing so, the Court leads itself to a reasoned and well-explained result. By reinvestigating Payton, the Court finds that the true concern of that decision is not the arrest itself, but rather the invasion of privacy that occurs when the officer enters without a warrant to make an arrest. Although it is not apparent at first glance, Payton involves an illegal search as opposed to an illegal seizure. Presuming that the later confession is unrelated to the search, the Court’s view of Payton and its ramifications is eminently sound.

The Court’s explanation of Payton may cause lower courts to reach different decisions than they had reached previously in cases where the police coerce suspects to come out of their homes to be arrested. Before Harris, lower courts had found violations of Payton on the ground that the homeowner was disrupted and coerced while inside his home. But because there is no search of the home in such circumstances, Payton no longer appears applicable after Harris. At any rate, even if these outside arrests violate Payton, no evidence obtained pursuant to such arrests will be

288. *See, e.g.*, United States v. Leon, 468 U.S. 897, 953 (1984) (Brennan, J., dissenting) (“The deterrence rationale for the [exclusionary] rule is not designed to be, nor should it be thought of as, a form of ‘punishment.’”).

289. *See generally* Nix v. Williams, 467 U.S. 431 (1984) (exclusionary rule is designed to return parties to status quo ante search; it was not designed to put officers in worse position than if search had never occurred).

290. *See, e.g.*, United States v. Maez, 872 F.2d 1444 (10th Cir. 1989) (finding Payton applicable because “the important point is that in cases of . . . coercion to leave the home . . . the privacy of the home is effectively invaded”); United States v. Al-Azzawy, 784 F.2d 890 (9th Cir. 1985) (Payton held applicable where suspect was forced from premises by use of guns and bullhorn; court reasoned that location of arrestee, not officer, is crucial under Payton), cert. denied, 976 U.S. 1144 (1986).
excluded after *Harris*, because by definition the arrestee is now outside the house.

*Harris* does not in any way question the fruits analysis in *Brown*, *Dunaway* and *Taylor*. In those cases, the arrest was itself illegal because it was made without probable cause. *Harris* merely makes the point that a *Payton* violation does not even result in an illegal arrest.

It is important to remember that in *Harris* the *Payton* violation turned up no evidence. Where the *Payton* violation does produce evidence and is followed by a stationhouse confession influenced by the seizure of the tainted evidence, the fruit of the poisonous tree doctrine is applicable. There is thus a distinction between a confession which is the product of the *Payton* arrest and one which is the product of the *Payton* search. For example, in *United States v. Beltran*,291 police arrested Beltran in her home without a warrant. During the arrest, the police saw cocaine in plain view. They took the defendant to the stationhouse where she made incriminating statements. The United States Court of Appeals for the First Circuit stated that “whether, or the extent to which *Harris* applies may turn on questions of fact, such as when the police seized the items in question or what motivated Ms. Beltran’s statements” and remanded the case to the district court for a factual determination.292 Thus, if Beltran was rattled into a confession not by the arrest but by the fact that the police saw the cocaine, *Harris* would not apply.

I. *Impeachment Exception to the Exclusionary Rule Does Not Apply to Impeachment of Defendant’s Witnesses*

1. *Discussion of James v. Illinois*

*James v. Illinois*293 is a divergence from the Burger-Rehnquist Courts’ trend of expanding exceptions to the exclusionary rule. To reverse this trend, however, the majority tried to extricate itself from the corner in which prior precedent had painted it. While the Court may be said to have made the best of a bad situation, it cannot be said that the majority’s opinion is a satisfying and honest analysis of precedent.

*James* told police officers that he had changed his hair color and style on the day after taking part in a shooting.294 The trial

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291. 917 F.2d 641, 645 (1st Cir. 1990).
292. *Id.*
294. *Id.* at 650.
court suppressed this statement because it was the fruit of an arrest without probable cause.\textsuperscript{295} Prosecution witnesses at trial identified James, even though they admitted that his hair color at trial was different from that of the perpetrator at the time of the shooting. James called a family friend, who testified that just before the shooting, James’ hair color and style was the same as it was at trial. The trial court, relying on the impeachment exception to the exclusionary rule, allowed the prosecution to introduce James’ suppressed statement to impeach the credibility of the defense witness.\textsuperscript{296}

The Supreme Court reversed in an opinion by Justice Brennan for five members of the Court. The majority refused to extend the impeachment exception to the exclusionary rule to allow impeachment of defendant’s witnesses with illegally obtained evidence.\textsuperscript{297}

Justice Brennan found a compelling distinction between impeachment of a defendant’s own testimony and that of defense witnesses. Despite his prior dissents on the impeachment exception, Justice Brennan argued that as applied to the defendant, the impeachment exception served salutary purposes: it “penalizes defendants for committing perjury,” and yet “leaves defendants free to testify truthfully on their own behalf.”\textsuperscript{298} According to the Court, the impeachment exception keeps perjury out and allows truthful testimony in, thus furthering in both ways the search for truth.

In contrast, expanding the impeachment exception to encompass the testimony of all defense witnesses would result in the loss of truthful testimony. Justice Brennan argued in James that the fear of impeachment of one’s witnesses would likely chill some defendants from presenting the testimony of others.\textsuperscript{299} Unlike the defendants who could carefully tailor truthful testimony to avoid reference to illegally obtained evidence, the defendant’s witnesses could not be so easily controlled.\textsuperscript{300} Justice Brennan

\textsuperscript{295} Such a ruling is still viable after Harris, which found that a confession outside the home could not be the fruit of a Payton violation, but could still be the fruit of an arrest without probable cause. Harris, 110 S. Ct. at 1644.

\textsuperscript{296} James, 110 S. Ct. at 650-51.

\textsuperscript{297} Id. at 656. The James majority refused to extend the rule because it would not further the truthseeking value of the proceedings and would appreciably undermine the deterrent effect of the rule. Id.

\textsuperscript{298} Id. at 652.

\textsuperscript{299} Id. at 653.

\textsuperscript{300} “Defendants might reasonably fear that one or more of their witnesses, in a position to offer truthful and favorable testimony, would also make
concluded that "an expanded impeachment exception likely would chill some defendants from calling witnesses who would otherwise offer probative evidence," creating a deleterious effect on the search for truth.301

Nor, according to the majority, was the impeachment exception necessary in these circumstances to deter defense witnesses from offering perjurious testimony.302 Unlike the defendant, defense witnesses are sufficiently deterred by the threat of a perjury prosecution.

The cost-benefit analysis of the impeachment exception is based heavily on the principle that sufficient deterrence of police misconduct flows from excluding illegally obtained evidence from the case-in-chief.303 Justice Brennan concluded that such deterrent effect is much more limited if the evidence could be used to impeach not only the defendant but the defendant's witnesses.304 This is because the value of the illegally obtained evidence would be significantly greater. It could be used not just to deter perjury, but also to deter defendants from calling witnesses at all.305

Justice Kennedy, in a dissenting opinion joined by Chief Justice Rehnquist and Justices O'Connor and Scalia, complained that the majority had granted the defendant "broad immunity to introduce whatever false testimony it can produce from the mouth of a friendly witness."306 The dissent found no legitimate distinction, in terms of the policies of the exclusionary rule, between impeachment of the defendant and impeachment of defense witnesses.

Justice Kennedy was particularly concerned with the costs to the truthseeking process if defense witnesses could testify to pro-

some statement in sufficient tension with the tainted evidence to allow the prosecutor to introduce that evidence for impeachment." Id.

301. Id. at 654.
302. Id. at 653.
304. James, 110 S. Ct. at 655.
305. Justice Brennan wrote:

[Expanding the impeachment exception to all defense witnesses would significantly enhance the expected value to the prosecution of illegally obtained evidence. . . . The prosecutor's access to impeachment evidence would not just deter perjury; it would also deter defendants from calling witnesses in the first place, thereby keeping from the jury much probative exculpatory evidence.

Id. at 654-55.
306. James, 110 S. Ct. at 657 (Kennedy, J., dissenting).
bative evidence without fear of impeachment. He argued that impeachment is even more vital for attacking untruthful testimony of a defense witness than it is for attacking the defendant: the defendant’s self-serving testimony will be given limited weight by the jury anyway, whereas a witness who is apparently unbiased will not be self-impeaching. Justice Kennedy also noted that the state would suffer a negative impact from the lack of impeachment evidence because the jurors would draw a negative inference about the prosecution’s case due to the absence of impeachment that would otherwise be expected.

Justice Kennedy advocated a rule that illegally obtained evidence could be used to impeach defense witnesses, but only where there was a direct conflict between that evidence and the witness’ testimony. According to the dissent, the requirement of a direct conflict would alleviate the majority’s concern that the defendant would be reluctant to call truthful witnesses, for fear they would be impeached in virtually all cases. There is much to be said for Justice Kennedy’s argument that the majority’s reference to testimony “in tension” with illegally obtained evidence was an overstatement of the threat of impeachment.

2. Implications from James

The flaw in the majority’s reasoning is its assumption that the defendant can tailor his testimony to avoid impeachment while the defendant’s witnesses cannot. After United States v. Havens, it is virtually impossible for the defendant to avoid impeachment

307. Id. at 658 (Kennedy, J., dissenting). Justice Kennedy opined that “[a] more cautious course is available, one that retains Fourth Amendment protections and yet safeguards the truth-seeking function of the criminal trial.” Id. at 657 (Kennedy, J., dissenting).

308. Justice Kennedy reasoned:

The potential for harm to the truth-seeking process resulting from the majority’s new rule in fact will be greater than if the defendant himself had testified. It is natural for jurors to be skeptical of self-serving testimony by the defendant. Testimony by a witness said to be independent has the greater potential to deceive. And if a defense witness can present false testimony with impunity, the jurors may find the rest of the prosecution’s case suspect, for ineffective and artificial cross-examination will be viewed as a real weakness in the State’s case. Jurors will assume that if the prosecution had any proof the statement was false, it would make the proof known. . . . The State must . . . suffer the introduction of false testimony and appear to bolster the falsehood by its own silence.

Id. at 658 (Kennedy, J., dissenting).

309. Id. at 660 (Kennedy, J., dissenting).

310. 446 U.S. 620 (1980).
with illegally obtained evidence. *Havens* allowed contradiction on cross-examination even though the direct testimony was carefully tailored to avoid any reference to the tainted evidence. So the Court in *James* intentionally underestimates the effect on defendants of the current impeachment rule, in order to provide a false contrast to what would basically be the same effect if the evidence could be used to impeach defense witnesses. This can hardly be viewed as a head-on, direct critique of precedent. Indeed, the majority opinion is disingenuous in the extreme. Unlike the other exclusionary rule case from the term, *New York v. Harris*, the Court's analysis of prior precedent in *James* is dishonest and unpersuasive; as a result, *James* is an unreasoned exception to an unreasoned exception.

While *James* concerns a fourth amendment violation, its principles are equally applicable to violations of *Miranda*. *Miranda* defective confessions can be used to impeach the defendant, but not defense witnesses. The Court has used fourth amendment and *Miranda* cases interchangeably in determining the scope of the impeachment exception. For example, *Harris v. New York* is a *Miranda* case while *Havens* is a fourth amendment case.

J. The Fourth Amendment Does Not Apply to the Search of an Alien's Property in a Foreign Country

1. Discussion of United States v. Verdugo-Urquidez

One case, *United States v. Verdugo-Urquidez*, which did represent something of a doctrinal breakthrough concerned the fourth amendment rights of non-resident aliens as to searches and seizures conducted outside the United States. Verdugo-Urquidez was a Mexican citizen and resident who was apprehended by Mexican police and transported to the United States for trial on drug charges. After defendant's arrest, United States law enforcement officials, working with Mexican officials, conducted warrantless searches of the defendant's residences in Mexico. The

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314. *Havens*, 446 U.S. at 628 (illegally seized evidence admitted for purpose of impeaching statements made by defendant on cross-examination did not violate his constitutional rights).
316. *Id.* at 1059.
317. *Id.* United States Drug Enforcement Agency (DEA) agents conducted
district court held that the searches violated the fourth amendment; the United States Court of Appeals for the Ninth Circuit affirmed.\textsuperscript{318}

In an opinion written by Chief Justice Rehnquist, the Supreme Court held that the fourth amendment does not apply to a search of property owned by a non-resident alien and located in a foreign country.\textsuperscript{319} The Court reasoned that the fourth amendment’s reference to “the people,” as opposed to a particular person, was a term of art intended to refer only to a class of persons “who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.”\textsuperscript{320}

The Court stated that because the defendant was not voluntarily within the United States and was not an American citizen, he lacked sufficient connection with the United States to be one of “the people” protected by the fourth amendment.\textsuperscript{321} Upon a brief examination of the history of the Amendment, the Court found that the purpose of the fourth amendment was to “protect the people of the United States against arbitrary action by their own [g]overnment,” rather than limiting government actions against aliens outside the United States.\textsuperscript{322}

Chief Justice Rehnquist distinguished \textit{Verdugo-Urquidez} from \textit{Reid v. Covert}.\textsuperscript{323} In \textit{Reid}, the Court held that it was unconstitutional for military authorities to try the wives of American servicemen living abroad.\textsuperscript{324} The \textit{Reid} Court further stated that the Constitution protects citizens whether or not they reside in the

\textsuperscript{318} United States v. Verdugo-Urquidez, 856 F.2d 1214 (9th Cir. 1988).

\textsuperscript{319} \textit{Verdugo-Urquidez}, 110 S. Ct. at 1059.

\textsuperscript{320} \textit{Id.} at 1061. The Court examined the use of the phrase “the people” elsewhere in the constitution—the preamble, second, ninth and tenth amendments. The Chief Justice reasoned that “the people” appeared to refer to people of the United States. \textit{Id.} The Court contrasted this phrase with the words “person” and “accused,” as used in the fifth and sixth amendments. \textit{Id.}

\textsuperscript{321} \textit{Id.} at 1066.

\textsuperscript{322} \textit{Id.} at 1061.

\textsuperscript{323} 354 U.S. 1 (1957).

\textsuperscript{324} \textit{Id.} at 5. Both Mrs. Clarice Covert and Mrs. Dorothy Smith had killed their husbands who were members of the United States Armed Forces on overseas bases. \textit{Id.} at 3-4. Both were court-martialed on murder charges and found guilty. \textit{Id.} Because the women were civilians, the Court ruled that neither could be tried by military authorities and released them from custody. \textit{Id.} at 41.
United States. The Court in *Verdugo-Urquidez* interpreted *Reid* narrowly, limiting its protection to United States citizens residing abroad.

The Court listed a series of cases relied on by the defendant in which the Court provided constitutional protection to aliens residing in the United States. Chief Justice Rehnquist reasoned that in those cases constitutional protection was premised upon a voluntary and significant connection of the alien with the United States. By contrast, *Verdugo-Urquidez*’s connection with the United States (a few days of involuntary presence) was not sufficient to establish a substantial connection and thus warrant his treatment as one of “the people.” The Court found it unnecessary to decide whether a long-term prison sentence—involuntary but substantial—would suffice to establish a substantial connection with the United States.

More broadly, the Court even left open the question of whether illegal aliens residing in the United States were entitled to fourth amendment protection as part of “the people.” Chief Justice Rehnquist rejected the argument that the issue had already been decided by *Immigration and Naturalization Service v. Lopez-Mendoza*. In *Lopez-Mendoza*, the Court held that the exclusionary rule was inapplicable to deportation proceedings. However, *Lopez-Mendoza* was decided pursuant to a limited grant of certiorari, and the Chief Justice recognized this fact in *Verdugo-Urquidez*. Thus, the *Lopez-Mendoza* Court assumed resident ille-

325. *Id.* at 6.
327. *Id.* at 1064; see, e.g., *Plyer v. Doe*, 457 U.S. 202 (1982) (denying children of illegal aliens public school education was violative of equal protection clause).
329. *Id.* Compare *Verdugo-Urquidez* with *Plyer*, discussed at supra note 327.
330. *Verdugo-Urquidez*, 110 S. Ct. at 1064. For a discussion of the lack of clarity of the “substantial connection” standard established by the Court in *Verdugo-Urquidez*, see *Recent Developments, Foreigners, Foreign Property, and the Fourth Amendment: United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990), 13 *Harv. J.L. & Pub. Pol’y* 1037, 1040-41 (1990); see also *Comment, United States v. Verdugo-Urquidez: Restricting the Borders of the Fourth Amendment*, 14 *Fordham Int’l L.J.* 267, 303 (1991) (pointing out inconsistency between Court’s implication that “an alien who had developed sufficient connection with the United States would be protected by the fourth amendment regardless of the location of the search” with Court’s emphasis on location of search and difficulties attendant on carrying out fourth amendment’s requirements during law enforcement activities abroad).
332. *Id.* at 1034.
gal aliens were among "the people" entitled to fourth amendment protection, without explicitly deciding that issue because it was not before the Court.334

Finally, the Chief Justice relied upon policy considerations to limit the application of the fourth amendment. The Court asserted that if the fourth amendment applied to all foreign searches and seizures, it would have a pernicious effect on foreign policy and military operations of the United States.335 The Chief Justice imagined a parade of horribles where the magistrate would be determining whether the invasion of Panama was supported by probable cause.336 A possible response to this argument is that most, if not all, foreign policy needs could be handled by excusing the warrants and probable cause under the reasonableness clause of the fourth amendment. Foreign policy needs would clearly constitute special needs beyond mere law enforcement.337 and such needs would undoubtedly be strong enough to outweigh a personal interest in privacy or security so as to justify warrantless intrusions.

Justice Stevens concurred in the judgment. He argued that the fourth amendment was applicable to the search, but because the warrantless search of Verdugo-Urquidez's property was reasonable under the circumstances, the evidence obtained from the search should be admissible.338 He reasoned that a warrant issued by a United States magistrate would have no effect in a foreign country.339 In essence, Justice Stevens' view is that the reasonableness limitation applies to foreign searches conducted by United States officials. The reasonableness standards utilized must take into account that United States courts lack authority over how the search is conducted.

334. Id.
335. Id.
336. See id. The Chief Justice illustrated the consequences of allowing the fourth amendment to apply to foreign searches and seizures.
Application of the fourth amendment to those circumstances could significantly disrupt the ability of the political branches to respond to foreign situations involving our national interest. . . . [T]he Court of Appeals' global view of its applicability would plunge [the government] into a sea of uncertainty as to what might be reasonable in the way of searches and seizures conducted abroad.

Id. at 1065-66.
338. Verdugo-Urquidez, 110 S. Ct. at 1068 (Stevens, J., concurring).
339. Id. (Stevens, J., concurring).
Justice Kennedy also wrote a concurring opinion. Although he joined the majority opinion, he disagreed with the majority's reliance on the term "the people" as a qualifying term, viewing it instead as language intended to underscore the fourth amendment right. Justice Kennedy also found it anomalous and impractical to apply the fourth amendment warrant requirement to a search of an alien's residence in a foreign country. As reasons why a warrant requirement would be impracticable, Justice Kennedy noted the absence of local judges or magistrates, the differing conceptions of reasonableness and privacy that may exist in a foreign country and the necessity to cooperate with foreign officials.

Justice Brennan, joined by Justice Marshall, dissented. He argued that it was unfair for the federal government to require aliens outside the country to abide by United States laws when the government need not obey its own laws in the course of investigating the very extraterritorial activity that it has criminalized. According to Justice Brennan, "the Fourth Amendment is an unavoidable correlative of the Government's power to enforce the criminal law."

Justice Brennan further argued that the term "the people" was not intended to qualify the class of people protected by the fourth amendment. If the drafters of the fourth amendment wished to qualify its protection, Justice Brennan contended, they could have used more precise terms in the language of the amendment, such as "citizens" or "residents."

Justice Brennan contended that the majority's position that the fourth amendment protects only certain groups was inconsistent with the goal of the Bill of Rights which is to limit how the government may act, rather than to determine against whom such actions can be taken. According to Justice Brennan, the term

340. Id. at 1067 (Kennedy, J., concurring). "Given the history of our Nation's concern over warrantless and unreasonable searches, explicit recognition of 'the right of the people' to Fourth Amendment protection may be interpreted to underscore the importance of the right, rather than to restrict the category of persons who may assert it." Id. (Kennedy, J., concurring).
341. Id. at 1068 (Kennedy, J., concurring).
342. Id. (Brennan, J., dissenting).
343. Id. at 1070 (Brennan, J., dissenting).
344. Id. at 1073 (Brennan, J., dissenting).
345. Id. (Brennan, J., dissenting).
346. Id. (Brennan, J., dissenting). The Bill of Rights, was not intended to "create" new rights; it was designed by the Framers to prevent the government from infringing pre-existing rights. Id. (Brennan, J., dissenting); see also U.S. Const. amend. IX.
“the people” under the fourth amendment includes everyone to whom United States governmental power extends. Justice Brennan concluded that an alien defendant subjected to criminal prosecution in the United States clearly is one of the governed. The government treats the alien as a member of the community by prosecuting him.

Justice Blackmun also dissented. He agreed with the government’s argument that the warrant clause is inapplicable to a foreign search since United States magistrates lack the power to authorize a search. However, Justice Blackmun contended that the probable cause requirement still applied to such a search, and that the case should be remanded for a determination of probable cause.

2. Implications of Verdugo-Urquidez

The majority’s broad holding in Verdugo-Urquidez, is notable because it is relatively unencumbered by Warren Court precedent. In some areas, such as probable cause requirements and exceptions to the warrant clause, the Burger-Rehnquist Court has been unable to break free from the constructs established by the Warren Court, and has resorted to shifts in emphasis rather than changes in structure. In other areas, the Burger-Rehnquist Court has been able to limit fourth amendment protection by taking advantage of certain Warren Court cases which left considerable room for further limitation of personal rights. The facts of Verdugo-Urquidez provided a rare opportunity for the Rehnquist Court to make its mark on virgin constitutional territory. How-

347. Verdugo-Urquidez, 110 S. Ct. at 1072 (Brennan, J., dissenting).
348. Id. at 1071 (Brennan, J., dissenting). Justice Brennan based this conclusion on notions of “mutuality” between nations. Id. (Brennan, J., dissenting).
349. Id. at 1078 (Blackmun, J., dissenting).
350. Id. (Blackmun, J., dissenting).
351. See, e.g., Alabama v. White, 110 S. Ct. 2412 (1990) (Court rejected Warren Court’s strict adherence to two-pronged test of evaluating informant’s tips, but retained structure of that test). For a general discussion of the difference in treatment of constitutional criminal procedure between the Warren Court and the Burger Court, see Saltzburg, supra note 1.
352. For example, in Terry v. Ohio, 392 U.S. 1 (1968), the Court permitted stops and frisks on the basis of reasonable suspicion. Id. at 20. This decision unlocked the reasonableness clause of the fourth amendment, giving the Burger and Rehnquist Courts a virtual invitation to dispense with the probable cause requirement in a wide variety of circumstances. For a discussion of the Court’s treatment of Terry, see supra note 21 and accompanying text. For a general discussion of Terry, see Sundby, A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry, 72 MINN. L. REV. 383 (1988).
ever one feels about the result, it is clear that the Court made the most of its opportunity.

Justice Kennedy explicitly joined the majority opinion, even though in a concurring opinion he rejected the linchpin of the majority’s analysis: “the people” who are entitled to fourth amendment protection do not include non-resident aliens.353 Despite this apparent inconsistency, his concurrence made a majority of the Court and determined that the fourth amendment would be completely inapplicable to a foreign search of a non-resident alien or his property.354 As a result, the “alternative compromise” view embraced by Justice Stevens in his concurring opinion has been rejected.355

In Verdugo-Urquidez, the Court refused to be contained by its previous reasonableness methodology; instead, it pushed more aggressively toward a doctrinal innovation which renders the fourth amendment completely inapplicable. Moreover, the Court’s break from standard reasonableness balancing was accomplished by reference to the text of the fourth amendment itself. The Court’s reversion to text is rather innovative because the Court had in the past, especially in the Warren years, eschewed a textual approach to the fourth amendment.356 Reversion to text of the fourth amendment could be an important doctrinal development because the reasonableness clause would be affirmatively held to predominate over the warrant clause so that warrantless searches could no longer be presumed unreasonable. The warrant clause would come into play only when a warrant is sought to justify government action.357 It remains to be

353. Verdugo-Urquidez, 110 S. Ct. at 1067 (Kennedy, J., concurring).

354. Id. at 1059. Note that while Justice Kennedy appeared to disagree with the majority’s analysis in his concurring opinion, he specifically joined the majority opinion and did not merely concur in the judgment. Id. at 1066 (Kennedy, J., concurring). Consequently one commentator’s characterization of the Chief Justice’s opinion as a “plurality” opinion is incorrect. See Comment, supra note 330, at 303. Justices White, O’Connor, and Scalia also joined in the majority opinion. Verdugo-Urquidez, 110 S. Ct. at 1059.

355. Verdugo-Urquidez, 110 S. Ct. at 1068 (Stevens, J., concurring in judgment). The “alternative compromise” would make the reasonableness standard in the fourth amendment applicable to foreign searches and seizures. Id.

356. See Katz v. United States, 389 U.S. 347 (1967) (applying non-textual approach to determine threshold question of fourth amendment application). The Burger Court had once reverted to a textual approach to hold that a search of open fields was not covered by the fourth amendment. See Oliver v. United States, 466 U.S. 170 (1984) (open field is neither person, house, paper nor effect).

357. See generally T. Taylor, supra note 9, at 23-24 (suggesting that the
seen, however, whether the majority opinion is a step in a new doctrinal development or a one-time break from the past.

In Verdugo-Urquidez, the Court specifically refused to decide whether an illegal alien who lived in the United States would be one of "the people" protected by the fourth amendment. Presumably, however, the fourth amendment would apply, because an illegal alien living in the United States would have the required "connection" with this country to qualify as one of "the people." Five Justices, in various opinions in Verdugo-Urquidez, indicated that they would hold the fourth amendment applicable to searches of illegal aliens conducted within the United States. However, two of those Justices have now left the Court.

The majority distinguished the fourth amendment from other constitutional protections such as the fifth amendment and the due process clause. These protections are not violated until evidence is introduced at trial. In contrast, a fourth amendment violation is complete at the time of the intrusion. Moreover, the fourth amendment contains a qualifying term—"the people"—which is not found in these other amendments.

It follows that if the government officials in Verdugo-Urquidez had coerced a confession on foreign soil, its admission would have violated the due process and fifth amendment rights of Verdugo-Urquidez at his trial in the United States. It also follows that if the government officials conducted a foreign search or seizure that "shocked the judicial conscience," the evidence obtained could be excluded from a United States trial under the due

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359. Id. at 1068 (Stevens, J., concurring in judgment); id. at 1067-68 (Kennedy, J., concurring); id. at 1070 (Brennan, J., dissenting); id. at 1078 (Blackmun, J., dissenting). See generally Note, Supreme Court Review: Fourth Amendment—Search and Seizure of Property Abroad: Erosion of the Rights of Aliens, 81 J. CRIM. L. & CRIMINOLOGY 779, 794 (1991) (Court erred in applying "substantial connection" test when such test not prescribed by fourth amendment and when incorrectly applying test created).

360. Verdugo-Urquidez, 110 S. Ct. at 1060.

361. See generally Saltzburg, The Reach of the Bill of Rights Beyond the Terra Firma of the United States, 20 VA. J. INT'L L. 741 (1980). Professor Saltzburg asserts that constitutional protection attaches "wherever U.S. officials are responsible for governmental conduct outside the territorial limits of the United States." Id. at 741-42. Therefore, when U.S. officials are working in conjunction with foreign law enforcement officials to conduct a search of an alien in a foreign country, they should request that the search be conducted in such a manner so as to comply with the United States Constitution. Id. at 771.
process clause.  

Recently, the United States Court of Appeals for the Ninth Circuit relied on Verdugo-Urquidez to hold that the fourth amendment does not apply to searches and seizures of non-resident aliens and their vessels on the high seas. While Verdugo-Urquidez dealt with foreign soil, the court argued that its holding should be equally applicable to water. The fact that a crew member is American does not prevent the search, because the crew member has no standing concerning most areas of the boat which are searched such as the cargo hold of the ship.

III. Fifth Amendment Cases

A. Production of a Child in Child-Protective Proceedings and the Required Records Exception

1. Discussion of Baltimore City Department of Social Services v. Bouknight

In Baltimore City Department of Social Services v. Bouknight, the Baltimore City Department of Social Services obtained a court order removing Maurice Bouknight from his mother's control because of suspected child abuse. The Department obtained a further order declaring Maurice to be a "child in need of assistance" thereby placing him under the jurisdiction of the Department. Under extensive conditions imposed by a protective

362. See Rochin v. California, 342 U.S. 165 (1952) (conviction reversed because methods used to obtain evidence violated due process); United States v. Rose, 570 F.2d 1558 (9th Cir. 1978) (evidence obtained in foreign search may be excluded if court's conscience is shocked); see also United States v. Van Sichem, No. 89-813 (S.D.N.Y. Sept. 26, 1990) (1990 U.S. Dist. LEXIS 12597) (evidence seized abroad by Dutch officials in search of apartment of Dutch national admissible under Verdugo-Urquidez; because defendant stated no factual basis for his claim that circumstances of search "shocked the conscience," there was no violation of fifth amendment).


364. Id. The analysis and language adopted by the Court in Verdugo-Urquidez did not favor creating an exception for searches on the high seas.

365. See United States v. Akins, 912 F.2d 285, 289 (9th Cir. 1990) (finding that "it [is] well settled that the crew has no legitimate expectation of privacy in the cargo hold of a vessel" (quoting United States v. Peterson, 812 F.2d 486, 494 (9th Cir. 1987)).


367. Id. at 903. Evidence established that Maurice had been physically abused by his mother when he was as young as three months old and that this severe physical abuse had resulted in several broken bones and fractures. Id.

368. Id.
order, Maurice was then returned to his mother. Bouknight did not comply with those conditions, and the Juvenile Court granted the Department’s petition again to remove Maurice from his mother’s control. Ms. Bouknight failed to produce Maurice; Department officials feared that he might be dead.

The case was referred to the police homicide division. The Juvenile Court directed that Bouknight be held in contempt for failing to produce Maurice. In so doing, the Juvenile Court rejected Bouknight’s argument that the fifth amendment protected her from any incrimination that might result from her act of producing her son.

Justice O’Connor wrote the majority opinion for seven members of the Court. The Court’s analysis was structured as alternative holdings, relying on two separate lines of doctrine: the collective entity doctrine and the required records exception. As a result, the Bouknight Court found the fifth amendment inapplicable to the act of producing Maurice.

The majority in Bouknight assumed, without deciding, that Bouknight’s act of producing her son could be potentially incriminating because it would impliedly communicate her control over Maurice at the moment of production. The fact that Maurice may have been injured at the time of production could also have

369. Id. Bouknight was permitted to continue as custodian of the child if she cooperated with the Baltimore Department of Social Services, underwent parental training programs and refrained from punishing Maurice. Id.

370. Id. The petition requested that Maurice be placed in foster care after he was removed from his mother’s control. Id.

371. Id. at 904.

372. Id. The case was referred to the Baltimore police homicide division after Baltimore City Department of Social Services filed a missing persons report following findings by the Department that relatives and friends of Bouknight had not recently seen Maurice alive. Id.

373. Id.

374. Id.

375. Id. at 903.

376. See, e.g., Braswell v. United States, 487 U.S. 99, 100 (1988) (corporate agent not protected from producing corporate records even though production may incriminate him personally). The collective entity rule was established in Hale v. Henkel, 201 U.S. 43 (1906). Under the rule, business entities may not claim protection under the fifth amendment when required to produce records. Id. at 74; see also United States v. White, 322 U.S. 694 (1944) (officer of unincorporated labor union has no right under fifth amendment to refuse production of records on ground that they could incriminate union or himself individually).

377. See, e.g., Shapiro v. United States, 335 U.S. 1, 17 (1948) (fifth amendment inapplicable when government requires records to be kept pursuant to valid regulatory interest).

378. Bouknight, 110 S. Ct. at 905.
been incriminating, but was not in itself testimonial. The Court had established an analogous rule for documents in Fisher v. United States. Fisher provides that the contents of documents which pre-date compulsion are not protected, because there is nothing testimonial about them at the time of compulsion. However, the act of producing documents was deemed testimonial in Doe v. United States because the act of production the citizen was asserting existence, control and authentication. Where any one of these three assertions is incriminating, the fifth amendment protects against a compelled act of production.

In Bouknight, the act of producing Maurice was testimonial as to existence ("Maurice exists"), control ("I produced him therefore I control him"), and authentication ("this is the person you compelled me to produce"). Testimony as to Maurice’s existence was clearly not incriminating because there was no dispute as to whether Maurice ever existed. His existence was a foregone conclusion. Likewise, the government did not need the act of production to show that the person produced would have been Maurice. Therefore, authentication by the act of production is not incriminating.

On the other hand, admitting control at the time of production would clearly have been an assertion that could have incriminated Bouknight, depending on Maurice’s condition at that point. The Bouknight majority did not decide this issue, despite the apparent applicability of the fifth amendment, as well as the need to provide guidance to the lower courts on which aspects of an act of production could be incriminating. Justice O’Connor concluded that Bouknight could not invoke the privilege at any

379. See Doe v. United States, 487 U.S. 201 (1988) (compelling execution of consent directive does not violate fifth amendment privilege against self-incrimination because execution has no testimonial significance).
381. See id. at 409-10.
383. See id. at 209.
384. Id.
385. Bouknight, 110 S. Ct. at 905.
386. Id.; see also Fisher v. United States, 425 U.S. 391, 411 (1976). When testimony attendant to the act of production is cumulative or obvious, it is a "foregone conclusion." Consequently, there is no incrimination and the fifth amendment does not apply. Fisher, 425 U.S. at 411.
rate "because she has assumed custodial duties related to production and because production is required as part of a noncriminal regulatory regime." Thus, the majority conflated two separate lines of fifth amendment doctrine in order to resolve the case.

Regarding the collective entity rule, Justice O'Connor found an analogy to the act of producing corporate records held permissible in Braswell v. United States. In that case, the Court reasoned that because a corporate agent was compelled to turn over records in his representative capacity, the testimonial act of production was a corporate act and not a personal act, therefore, it was inconsistent to invoke a personal privilege to a corporate act of production. Due to this agency analysis, the Braswell Court intimated that should the agent be subsequently prosecuted, the testimonial aspects of the act of production of the documents could not be used to incriminate him personally. The prosecution could state that the corporation turned over the records, but not that the individual did. This result followed from the proposition that the act of production was a corporate and not a personal act. Braswell's nonconstitutional agency limitation is, in many cases, tantamount to a grant of use immunity.

In Bouknight, Justice O'Connor argued that by "accepting care of Maurice subject to the custodial order's conditions," Bouknight accepted the consequent obligations of production as had the corporate agent in Braswell. However, because the act of production would be in a custodial rather than a personal capacity, Justice O'Connor also relied upon the agency analysis of Braswell to intimate that the state could not later offer the act of production as a personal act of Bouknight:

We are not called upon to define the precise limitations that may exist upon the State's ability to use the testimonial aspect of Bouknight's act of production in subsequent criminal proceedings. But we note that im-

388. Bouknight, 110 S. Ct. at 905.
389. Id. at 907; see Braswell v. United States, 487 U.S. 99 (1988).
391. Id. at 118.
392. Id. For a statement of the holding of Braswell, see supra note 371.
393. Braswell, 487 U.S. at 117. In some cases, the individual will be inexorably tied to the act of production even where the fact that he who produced them cannot be introduced. For example, in small or closely held corporations, the factfinder who hears that the corporation turned over documents can easily infer that the individual defendant was the one who turned them over. Id.
394. Bouknight, 110 S. Ct. at 907.
position of such limitations is not foreclosed. The same custodial role that limited the ability to resist the production order may give rise to corresponding limitations upon the direct and indirect use of that testimony.995

Up to this point in the opinion, the Court had been singularly unhelpful. Indeed, the Court was like an adverse witness who cannot be pinned down to give a straight answer. The Court implied that the testimonial act was incriminating, but then did not decide the issue. The Court implied that Bouknight's act of production could not be used against her at a criminal trial but then did not decide the issue. Instead of setting a guide for future decisions, the Court decided only the case before it and viewed the case in a very limited way.

To make this opinion even more disconcerting and confusing, the above implications were placed in the context of an alternative holding. Justice O'Connor proceeded to analyze the case under the required records exception.996 On this point, she relied heavily on Shapiro v. United States997 and California v. Byers.998 As in those cases, the state's demand for information in Bouknight was imposed as part of a "non-criminal, regulatory regime" and was not "aimed at a selective group suspect of criminal activities."999 More specifically, Justice O'Connor reasoned that the state's efforts to gain access to a child declared in need of assistance did not focus on criminal conduct and were motivated by the proper regulatory purpose of concern for the child's safety and welfare.1000

Justice Marshall, joined by Justice Brennan, dissented and took issue with both lines of the majority's analysis.1001 Justice Marshall first rejected the analogy to the collective entity rule.1002

996. See Wilson v. United States, 221 U.S. 361, 380 (1911) (public documents required by law to be kept are not privileged from compulsory production because duty which custodian has voluntarily assumed overrides privacy interest in documents).
997. 335 U.S. 1 (1948) (fifth amendment inapplicable when government requires records to be kept pursuant to valid regulatory interest).
998. 402 U.S. 424, 433-34 (1971) (holding that state statute requiring person in accident to stop and give name and address was constitutionally permissible under required records exception, even where it compelled individual to incriminate himself).
999. Bouknight, 110 S. Ct. at 907 (citation omitted).
1000. Id. at 908.
1001. Id. at 909 (Marshall, J., dissenting).
1002. Id. at 910 (Marshall, J., dissenting). Justice Marshall noted that
He argued that Bouknight could not be analogized to a corporate custodian because she was not acting on behalf of a fictional entity, but was rather acting as a parent.\(^{403}\)

Justice Marshall also rejected the analogy to the required records exception.\(^{404}\) He noted that as a matter of fact, the state’s scheme was “narrowly targeted at parents who through abuse or neglect deny their children the minimal reasonable level of care and attention,” and argued that the state’s goal of protecting children from abuse inevitably intersects with criminal provisions that serve the same goal.\(^{405}\)

2. **Implications from Bouknight**

*Bouknight* is the classic case of a court using precedent mechanistically in an obsessive attempt to decide the case at bar at all costs. What we know is that Bouknight must produce Maurice in this proceeding. But we know little else. Most importantly, it is unclear whether this act of production can be used against her in a criminal trial. The Court’s decision on the alternative ground of required records creates uncertainty as to whether the *Braswell* agency analysis would protect Bouknight in a criminal trial. Does one alternative holding trump the other?

The result is also uncertain if the child’s parent has never been the subject of a prior court order. Arguably the result may differ from that in *Bouknight* in that such a person would be more like a parent than a custodian. That is true, however, only under the collective entity reasoning in *Bouknight* where the Court emphasized that the court order established a custodial relationship.\(^{406}\) Again, the question is whether the required records line of authority trumps the collective entity analysis.

In discussing the nonconstitutional agency analysis, Justice O’Connor refers to the “direct and indirect” limitations upon the use of the act of production.\(^{407}\) Apparently, this provides a

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Bouknight was, first and foremost, Maurice’s mother. She could not be merely his “custodian” whose rights and duties were established only by state law. *Id.*

403. *Id.* at 911 (Marshall, J., dissenting). Justice Marshall argued that Bouknight’s “role as Maurice’s parent is very different from the role of a corporate custodian who is merely the instrumentality through whom the corporation acts.” *Id.*

404. *Id.* at 912-13 (Marshall, J., dissenting).

405. *Id.* at 913 (Marshall, J., dissenting).

406. *Id.* at 908.

407. *Id.* Justice O’Connor stated that “[t]he same custodial role that limited the ability to resist the production order may give rise to corresponding limitations upon the direct and indirect use of that testimony.” *Id.*
broader grant of immunity than the Court provided in Braswell, in which the Court referred only to limitations on the direct use of the compelled testimony. If the Court in Bouknight is prepared to prohibit direct and indirect use as a matter of nonconstitutional agency analysis, it would seem coextensive with a grant of use immunity. There would be little practical difference in finding the fifth amendment applicable or not. It should be noted again that this issue is only relevant if the collective entity half of Bouknight is predominant.

Under the required records exception analysis of Bouknight, it does not matter that the compelled information could be used in a criminal prosecution as long as a valid regulatory scheme is in place. Thus in California v. Byers, the Court found that a use restriction was not necessary to bring a statute within the required records exception. Courts have made the required records exception to the fifth amendment analogous to the administrative search exception to the fourth amendment: so long as the government can articulate a legitimate need beyond mere law enforcement, the traditional protections of the fourth and fifth amendments do not apply.

By now it is apparent that the Bouknight Court's obsession to find a way to have Maurice produced comes at the expense of legitimate legal analysis. The two lines of authority used to decide the case are in fact in conflict with each other. The Court's technocratic approach seems a peculiarly inept method of deciding important and sensitive issues concerning child abuse. Given

408. See Braswell v. United States, 487 U.S. 99, 118 (1988). The Braswell Court explained that, at trial, the government could not tell the jury that the defendant produced the records. Instead, the jury could only infer this fact from the testimony of others concerning the events surrounding the incident. Id.

409. A commentator has suggested that Bouknight may seriously impair the states' ability to protect children and to prosecute child abusers. If states must grant some sort of immunity in regard to the compelled production of the child, abusive parents have "an incentive to hide their children once they have abused them." Recent Development, Child Abuse and the Fifth Amendment: Baltimore City Department of Social Services v. Bouknight, 110 S. Ct. 900 (1990), 13 HARV. J.L. & PUB. POL'y 1017, 1026 (1990).


412. Id. at 427.

413. For a discussion of the legitimacy of interests supporting an administrative search, see New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985) (allowing search by school authorities without warrant or probable cause so long as search is reasonable in light of school rules, method of enforcement and intrusiveness of search).
the majority opinion and what it does not do, one wonders why the Court ever took and decided the case in the first place.

B. Sobriety Tests, Testimonial Evidence, and the "Booking" Exception to Miranda

1. Discussion of Pennsylvania v. Muniz

In Pennsylvania v. Muniz, the Court considered the applicability of the fifth amendment and Miranda to sobriety testing. It breaks no new ground, other than stating that there is a booking exception to Miranda that lower courts have applied for years and even that statement is rather murky.

After Muniz failed sobriety tests, police officers transported him to a booking center. There, they asked Muniz, without first giving him Miranda warnings, his name, age, address, and the date of his sixth birthday. Muniz responded with slurred speech, stumbled over his answers, and said that he did not know the date of his sixth birthday. Both the manner of speech and the content of Muniz's answers were used as evidence that he was under the influence of alcohol.

Writing for eight members of the Court, Justice Brennan concluded that evidence of the slurred nature of Muniz's speech was not testimonial under Schmerber v. California. Since Schmerber, the Court has construed the fifth amendment term "witness" to apply only to testimonial evidence—evidence given by a witness. The Court has consistently distinguished between testimonial evidence and evidence introduced for its physical characteristics. Thus, a defendant can be forced to stand in a line-up, give handwriting samples, wear certain types of clothing for identification purposes, and give fingerprints and breath samples.

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415. Id. at 2642.
416. Id.
417. Id.
418. Id.
419. Id.
420. 384 U.S. 757, 761 (1966) (holding that compelled blood testing is not protected by fifth amendment).
421. Muniz, 110 S. Ct. at 2645.
422. See, e.g., United States v. Wade, 388 U.S. 218, 221 (1967) (standing in line-up is not testimonial); Gilbert v. California, 388 U.S. 263, 266 (1967) (handwriting exemplar is physical, not testimonial evidence so that its compulsion does not violate fifth amendment); Holt v. United States, 218 U.S. 245, 252-53 (1910) (forcing defendant to don clothing for identification purposes is not pro-
The slurred speech in Muniz was held to be physical evidence because its relevance was divorced from the content of the words themselves. Because the Court has held in prior cases that voice exemplars were non-testimonial, the placement of slurred speech in the same category is unremarkable.

The Muniz Court did not decide whether a person’s performance on a sobriety test (e.g. walking a line or standing on one foot) was testimonial, since Muniz did not challenge the lower court’s decision that such evidence was non-testimonial under Schmerber. The Court noted, however, that many lower courts have held that such tests measure physical capacity such as reflex, dexterity and balance and, consequently, are not testimonial under Schmerber. There is no meaningful distinction between the physical incapacity shown through slurred speech and the physical incapacity shown through unsteady walking. While Muniz did not decide whether physical performance tests compel testimonial evidence, it seems clear after Muniz that they do not.

With respect to the answer to the sixth birthday question, the Court, with Justice Brennan writing on this point for five Justices, held that Muniz’s response was testimonial. The state argued that an answer to the sixth birthday question is not protected by the fifth amendment because the only evidence derived would concern “the physiological functioning of Muniz’s brain,” which the state contended was physical and not testimonial. Justice Brennan responded that the physical nature of the fact to be


424. See United States v. Dionisio, 410 U.S. 1, 7 (1973) (evidence from voice recordings is nontestimonial when “used solely to measure the physical properties of the witnesses’ voices”).

425. The Court in Muniz stated that “[r]quiring a suspect to reveal the physical manner in which he articulates words, like requiring him to reveal the physical properties of the sound produced by his voice . . . does not, without more, compel him to provide a ‘testimonial’ response for purposes of the privilege.” Muniz, 110 S. Ct. at 2645 (citation omitted). Only Justice Marshall dissented on this point. See id. at 2654 (Marshall, J., concurring in part and dissenting in part).

426. Id. at 2651 n.16; see, e.g., State v. Badon, 401 So. 2d 1178, 1179 (La. 1981) (finding that Miranda warnings need not be given before field sobriety test because it does not involve fifth amendment privilege); People v. Hager, 69 N.Y.2d 141, 142, 505 N.E.2d 237, 238, 512 N.Y.S.2d 794, 795 (1987) (“Physical performance tests do not reveal a person’s subjective knowledge or thought processes but, rather, exhibit a person’s degree of physical coordination . . . .”).

427. Muniz, 110 S. Ct. at 2649.

428. Id. at 2645-46 (quoting Brief for Petitioner at 21).
proven is not relevant; the issue for fifth amendment purposes is whether the type of evidence used to prove the fact is physical or testimonial.\textsuperscript{429}

Thus, facts about a person's physical condition may be obtained either through physical or testimonial evidence. When they are obtained through testimonial evidence, the fifth amendment applies. If the police had compelled Schmerber to answer questions about the alcohol in his blood, his responses would have been testimonial even though the fact proven would have concerned Schmerber's physical condition.

Justice Brennan concluded that Muniz's answer to the sixth birthday question was protected by the "core meaning" of the self-incrimination clause, which he found to be based in the reaction to the horrors of the Inquisition and the Star Chamber.\textsuperscript{430} According to the Court, the privilege protects a citizen from being placed in a "cruel trilemma." The cruel trilemma refers to the following three unpalatable scenarios imposed by the Star Chamber—first, the citizen was not allowed to remain silent, because if he did he would be punished for contempt; second, the citizen could not testify truthfully, because it could incriminate him and he would be punished on the substantive charge; finally, the citizen could not testify falsely, because if he did he would be punished for perjury.\textsuperscript{431} In Muniz, Justice Brennan argued that whenever a citizen was placed in "the modern day analog" of the cruel trilemma, the evidence compelled must be considered testimonial.\textsuperscript{432}

\textsuperscript{429} Id. at 2646; see Note, Fifth Amendment—Videotaping Drunk Drivers: Limitations on Miranda's Protections, 81 J. CRIM. L. & CRIMINOLOGY 883 (1991) (whether evidence is physical or testimonial depends on method used to gather evidence).

\textsuperscript{430} Muniz, 110 S. Ct. at 2647.

\textsuperscript{431} Id. at 2648. See generally, Doe v. United States, 487 U.S. 201 (1988) (discussing the basis for the privilege against self-incrimination). The Court in Doe stated that:

Historically, the privilege was intended to prevent the use of legal compulsion to extract from the accused a sworn communication of facts which would incriminate him. Such was the process of the ecclesiastical courts and the Star Chamber—the inquisitorial method of putting the accused upon his oath and compelling him to answer questions designed to uncover uncharged offenses, without evidence from another source.

\textsuperscript{432} Id. at 212.

Muniz, 110 S. Ct. at 2647-48. Justice Brennan argued that:

Because the privilege was designed primarily to prevent "a recurrence of the Inquisition and the Star Chamber . . .," it is evident that a suspect is "compelled . . . to be a witness against himself" at least whenever he must face the modern-day analog of the historic trilemma . . . . Whenever a suspect is asked for a response requiring him to communi-
At first glance, Muniz’s choice of responses to the sixth birthday question do not seem comparable to those of the citizen before the Star Chamber. Muniz was not at trial and was merely asked to respond to a question during custodial interrogation. Therefore, Muniz could not be subject to contempt for refusal to respond, nor could he be subject to a perjury prosecution for giving the wrong answer to the sixth birthday question to police. Nonetheless, Justice Brennan found that Muniz faced the “modern day analog” of the Star Chamber and the cruel trilemma when he was asked the sixth birthday question in the course of custodial interrogation.\(^{433}\) Justice Brennan asserted that when a suspect is required to communicate “an express or implied assertion of fact or belief” then the suspect confronts the trilemma of truth, falsity and silence which triggers the privilege.\(^{434}\)

The term “modern day analog” refers to \textit{Miranda v. Arizona},\(^{435}\) which transported fifth amendment protection from judicial use of the contempt power to custodial police interrogation on the ground that the latter was compulsion.\(^{436}\) The modern analog as applied in \textit{Muniz} is as follows. First, the silence prong of the trilemma is triggered by the coercive aspects of custodial interrogation, which is comparable to the coercive power of contempt, so in either case, the defendant is not able to remain silent. Next, a truthful response (saying that he did not know the date of his sixth birthday) could incriminate Muniz, which is comparable to incrimination by truthful testimony at trial. Lastly, a false response (giving a wild guess as to the date of his sixth birthday), while it would not result in perjury as it would at trial, would nonetheless result in incriminating evidence which is comparable enough to perjury to constitute a “modern day analog.” Thus, Muniz faced his own personal Star Chamber when trying to figure out his sixth birthday in front of a police officer.\(^{437}\)

\(^{433}\) \textit{Id.} at 2649.

\(^{434}\) \textit{Id.} at 2648.


\(^{436}\) \textit{Id.} at 467.

\(^{437}\) On this point, Justice Brennan found that: By hypothesis, the inherently coercive environment created by the custodial interrogation precluded the option of remaining silent. Muniz was left with the choice of incriminating himself by admitting that he did not then know the date of his sixth birthday, or answering untruth-
Chief Justice Rehnquist, joined by Justices White, Blackmun and Stevens, dissented from the Court's holding that the content of Muniz's answer to the sixth birthday question was testimonial. The Chief Justice argued that the question was designed to elicit the physical fact of Muniz's mental coordination. The dissenters reasoned that because the police were permitted in Schmerber to extract Schmerber's blood "to determine how much that part of his system had been affected by alcohol," the police could likewise "examine the functioning of Muniz's mental processes for the same purpose."

The dissenters also took issue with the Court's analysis of the "trilemma" facing Muniz. According to the Chief Justice, "the potential for giving a bad guess does not subject the suspect to the truth-falsity-silence predicament that renders a response testimonial . . . ." The Chief Justice reasoned, by analogy, that if the condition of Muniz's eyes was relevant, a question concerning what Muniz saw on an eye chart would not require a testimonial response, even though Muniz might have to say "I don't know" or make a wrong guess. The dissenters could not see a distinction between oral responses to an eye chart and oral responses concerning defendant's mental faculties.

What about Chief Justice Rehnquist's hypothetical case of the eye test where the defendant's poor eyesight is relevant to a prosecution? When asked to read an eye chart during custodial interrogation, the suspect would appear to be subject to the modern analog of the cruel trilemma—the same one in which Muniz

| 438. Id. at 2652-53 (Rehnquist, C.J., concurring in part and dissenting in part). |
| 439. Id. at 2653 (Rehnquist, C.J., concurring in part and dissenting in part). |
| 440. Id. (Rehnquist, C.J., concurring in part and dissenting in part). |
| 441. Id. (Rehnquist, C.J., concurring in part and dissenting in part). |
| 442. Id. at 2654 (Rehnquist, C.J., concurring in part and dissenting in part). |
| 443. Id. at 2655 (Rehnquist, C.J., concurring in part and dissenting in part). |
| 444. Id. at 2653-54 (Rehnquist, C.J., concurring in part and dissenting in part). |
found himself. He cannot be silent due to the pressures of custodial interrogation. If he answers truthfully, and states that he cannot read the chart, such information can incriminate him where poor eyesight is relevant. If he answers untruthfully and ventures a guess about the chart, that information is incriminating as well. So despite Chief Justice Rehnquist’s use of a hypothetical which he obviously feels does not present a testimonial problem, the fact is that a testimonial problem does exist after Muniz. Much to the dissenters’ chagrin, the risk of making a wrong guess is now the modern day analog of the Star Chamber.

Muniz does not, however, stand for the proposition that all compelled oral statements are testimonial. If a compelled statement is not an express or implied assertion of fact which can be true or false, the Court has held that the statement is not testimonial, even though it is a communicative statement. There is no risk of perjury since such a statement cannot be false.445 Thus, in Doe v. United States,446 the Court held that a person’s signature on a bank consent form, directing the release of bank records assuming such records existed, was not testimonial since there was no assertion of fact that the records did or did not exist.447

In addition to the sixth birthday question, Muniz, when brought to the booking center, was asked such questions as his name, address, height, weight, eye color, date of birth and current age. Muniz stumbled over the answers and gave incorrect information on some points. Justice Brennan, writing for a plurality of four members of the Court, found that the content of the incorrect answers was testimonial on grounds similar to the sixth birthday question.448 Justice Marshall agreed with the four member plurality on this point.449

The plurality held, however, that Muniz’s answers to these questions were admissible even though they were made in response to custodial interrogation, because they fell within a ‘routine booking question’ exception which exempts from Mi-

445. Id. at 2648.
447. Id. at 219. Compare In re Grand Jury Subpoena, 826 F.2d 1166, 1170 (2d Cir. 1987) (“The directives here . . . do not contain any assertions by appellants regarding the existence of, or control over, foreign bank accounts. They authorize disclosure of records and information only if such accounts exist.”), cert. denied, 487 U.S. 1218 (1988) with United States v. Davis, 767 F.2d 1025, 1040 (2d Cir. 1985) (consent form may be testimonial if there is an implied assertion that bank records actually exist).
448. Muniz, 110 S. Ct. at 2650.
449. Id. at 2655 (Marshall, J., concurring in part and dissenting in part).
rand'a's coverage questions to secure the 'biographical data necessary to complete booking or pretrial services.'" The plurality noted that the booking exception would not apply if such questions were "designed to elicit incriminatory admissions."

Chief Justice Rehnquist, joined by Justices White, Blackmun and Stevens, concurred in the result as to the admissibility of the content of Muniz's responses. The Chief Justice did not find it necessary to consider whether the questions to Muniz fell within a booking exception to Miranda. He found Muniz's answers to these questions to be non-testimonial and, as a result, not protected by the fifth amendment, since they were used at trial only to show that Muniz's mental processes were not operating properly. Chief Justice Rehnquist assumed, however, that a booking exception to Miranda does exist.

Justice Marshall dissented from the plurality's adoption of a booking exception. He argued that a booking exception would lead to difficult, time-consuming litigation concerning its scope and application, contrary to the Miranda bright-line approach.

After the booking questions, the defendant in Muniz was asked to perform certain sobriety tests and to submit to a breathalyzer test. The officers explained to Muniz how the tests would be conducted, as well as the consequences of refusal.

450. *Id.* at 2650 (quoting Brief for the United States as Amicus Curiae at 12). Similarly, it has been held that Miranda does not apply to a routine post-conviction presentence interview by a probation officer. This situation would not amount to either a coercive environment or interrogation as contemplated by Miranda even if the defendant is in custody and the severity of his punishment might be affected by an admission. United States v. Rogers, 899 F.2d 917, 921 (10th Cir.), cert. denied, 111 S. Ct. 113 (1990); see also United States v. Herrera-Figueroa, 918 F.2d 1430 (9th Cir. 1990) (denial of reduction in offense level for acceptance of responsibility because defendant refused to attend the presentence interview without his attorney was not penalty for exercise of fifth amendment right). In Herrera-Figueroa, the court did not decide whether, with the Sentencing Guidelines, the presentence interview had become a "critical stage" of the adversary proceeding at which the consultation with counsel is guaranteed by the sixth amendment. Instead the court exercised its supervisory power over the orderly administration of justice to hold that probation officer must permit defendants to have their attorneys present at the presentence interview. *Id.* at 1433.


452. *Id.* at 2652-53 (Rehnquist, C.J., concurring in part and dissenting in part).

453. *Id.* at 2653 (Rehnquist, C.J., concurring in part and dissenting in part).

454. *Id.* (Rehnquist, C.J., concurring in part and dissenting in part).

455. *Id.* at 2655 (Marshall, J., concurring in part and dissenting in part).

456. *Id.* at 2642.
to perform the tests. No Miranda warnings were given during these explanations.\(^{457}\) While attempting to comprehend the explanations, Muniz gave responses admitting that he was impaired by alcohol.\(^{458}\)

Writing for eight members of the Court, Justice Brennan concluded that Muniz’s responses to the sobriety tests were admissible because the instructions from the officers “were not likely to be perceived as calling for any verbal response” and thus were not interrogation.\(^{459}\) This result was obtained by a simple application of the test for interrogation set forth in Rhode Island v. Innis.\(^{460}\) The Court reasoned that the officers’ instructions were “limited and focused inquiries” which were “necessarily ‘attendant to’ the legitimate police procedure.”\(^{461}\)

The Court found two exceptions to this principle on the facts: where the officer ordered Muniz to count from one to nine while walking the line and to count to thirty while standing on one foot.\(^{462}\) This was custodial interrogation because it directly called for a verbal response.\(^{463}\) Still, the Court could find Muniz’s responses admissible despite Miranda if they were nontestimonial or non-incriminating. The Court found them to be non-incriminating.\(^{464}\) While walking the line, Muniz actually counted from one to nine, so, except for the non-testimonial slurred speech, his response was not incriminating. While standing on one foot, Muniz did not count despite being directed to do so. He did not argue, however, that his failure to count had any independent incriminatory significance.\(^{465}\) Consequently, the Court did not have to decide whether the counting was itself testimonial, but the rationale in Muniz would seem to indicate that counting is tes-

\(^{457}\) Id.

\(^{458}\) Id.

\(^{459}\) Id. at 2651.

\(^{460}\) 446 U.S. 291, 303 (1980) (interrogation includes express questioning as well as conduct that officer should have known would be reasonably likely to elicit incriminating response from average suspect).

\(^{461}\) Muniz, 110 S. Ct. at 2652 (quoting South Dakota v. Neville, 459 U.S. 553, 564 n.15 (1983)). Justice Marshall dissented from the Court’s holding that questions and instructions attendant to sobriety tests and breathalyzer tests were not interrogation. Id. at 2656 (Marshall, J., concurring in part and dissenting in part). He concluded that under the circumstances of Muniz’s impaired state, such questions were reasonably likely to elicit an incriminating response. Id. (Marshall, J., concurring in part and dissenting in part).

\(^{462}\) Id. at 2651 n.17.

\(^{463}\) Id. at 2651.

\(^{464}\) Id. at 2651 n.17.

\(^{465}\) Id.
testimonial. Counting is an implied assertion that one number comes after another, which can either be true or false. There does not appear to be a distinction between the sixth birthday question and the counting. The sixth birthday question in fact calls for counting within the mind.

2. Implications from Muniz

The application of the booking exception in *Muniz* may be important with respect to provision of pretrial services. In federal proceedings, an officer may inquire about a suspect’s financial status before a magistrate rules on pretrial release. This financial information might be relevant to prove guilt. It might show that the defendant had unexplained income for a tax violation, that the defendant had money shortly after a crime occurred, or that the defendant had no money and thus had a motive to commit a crime. After *Muniz*, such questions appear to fall within the booking exception, even though incriminating information may be obtained. While only four members of the Court specifically adopted the booking questions exception, four other members of the Court assumed that it existed. Still, the Court failed to decide an issue on which the lower courts had been uniform for years.

For better or worse, it is true that the booking questions exception detracts from the bright-line nature of the *Miranda* rule. The Court in *Muniz* was inspecific about the parameters of the booking exception, assuming the exception exists. The Court's only statement was that the exception would not apply if the officer’s question is “designed to elicit incriminatory admissions.” It is unclear whether the Court is establishing a

466. See, e.g., United States v. McLaughlin, 777 F.2d 388, 391 (8th Cir. 1985) (questions concerning name and employment are within booking exception even though responses to such questions are incriminating).


469. *Muniz*, 110 S. Ct. at 2650 n.14 (quoting Brief for the United States as Amicus Curiae at 13).
subjective bad faith test. Again, the Court could have accomplished more by not confusing relatively settled lower court jurisprudence.

Lower courts have looked to objective factors such as whether there could be a proper administrative purpose for the question, whether the question is asked by an officer who routinely books suspects, and whether the officer would need to know the information for booking purposes.470 Despite the confusion left by the Supreme Court, lower court jurisprudence determining the scope of the booking questions exception is at least arguably consistent with Muniz.471 It is notable that the Muniz Court did not attempt to place the sixth birthday question within the booking exception. Such a question could have no proper administrative purpose. Still, at least on the question of the booking exception, the Court in Muniz did not even rise to the level of a lower court, rather, it confused settled applications of law to fact for no good reason.

After Muniz, explanations concerning custodial procedures, such as fingerprinting, transportation and inventorying, will not be considered interrogation even though the defendant may make incriminating statements during the explanation. This is because such explanations cannot be considered to call for an incriminating response any more than did the explanations made in Muniz.472 Moreover, even direct questions about the suspect's

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470. See, e.g., People v. Nelson, 147 A.D.2d 774, 775-76, 537 N.Y.S.2d 995, 997, appeal denied, 74 N.Y.2d 794, 544 N.E.2d 234, 545 N.Y.S.2d 556 (1989) (questions concerning residence are within pedigree exception even though answers are incriminating; issue is not whether answer is incriminatory, "but whether the police were trying to inculpate defendant or merely processing him").

471. See, e.g., United States v. Carmona, 873 F.2d 569, 573 (2d Cir. 1989) (pedigree information is always within booking exception, even if officer knows such information; prudent practice to make sure that person arrested is correct person); Gladden v. Roach, 864 F.2d 1196, 1198 (5th Cir.) ("straightforward questions to secure the biographical data necessary to complete the booking process" are not covered by Miranda), cert. denied, 491 U.S. 907 (1989); United States v. Webb, 755 F.2d 382, 389 (5th Cir. 1985) (questions by classification officer concerning nature of defendant's crime were not booking questions where classification officer already knew what defendant was charged with, and testimony indicated that such questions were not ordinarily asked by classification officers), aff'd, 793 F.2d 1288 (5th Cir. 1986), cert. denied, 479 U.S. 1058 (1987); United States v. Hinkley, 672 F.2d 115, 122-23 (D.C. Cir. 1982) (questions are not within booking exception where they have clear investigative purpose, and interrogation was conducted by officers who did not ordinarily book suspects).

472. See Commonwealth v. Rishel, 399 Pa. Super. 413, 582 A.2d 662 (1990). In Rishel, after being arrested for drunk driving, the defendant was videotaped during processing at the stationhouse. Id. at 416, 582 A.2d at 663. The
understanding of such explanations will not be interrogation since they are considered "necessarily ‘attendant to’ " such explanations. Statements going beyond the subject matter of the explanation could conceivably be considered interrogation after Muniz since the Court emphasized that the officers therein strictly directed the dialogue to the specific issues of a breathalyzer test and a sobriety test.

Extended discussions with much incriminating information can occur in these explanatory situations. A Minnesota court recently held that a fifteen minute tête-à-tête in which 100 statements were made between a law enforcement officer and a suspect fell within the explanatory exception of Muniz. It was not carefully scripted, as was the exchange in Muniz, but the court found all of the statements to be within proper limits of the subject matter of explaining a procedure.

C. Miranda Inapplicable to Questions by Undercover Agents

1. Discussion of Illinois v. Perkins

In Illinois v. Perkins, an undercover agent was placed in Perkins' cell. Perkins was in prison on charges unrelated to those being investigated by the undercover officer. In the course of conversation concerning a planned escape, the agent asked Perkins whether he had killed anybody. Perkins said he had and de-

first part of the videotape showed Rishel answering biographical booking question and was admitted. Id. at 416, 582 A.2d at 665-64. The second part of the tape, which was suppressed, showed Rishel being informed of his Miranda rights and Rishel requesting counsel. Id. The third section, the section at issue, showed the defendant being fingerprinted and photographed. Id. During this process the defendant made voluntary comments and asked questions. Id. The officer sometimes answered the questions, but asked no questions himself and told the defendant that he could not talk to him unless he waived his right to an attorney. Id. This portion of the tape was admissible under the fifth amendment because the statements were, in part, an exhibition of physical characteristics and not testimonial, and, in part, testimonial, but not made in response to an interrogation intended to elicit incriminating statements. Id. at 419-20, 582 A.2d at 665.

473. See Muniz, 110 S. Ct. at 2652 (quoting South Dakota v. Neville, 459 U.S. 553, 564 n.15 (1983)).
474. Id.
475. State v. Whitehead, 458 N.W.2d 145, 149 (Minn. Ct. App. 1990) (advisory interview that consisted of extensive discussion, where defendant and officer each made over 100 statements, does not constitute interrogation under Muniz because discussion was within scope of questioning attendant to advisory interview).
477. Id. at 2395.
478. Id.
scribed the murder that the undercover officer was investigating.\footnote{479}

Justice Kennedy, writing for seven members of the Court, stated that "Miranda was not meant to protect suspects from boasting about their criminal activities in front of persons whom they believe to be their cellmates."\footnote{480} Consequently, the Court held that interrogation by an undercover agent is not regulated by Miranda even if the questions may elicit an incriminating response.\footnote{481} To reach this result, the majority went back and investigated the rationale supporting Miranda.

The majority reasoned that Miranda was concerned with the pressures upon a suspect in a "police-dominated atmosphere."\footnote{482} If the suspect does not even know that he is talking to a police officer, the problems with which the Court was concerned in Miranda do not exist.\footnote{483} Thus, a fair reading of Miranda shows that the Court focused on the pressures upon the suspect, and that compulsion is in the eye of the beholder. With undercover questioning, the beholder sees no police-created compulsion.\footnote{484}

One of the virtues of Miranda, recognized as such by the Burger-Rehnquist Court, is its bright-line character.\footnote{485} Perkins ar-

479. Id. at 2396.

480. Id. at 2398. In Alexander v. Connecticut, 917 F.2d 747 (2d Cir. 1990), cert. denied, 111 S. Ct. 2831 (1991), the questioning of the jailed suspect was performed, with the encouragement of the police, by a friend of the suspect. Id. at 748-49. Reversing its former suppression of the evidence in light of Perkins, the court stated:

The Miranda "custodial interrogation" involves two elements. The suspect must be in police custody, and he must be aware that he is being interrogated by government authorities or their representatives. Deception which takes advantage of a suspect's misplaced trust in a friend does not implicate the right against self-incrimination nor the fifth or sixth [sic] amendment rights to counsel.

Id. at 751.

481. Perkins, 110 S. Ct. at 2399.

482. See id. at 2397.


484. The Court discussed this point stating:

It is the premise of Miranda that the danger of coercion results from the interaction of custody and official interrogation. . . . Questioning by captors, who appear to control the suspect's fate, may create mutually reinforcing pressures that the Court has assumed will weaken the suspect's will, but where a suspect does not know that he is conversing with a government agent, these pressures do not exist.

Perkins, 110 S. Ct. at 2397.

gued that "a bright line rule for the application of Miranda is desirable," and that the creation of an undercover investigations exception to Miranda would destroy the clarity of the rule itself. The majority properly rejected this argument on the ground that the Perkins rule itself is a bright-line rule—if there is an undercover investigation, then Miranda is completely inapplicable.

The majority rejected the defendant's reliance on sixth amendment undercover cases such as United States v. Henry, where the Court held that incriminating statements deliberately elicited by an undercover informant without the suspect's attorney present could not be introduced as evidence. The Court in Perkins noted that sixth amendment rights do not come into play until charges have been filed on the subject of the interrogation, and that, unlike Henry, Perkins had not yet been charged in the murder to which he confessed.

The difference in results between Perkins and Henry lies in the difference between the interests protected by the fifth and sixth amendments. The fifth amendment protects against compulsion; that is, undue pressure on the suspect. Compulsion can occur during both the investigatory and accusatory stages. The sixth amendment protects against intrusion into the attorney-client relationship. It essentially establishes an ethical standard, similar to that in the Model Code of Professional Responsibility, whereby the state cannot approach an adversary client in the absence of counsel. This standard only applies when an adversary relationship has been formed. Thus, while the standard is triggered by any state attempt to elicit information in the absence of counsel, it

"[o]ne of the principal advantages of Miranda is the ease and clarity of its application" (quoting Berkener v. McCarty, 466 U.S. 420, 430 (1984)).

486. Perkins, 110 S. Ct. at 2399.

487. Justice Kennedy stated that the Court's holding permitting undercover agents to dispense with issuing Miranda warnings to suspects in jail would not be difficult for law enforcement officers to follow. Id.


489. Id. at 274.

490. Perkins, 110 S. Ct. at 2399; see Moran v. Burbine, 475 U.S. 412, 430 (1986) (by its terms, sixth amendment "becomes applicable only when the government's role shifts from investigation to accusation"); cf. Alexander v. Connecticut, 917 F.2d 747, 751 (2d Cir. 1990) (right to counsel not circumvented when defendant, in jail, charged with arson, confesses to friend acting as police informant that he murdered third party who had information incriminating him on arson charge, because no charge of murder had been filed at time of confession).

491. Model Code of Professional Responsibility DR 7-104 (1981); see also ABA Rules of Professional Conduct Rule 4.2.
is not dependent on the adversary knowing that he is being approached by the state.\textsuperscript{492}

2. **Implications from Perkins**

Unlike most of the cases from the 1989-90 term, Perkins represents a direct, honest and analytical appraisal of prior precedent. The Court returned to the policies of Miranda and found that Miranda was concerned with problems completely different from those presented in Perkins. Under the Court's usual mechanistic approach of applying fact to law, the analysis could have been a disaster. What occurred in Perkins was custodial interrogation, at least literally interpreted, so the Court may have tinkered with those terms in order to reach the same result. The consequence would have been a dishonest application of the custodial interrogation test, which would undoubtedly have deleterious effects in cases other than those involving undercover investigation. In contrast, a direct reconsideration of the underlying principles of Miranda leaves its protections intact in the very cases where it was intended to apply.\textsuperscript{493}

In his concurring opinion, Justice Brennan argues that the situation would have been different if the defendant had already invoked his right to counsel, making Edwards v. Arizona\textsuperscript{494} applicable.\textsuperscript{495} The Court in Edwards held that a defendant who invokes

\begin{itemize}
\item \textsuperscript{492} Justice Brennan concurred in the judgment in Perkins. When a suspect does not know he is talking to a police agent, Miranda warnings are not required. Perkins, 110 S. Ct. at 2399 (Brennan, J., concurring in the judgment). Justice Brennan argued, however, that undercover activity constituted trickery which could raise a "substantial claim that the confession was obtained in violation of the Due Process Clause." Id. (Brennan, J., concurring in the judgment).

Justice Marshall dissented arguing that undercover questioning of an incarcerated suspect constituted both custody and interrogation, and that the majority's opinion was thus an unjustified "exception" to Miranda. Id. at 2402-03 (Marshall, J., dissenting). Justice Marshall also expressed concern that police would use the majority's decision to circumvent Miranda requirements by the use of undercover agents. Id. at 2404 (Marshall, J., dissenting).

\item \textsuperscript{493} For a contrary view to the effect that Perkins is inconsistent with the original goals of Miranda, see Glennon, Illinois v. Perkins: Approving the Use of Police Trickery in Prison to Circumvent Miranda, 21 LOYOLA U. L.J. 811 (1990). Glennon argues that Perkins impermissibly rejects the Miranda premise that custodial interrogation is presumptively coercive. Id. at 828. However, this overlooks the fundamental premise of Miranda, which is that a suspect needs protection when subject to police interrogation while in custody. Miranda v. United States, 384 U.S. 436, 469 (1966) (the "aim [of Miranda] is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process").

\item \textsuperscript{494} 451 U.S. 477 (1981).

\item \textsuperscript{495} Perkins, 110 S. Ct. at 2399 (Brennan, J., concurring).
\end{itemize}
his right to counsel cannot thereafter be found to have voluntarily waived that right if police initiate interrogation.\(^496\) Despite Justice Brennan's contention in *Perkins*, it is clear that *Edwards* does not apply to undercover investigations. *Edwards* is merely an outgrowth of *Miranda*; if *Miranda* is not applicable to undercover investigations, *Edwards* is *a fortiori* inapplicable. *Edwards*, like *Miranda*, does not apply unless there is the kind of police pressure that the majority in *Miranda* sought to prohibit.

The majority in *Perkins* noted that it did not have to decide the question of whether interrogation by a prison official known to be such by the prisoner would always require *Miranda* warnings.\(^497\) In *Mathis v. United States*,\(^498\) the Court found a *Miranda* violation when a prisoner was interviewed by an agent of the Internal Revenue Service about possible tax violations.\(^499\) Other less coercive situations may not call for *Miranda* warnings, even though the prisoner is obviously in custody in the broad sense.\(^500\)

D. Admission of "*Other Crimes*" Evidence Does Not Violate the Double Jeopardy Clause

1. Discussion of United States v. Dowling

In *United States v. Dowling*,\(^501\) the defendant was charged with bank robbery.\(^502\) On the issue of identification, the prosecution offered evidence that Dowling had participated in another robbery wearing clothes and carrying a gun similar to those used in the bank robbery.\(^503\) The government also sought to show that Dowling committed the robbery with another person, whose affiliation with Dowling was relevant to the instant case.\(^504\) Dowling had been acquitted of that robbery, and argued that its introduc-

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499. Id. at 4.
500. Courts have held that questioning in prison was not coercive and thus outside the scope of *Miranda*. See, e.g., United States v. Conley, 779 F.2d 970, 973 (4th Cir. 1985), cert. denied, 479 U.S. 830 (1986); Cervantes v. Walker, 589 F.2d 424, 427-29 (9th Cir. 1978). The questioning that occurred in *Cervantes* and *Conley* occurred in relatively uncoercive areas of the prison: the library and the medical conference room. Moreover, in neither case was the questioning designed for the express purpose of eliciting incriminating statements. *Conley*, 779 F.2d at 973-74; *Cervantes*, 589 F.2d at 427-29.
502. Id. at 344.
503. Id. at 345.
504. Id.
tion at the later trial was prohibited by Ashe v. Swenson.\textsuperscript{505}

The Ashe Court held that the fifth amendment guarantee against double jeopardy incorporates the doctrine of collateral estoppel.\textsuperscript{506} In Ashe, the defendant was acquitted of robbing six men during a poker game.\textsuperscript{507} He was then charged with robbing another man at the poker game.\textsuperscript{508} The Court found that the subsequent prosecution was precluded, because all of the robbery victims were robbed by the same group of people, and the defendant had been found not to have been one of the robbers of six of the victims.\textsuperscript{509} The situation in Ashe is different from that in Dowling. In Ashe, the offenses arose from the same transaction; in Dowling, on the other hand, the acquittal pertained to an unrelated act which was relevant to prove the prosecution's case as to the crime charged.

The Court in Dowling refused to apply the collateral estoppel doctrine to situations where facts underlying a prior acquittal are used as evidence of an unrelated offense.\textsuperscript{510} Justice White's opinion for six members of the Court distinguished Ashe on the ground that Dowling's "prior acquittal did not determine an ultimate issue in the present case."\textsuperscript{511} In contrast, the prosecutions in Ashe arose from the same set of factual circumstances and the question in each case—who was the robber on a certain night—was dispositive and identical.\textsuperscript{512} Acquittal on one charge arising from that transaction would necessarily require acquittal on the other charge.

Nor did Dowling show that the jury in the prior case actually determined that he was not the robber.\textsuperscript{513} In the later case, the burden is on the defendant to make such a positive showing regarding the mind of the earlier jury.\textsuperscript{514} The Court found that

\textsuperscript{505} 397 U.S. 436 (1970).
\textsuperscript{506} Id. at 445-46.
\textsuperscript{507} Id. at 439. The Court in Ashe defined collateral estoppel as "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot be relitigated by the same parties in any future lawsuit." Id. at 445.
\textsuperscript{508} Id. at 439.
\textsuperscript{509} Id.
\textsuperscript{510} Dowling, 493 U.S. at 350.
\textsuperscript{511} Id. at 348.
\textsuperscript{512} Ashe, 397 U.S. at 445.
\textsuperscript{513} Dowling, 493 U.S. at 346 n.2.
\textsuperscript{514} See United States v. Gugliaro, 501 F.2d 68, 70 (2d Cir. 1974) ("[T]he burden is upon the defendant to show that the jury's verdict in the prior trial necessarily decided the issues raised in the second prosecution." (citing United States v. Friedland, 391 F.2d 378, 382 (2d Cir. 1968))).
there were possible explanations other than misidentification for Dowling's acquittal, such as that no robbery had taken place.\(^{515}\) If that were the case the event could still be used to link the defendant with another person who was present at the scene of both alleged robberies.

The Court further noted that to introduce evidence of an unrelated crime, the prosecution was not required to show that the defendant committed that crime beyond a reasonable doubt.\(^{516}\) Under the Federal Rules of Evidence, similar act evidence is admissible if the jury could reasonably conclude that the act occurred and the defendant was the actor.\(^{517}\) Therefore, Dowling's acquittal on the prior charge did not preclude the jury in the second case from considering his involvement.

Justice Brennan, joined by Justices Marshall and Stevens, dissented.\(^{518}\) Justice Brennan argued that the majority took insufficient account of the burdens imposed upon a defendant when, in effect, facts are relitigated in a subsequent criminal prosecution.\(^{519}\) As it happened, these very burdens which were ignored in Dowling were found crucial in Grady v. Corbin\(^{520}\) discussed below.

2. Implications from Dowling

For the purpose of determining whether the doctrine of collateral estoppel applies, the distinction the Court made between facts which determine ultimate issues and facts which are merely relevant to a prosecution is not a compelling one. Under the principles of collateral estoppel, relitigation is prohibited if the

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\(^{515}\) *Dowling*, 493 U.S. at 351-52. Justice Brennan, however, argued in dissent that "'[t]here is every reason to believe that the jury rested its verdict on the belief that petitioner was not present in the Henry home. Petitioner was charged with such a wide array of offenses relating to the Henry incident that no other conclusion is 'rationally conceivable.' For example, if the jury had acquitted petitioner of attempted robbery because he lacked the requisite intent, it would still have found him guilty of a weapons offense." *Id.* at 358 (Brennan, J., dissenting) (citation omitted).

\(^{516}\) *Id.* at 348.


\(^{518}\) *Dowling*, 493 U.S. at 354.

\(^{519}\) *Id.* at 355-56. For a discussion of these burdens, see Recent Development, *Double Jeopardy, Due Process, and Evidence from Prior Acquittals*: *Dowling v. United States*, 110 S. Ct. 668 (1990), 13 HARV. J. L. & PUB. POL'y 1027 (1990) (arguing that sufficiency of jury instructions rather than protection of Constitution should be used by defense attorneys to limit evidence accessible to jury). *Id.* at 1035-36.

\(^{520}\) 110 S. Ct. 2084 (1990).
precise issue has already been fully litigated and determined.\footnote{521}{For a discussion of collateral estoppel, see \textit{supra} note 507.} This should be true no matter what the use to which the litigated issue is put in the subsequent trial. If the jury fully and fairly determines an issue, it should not matter whether the issue is determinative or merely relevant in the subsequent case. It certainly would not matter to the jury that heard the first case because they would be unaware of any subsequent usage.

\textit{Ashe} was decided at the very beginning of Chief Justice Burger’s tenure and clearly contains a residuum of Warren Court jurisprudence. In \textit{Dowling}, the Rehnquist Court reverts to the unsatisfactory performance of the mid and late Burger years, where the Court used unreasoned distinctions to limit Warren Court precedent.\footnote{522}{See, e.g., \textit{Scott} v. \textit{Illinois}, 440 U.S. 367, 373-74 (1979) (limiting right of indigent to appointed counsel by distinguishing between fine and imprisonment, even though there is no such distinction on face of sixth amendment).} The result of this case-by-case sniping is similar to what occurred in the Burger Court era—a later decision comes along that is apparently inconsistent, thus creating even more confusion.\footnote{523}{See, e.g., \textit{Baldasar} v. \textit{Illinois}, 446 U.S. 222, 224-26, \textit{reh’g denied}. 447 U.S. 930 (1980) (Marshall, J., concurring) (dealing with problem where uncounseled conviction permissible under \textit{Scott} is used to enhance a subsequent misdemeanor so as to allow for longer prison offense).} In this case, the inconsistent decision came in the very same term (as will be discussed below).

E. \textit{Subsequent Prosecutions Impermissible If Based on Conduct for Which Defendant Has Already Been Prosecuted}

1. \textit{Discussion of Grady v. Corbin}

\textit{Grady v. Corbin}\footnote{524}{110 S. Ct. 2084 (1990).} is a major expansion of protection under the double jeopardy clause, as applied to successive prosecutions. Corbin was a driver in a two-car accident that resulted in the death of the driver and passenger in the other car.\footnote{525}{\textit{Id.} at 2087-88.} Due to miscommunication in the District Attorney’s office, Corbin was allowed to plead guilty to driving while intoxicated and failing to keep to the right of the median, and received a minimum sentence.\footnote{526}{\textit{Id.} at 2088-89.}

Corbin was later charged with reckless manslaughter, second degree vehicular manslaughter, driving while intoxicated, third-degree reckless assault and criminally negligent homicide.\footnote{527}{\textit{Id.} at 2089.} In
its bill of particulars, the state admitted that to prove these more serious charges, it would contend that Corbin drove while intoxicated, failed to keep to the right of the median and drove too fast in heavy rain.\textsuperscript{528}

Justice Brennan, writing for five members of the Court, held that the subsequent prosecution violated the double jeopardy clause.\textsuperscript{529} The test given by the Court for subsequent prosecutions is whether the government, to establish an essential element of an offense charged in that prosecution, "will prove conduct that constitutes an offense for which the defendant has already been prosecuted."\textsuperscript{530}

Justice Brennan recognized that the subsequent prosecution in Grady survived the test of Blockburger v. United States,\textsuperscript{531} which held that multiple punishments are permissible where each offense requires proof of an element that the other does not.\textsuperscript{532} In Grady, the more serious crimes—manslaughter, assault and homicide—required an element that the lesser crimes did not. All three of those crimes have statutory elements which differ from drunk driving. However, the majority viewed Blockburger solely as a rule designed to determine whether the legislature intended multiple punishments.\textsuperscript{533}

Justice Brennan found a constitutional distinction between multiple punishments and multiple prosecutions.\textsuperscript{534} With multiple punishments, the double jeopardy concern is an enhanced sentence, for the same offense.\textsuperscript{535} With multiple prosecutions,
the dangers and concerns are greater than merely an enhanced sentence and include: the burdens of duplicative litigation,536 the possibility that the state will be allowed to rehearse presentation of proof,537 the increased risk of erroneous conviction,538 and continual anxiety and insecurity for the defendant.539 Justice Brennan concluded that "a subsequent prosecution must do more than merely survive the Blockburger test."540 In order to protect against the greater harm of multiple prosecutions, the state must show that it will not have to establish as an essential element of the new crime any conduct which "constitutes an offense for which the defendant has already been prosecuted."541

Because the state admitted that it would prove the entire conduct for which Corbin was convicted in order to establish the essential elements of the more serious offenses, the subsequent prosecution was barred.542 Justice Brennan noted that a subsequent prosecution would not be barred if the state's bill of particulars revealed that the state would not rely on proving conduct for which Corbin had already been convicted.543 For example, the subsequent prosecution would have been permissible if the state had relied solely on Corbin's driving too fast in heavy rain to establish recklessness or negligence, because that conduct was not used to support the drunk driving plea.544

Justice Scalia wrote a dissenting opinion joined by Chief Justice Rehnquist and Justice Kennedy.545 Justice Scalia engaged in an historical analysis and concluded that the Blockburger test was the exclusive definition of the term "same offence" in the double jeopardy clause.546 Justice Scalia also decried the practical impact


537. Id. at 2091-92. Justice Brennan opined that the opportunity to rehearse increases the risk of an erroneous conviction. Id. at 2092 (citing Tibbs v. Florida, 457 U.S. 31, 41 (1982)).

538. Id. at 2092.

539. Id. at 2091 (citing Green v. United States, 355 U.S. 184, 187 (1957)).

540. Id. at 2093.

541. Id.

542. Id. at 2094. The state admitted in its own pleadings that it would prove that Corbin drove while intoxicated and failed to keep to the right of the median, both essential elements of the homicide and assault charges. Id.

543. Id.

544. Id.

545. Id. at 2096-2105 (Scalia, J., dissenting).

546. Id. at 2096-2101 (Scalia, J., dissenting).
of the majority's decision on the criminal justice system: "In practice, it will require prosecutors to observe a rule we have explicitly rejected in principle: that all charges arising out of a single occurrence must be joined in a single indictment."\textsuperscript{547} Justice Scalia concluded that because respondent was not being prosecuted for the same offense in the subsequent prosecution, the second prosecution should not be barred by the double jeopardy clause.\textsuperscript{548}

Justice O'Connor wrote a separate dissenting opinion. She contended that the majority's decision was inconsistent with \textit{Dowling v. United States}.\textsuperscript{549} In \textit{Dowling}, the state was allowed to introduce evidence of a prior burglary of which defendant had been acquitted, as proof of identity in a separate burglary.\textsuperscript{550} Justice O'Connor contended that the decision in \textit{Grady} rendered \textit{Dowling} a "nullity in many circumstances."\textsuperscript{551} In \textit{Dowling}, the Government was offering the testimony of a witness whose description of the accused was similar to a description of a robber in a subsequent crime.\textsuperscript{552} So the same conduct was proven as an essential element in both prosecutions.\textsuperscript{553} The same evidence ruled admissible in \textit{Dowling} is therefore barred by \textit{Grady}.\textsuperscript{554}

2. Implications of \textit{Grady}

Justice O'Connor appears correct that \textit{Grady} is inconsistent with \textit{Dowling}. In \textit{Grady}, the prosecution was not allowed to reprove conduct for which the defendant had already been prosecuted;\textsuperscript{555} under \textit{Dowling}, the prosecution is so allowed.\textsuperscript{556} The only apparent distinction between the cases is that in \textit{Grady}, the defendant's conduct constituted a single "transaction," while in

\begin{itemize}
\item \textsuperscript{547} \textit{Id.} at 2096 (Scalia, J., dissenting).
\item \textsuperscript{548} \textit{Id.} (Scalia, J., dissenting).
\item \textsuperscript{549} 110 S. Ct. at 2095 (O'Connor, J., dissenting).
\item \textsuperscript{550} \textit{Id.} at 2095 (O'Connor, J., dissenting) (citing Dowling v. United States, 493 U.S. 342 (1990)).
\item \textsuperscript{551} \textit{Id.} (O'Connor, J., dissenting). For a discussion of \textit{Dowling}, see \textit{supra} notes 501-23 and accompanying text.
\item \textsuperscript{552} \textit{Dowling}, 493 U.S. at 345. The Government believed that the witnesses' description of the defendant "as wearing a mask and carrying a gun similar to the mask worn and the gun carried by the robber" of a later, unrelated burglary would strengthen the government's identification of the defendant. \textit{Id.} at 344-45. The defendant had been acquitted of the unrelated burglary charge. \textit{Id.} at 345.
\item \textsuperscript{553} \textit{Id.} at 345.
\item \textsuperscript{554} \textit{Grady}, 110 S. Ct. at 2095-96 (O'Connor, J., dissenting).
\item \textsuperscript{555} \textit{Id.} at 2094.
\item \textsuperscript{556} \textit{Dowling}, 493 U.S. at 348-49.
\end{itemize}
Dowling the defendant was prosecuted for two unrelated acts.\footnote{557. In Grady, the single transaction is the one automobile accident. Grady, 110 S. Ct. at 2087-88. In Dowling, there were two unrelated crimes committed: robbing a woman in her home and a bank robbery. Dowling, 493 U.S. at 344.} It is questionable whether that distinction is meaningful, because Dowling is forced to defend twice as to the same conduct when it is introduced in his second trial. Even though he is not being prosecuted for that conduct, he is subject to duplicative litigation and possible erroneous conviction. Indeed, the dissent in Dowling, written by Justice Brennan, emphasizes the same burdens of successive prosecution that the majority unsurprisingly relies upon in Grady.

Contrary to the implications of the dissent, the majority in Grady does not establish a full-fledged “transactional approach” to successive prosecutions.\footnote{558. Grady, 110 S. Ct. at 2094 n.15. Justice Brennan advocated such an approach in his dissent in Jones v. Thomas, 491 U.S. 376, 387-88 (1989) (Brennan, J., dissenting), where he stated that the double jeopardy clause requires that all charges against a defendant that are the result of one criminal transaction must be tried in one proceeding.} If the Court had adopted a transactional approach, Corbin could not have been retried even if the prosecution were to limit its proof to Corbin’s driving too fast in heavy rain to establish recklessness or negligence.\footnote{559. Grady, 110 S. Ct. at 2094 n.15.} Even though the proof would be different, the transaction would be the same.

In practical effect, however, the dissent is correct, and a prosecutor is all but forced to charge all crimes in a single transaction at one time, because it is rather unlikely that totally different proof arising from the same transaction could make a subsequent prosecution successful. In Grady, for instance, it is unlikely that Corbin would be convicted on a serious charge for driving too fast in heavy rain. The most damaging evidence is that of drunkenness, and that evidence cannot be used after Grady.

Another problem left by Grady lies in the second prosecution. There will often have to be one trial preceding another to determine which conduct the Government intends to prove to support the conviction, as well as which conduct was proven at the prior prosecution. At this “pre”-trial, the defendant may suffer at least to some degree from the same burdens of duplicative litigation, uncertainty and harassment discussed by Justice Brennan.\footnote{560. This point was voiced by Justice Scalia in his dissent. See id. at 2097-98 (Scalia, J., dissenting).} Moreover, the burden on the courts and on the prosecution is
obvious. Whatever the drawbacks of the Blockburger test, at least its required comparison of statutory elements as opposed to conduct, can be done without an extensive pre-trial hearing.

Grady did not disturb the Blockburger test as the benchmark for multiple offenses charged in a single prosecution. On the contrary, the Court affirmed the propriety of the Blockburger test for that situation.\textsuperscript{561}

Grady did not involve a conspiracy case, but the Court's conduct test leaves serious questions as to how to deal with subsequent prosecutions where a conspiracy is charged in either the former or latter case. Three separate questions must be resolved.

First, can a conspiracy and the underlying substantive crime be successively prosecuted? Although Justice Scalia said in his dissent in Grady that this would not be possible given the similarity of conduct,\textsuperscript{562} his argument should be evaluated in context: he was giving a parade of horribles in order to attack the reasoning of the majority. There is no indication in Grady that the Court intended to overrule the long line of cases typified by Pinkerton v. United States.\textsuperscript{563} to the effect that the collective criminal agreement is sufficiently distinct from the substantive offense for double jeopardy purposes.\textsuperscript{564} While there may be overlapping evidence in proving the agreement and the substantive offense, it is not necessarily the case that there is overlapping conduct. In Grady, the focus was on the same conduct, not the same evidence.\textsuperscript{565}

Next, can an enterprise and the predicate acts be successively prosecuted? In Garrett v. United States,\textsuperscript{566} the Court found that a prosecution under the Continuing Criminal Enterprise statute could be brought after predicate acts had been prosecuted.\textsuperscript{567}

\textsuperscript{561} The First Circuit has held that Grady "pertains only to successive prosecutions, not to claims that multiple counts within a single indictment have double jeopardy connotations." United States v. Ortiz-Alarcon, 917 F.2d 651, 654 (1st Cir. 1990) cert. denied, 111 S. Ct. 2035 (1991). In such cases the Supreme Court "did not propose to disturb Blockburger's primacy." Id.; accord United States v. Maldonado-Rivera, 922 F.2d 934, 981 (2d Cir. 1990) (Court in Grady "took evident care not to rule that this broader test was to be applied to multiple punishments in a single prosecution").

\textsuperscript{562} Grady, 110 S. Ct. at 2102-03 (Scalia, J., dissenting).

\textsuperscript{563} 328 U.S. 640 (1946).

\textsuperscript{564} Id. at 643-44 (double jeopardy not applicable because elements of conspiracy distinct from substantive crime); see Callanan v. United States, 364 U.S. 597, 593 (1961) ("The distinctiveness between a substantive offense and a conspiracy to commit is a postulate of our law.").

\textsuperscript{565} Grady, 110 S. Ct. at 2093; see United States v. Esposito, 912 F.2d 60, 64 (3d Cir. 1990) ("The 'conduct' inquiry is distinct from an 'evidence inquiry.' ").

\textsuperscript{566} 471 U.S. 773 (1985).

\textsuperscript{567} Id. at 795. Note that under the "dual sovereignty" doctrine, if the
Grady cites Garrett without an intent to overrule it.\(^568\) Again, as in conspiracy, the enterprise of the kind in Garrett is different from that of the predicate acts. Lower courts have generally held that Grady does not bar successive prosecutions vis-à-vis predicate acts and the enterprise.\(^569\)

Finally, when is a later conspiracy prosecution barred by a previous one? Before Grady, lower courts looked at several factors, including overlapping time frame, congruence of co-conspirators, identity of overt acts and location of relevant acts.\(^570\) These facts appear to be focusing on the identity of the conduct, precisely the test that Grady espouses.

It would appear that the new rule delineated in Grady v. Corbin is completely retroactive to all successive prosecutions based on overlapping conduct.\(^571\) Of course, new rules are not

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\(^568\) Grady, 110 S. Ct. at 2090-91.

\(^569\) See, e.g., United States v. Scarpa, 913 F.2d 993, 1013-14 n.8 (2d Cir. 1990) (Grady does not preclude establishment of predicate act in RICO prosecution by evidence of previously prosecuted conduct); United States v. Pungitore, 910 F.2d 1084, 1111 (3d Cir. 1990) ("However significant Grady v. Corbin may prove to be in cases of simple felonies, we are confident that it has nothing whatsoever to do with the compound-complex crimes at issue here."), cert. denied, 111 S. Ct. 2010 (1991).

\(^570\) See, e.g., United States v. Bryan, 896 F.2d 68, 71 (5th Cir.), cert. denied, 111 S. Ct. 76, 133 (1990); United States v. Marable, 578 F.2d 151, 154-56 (5th Cir. 1978).

For example, citing Grady, the Second Circuit recently dismissed a second conspiracy prosecution in United States v. Calderone, 917 F.2d 717, 721 (2d Cir. 1990). The first prosecution was for a massive international drug conspiracy. Id. at 718. Two of the defendants were granted judgments of acquittal because of insufficient evidence. Id. at 719. Of one defendant, the district judge said that if the government had proceeded against him with a more narrowly charged conspiracy, he would have sent it to the jury. Id. at 718-19. The government then prosecuted the two on charges of a small conspiracy to distribute heroin in New York. Id. at 719. The Second Circuit dismissed the case under Grady, rejecting the government's arguments that Grady applied only to double prosecutions arising out of a single event, such as Grady's car accident and because the conduct that constitutes the offense in a conspiracy is the agreement, and since a different, smaller agreement was at issue, Grady did not apply. Id. at 721. In applying the same conduct test to successive conspiracy prosecutions, the court stated that in conspiracy cases, a jury infers from conduct of the defendants that the agreement has been established. Id. The proper focus, therefore, is placed on conduct allowing a jury to infer that an agreement existed. Id.

571. Grady is "new" because reasonable minds could have differed about the result; four presumptively reasonable minds dissented in Grady. See S. Saltzburg & D. Capra, American Criminal Procedure at 4-5 (West 1991 Supp.).
generally applicable in habeas corpus cases. However, there are two exceptions to the Court's non-retroactivity rule. The first exception is that the defendant should never have been tried at all, that is, a prosecution is beyond the scope of lawmaking authority. This exception would appear to apply to a new rule of double jeopardy, since if successive prosecutions are barred, the defendant should never have been tried the second time. The second exception would apply if a prosecution requires adherence to those procedures that are "implied in the concept of ordered liberty."

In a footnote in Grady, the majority recognized that an exception to the double jeopardy bar could apply where the state is unable to proceed on a more serious charge because the additional facts necessary to prove such charge have not yet occurred or could not reasonably have been discovered. An example is a subsequent murder prosecution that could not have originally been brought because the victim had not yet died. No such exception was applicable in Grady, where the prosecutor was informed of the victims' deaths on the night of the accident.

IV. THE 1990-91 TERM: IS THE LAW BEING REEVALUATED OR MERELY CHANGED?

It can be argued in light of the 1990-91 term that the Court is no longer a prisoner of its own jurisprudence. Certainly, Justice Marshall, in his last written opinion, senses a possible wholesale evaluation of Supreme Court precedent given the new appointments to the Court and the Court's implication in Payne v. Tennessee.

572. See Teague v. Lane, 489 U.S. 288, 316 (1989) (habeas corpus cannot be used as vehicle to create new constitutional rules of criminal procedure unless those rules would apply retroactively to all defendants on collateral review through one of two articulated exceptions).

573. Id. at 307 (quoting Mackey v. United States, 401 U.S. 667, 692 (1971)).


575. Grady, 110 S. Ct. 2084.

576. Id. at 2090 n.7.

577. See Diaz v. United States, 223 U.S. 442, 448-49 (1912) (earlier conviction of assault and battery does not bar prosecution for homicide when victim died after first prosecution, because charges were distinct "both in law and fact").

578. Grady, 110 S. Ct. at 2090 n.7.
see that a 5 to 4 decision with vigorous dissent is subject to re-examination and likely reversal. But there is nothing in the Court's fourth and fifth amendment cases from the recent term to indicate that these re-examinations, if any, are likely to be true critical evaluations of prior precedent. Rather, they are more likely to be new votes on the issue. A review of the 1990-91 term suggests that the Court is still largely uninterested in examining the logic and critical persuasiveness of its precedent. If the Court finds no visceral dissatisfaction with prior case law, precedent is applied in mechanical fashion. If the Court finds dissatisfaction, it rejects precedent in mechanical fashion.

A brief review of the five fourth amendment cases and two fifth amendment cases will prove the point. The most "active" opinion of the Term was California v. Acevedo, where the Court overruled the Burger Court case of Arkansas v. Sanders. To understand the necessity of at least addressing the viability of Sanders, one must analyze two conflicting cases. The first, Carroll v. United States, held that with probable cause an officer can conduct a warrantless search of an automobile. The Court reasoned that the mobility of the car excused the warrant requirement—the car would be gone by the time a warrant could be obtained. The Carroll doctrine was later extended in cases such as Chambers v. Maroney, and Michigan v. Thomas to allow

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579. 111 S. Ct. 2597 (1991). Justice Marshall's dissent notes that certain cases will now be subject to reversal given the Court's statement that a 5 to 4 decision with a vigorous dissent is now subject to re-examination. Id. at 2619 (Marshall, J., dissenting).

580. See Green, supra note 3, at 391-92 (Court in Acevedo expanded scope of automobile exception because prior precedent was "administratively unworkable"); 399 (Court in Bostick relied on "long, unbroken line of decisions" to justify use of ad hoc test instead of bright line standard).


582. 442 U.S. 753, 766 (1979) (police must get search warrant before searching personal luggage found within automobile), overruled, Acevedo, 111 S. Ct. at 1991 ("We conclude that it is better to adopt one clear-cut rule to govern automobile searches and eliminate the warrant requirement for closed containers set forth in Sanders.").

583. 267 U.S. 192 (1925).

584. Id. at 149. The Carroll Court, per Justice Taft, defined probable cause as "a belief, reasonably arising out of the circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction . . . ." Id.

585. Id. at 153.

586. 399 U.S. 42, 52 (1970) (permitting officer having probable cause to wait to search automobile until after it has been taken to police station).

587. 458 U.S. 259, 261 (1982) (once car immobilized, probable cause to
officers to conduct warrantless searches of cars even though the cars were immobilized. The Court has explained that mobility was not the only factor justifying the car exception; a warrantless search was also justified by the diminished expectation of privacy attendant to cars.588

The case in conflict with Carroll is United States v. Chadwick,589 where the Court held that officers with probable cause could not conduct a warrantless search of a footlocker absent exigent circumstances.590 A footlocker is, in most circumstances, as mobile as a car, but the Court pointed out that the distinction between cars and other containers is not based upon mobility, but rather upon a different degree of expectation of privacy.591 The Court found three distinctions bearing upon privacy expectations. First, a container's contents are not in public view the way a car's contents are.592 A car is primarily a means of transportation, whereas a container is a means by which things are kept private.593 Finally, a container is not as heavily regulated as a car.594

believe contraband in car continues and does not depend on reviewing court's decision as to whether car could have been removed during time police were getting warrant).

588. See generally California v. Carney, 471 U.S. 386, 391-92 (1985) (diminished expectation of privacy also justified by "the configuration" and "the pervasive regulation of vehicles").


590. Id. at 11.

591. Id. at 12-13. Other factors diminishing the expectation of privacy in a motor vehicle include vehicle registration, operator licensing, automobile inspection, and state and local codes regulating the use of motor vehicles. Id.

592. Id. at 13. Of course, much of the interior of a car is not in public view either. Indeed, the increasing use of tinted windows further weakens any conclusion that a car's occupants and contents are in plain view. See Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion), quoted with approval in Chadwick, 433 U.S. at 12.

593. Chadwick, 433 U.S. at 13. Note that a car is also a means of keeping things private, and a container is often a means of transportation. One can imagine the mercantilistic disaster of marketing a car without a trunk, or an immobile suitcase.

594. Id. A house, which is the ultimate container, is more heavily regulated than a car, and yet the expectation of privacy in a house is higher than the same expectation in a car.

The distinctions between cars and containers set forth in Chadwick are obviously not compelling, but the Court was trying to make the best of a bad situation—it was trying to retain the car exception and yet not extend it to all mobile containers. That this effort is doomed to failure is proven by the Court's resolution in Acevedo. Undoubtedly, part of the reason the Court came out as it did in Chadwick was as a reaction to the extreme arguments of the government in that case. The government contended that the warrant clause "protects only interests traditionally identified with the home." Id. at 6. Chief Justice Burger, in his majority opinion, spent considerable time and effort attacking that categorical argument. See id. at 2-11.
It would only be a matter of time before the container rules collided with the car rules. In Sanders, the Court invalidated a warrantless search of a briefcase placed in a taxi. The Court held that the Carroll doctrine was inapplicable, because the probable cause to search was focused solely on the briefcase and there was no danger that the luggage would be destroyed before a warrant could be obtained; there was no probable cause to search any part of the taxi independent of the briefcase. In United States v. Ross, the Court chose Carroll over Chadwick, holding that whenever there is probable cause to search a car independent of a container, officers can conduct a warrantless search of any area where probable cause exists, including containers in the car. In other words, if there is car-wide probable cause, then the container rules are trumped by the car rules. The Court in Ross nonetheless preserved the Sanders rule, so that if probable cause was limited to a container in the car, the police needed a warrant to open the container.

In Acevedo, Justice Blackmun, writing for the majority, correctly noted that the combination of Sanders and Ross meant that the "Court has drawn a curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile." While the Court recognized the incongruity of this conflicting precedent, its solution was hardly well-considered. The Court simply overruled Sanders, without exploring whether the alternative of overruling Ross and Carroll would be more consistent with fourth amendment principles. The Court's mechanistic choice fails to persuade us that the Carroll-Chambers doctrine makes any

595. Chadwick was not really such a case, because the government did not contend that the brief contact between the footlocker and defendant's automobile made the footlocker search an automobile search. Id. at 11. The government took the more extreme position that the warrant clause "protects only dwellings and other specifically designated locales." Id. at 7.

For a discussion of what a court should do when two lines of irreconcilable precedent apply equally to a fact situation, see Hynes v. New York Cent. R. Co., 231 N.Y. 229, 235-36, 131 N.E. 898, 900 (1921) (Cardozo, J.) (court should apply precedent that is more consistent with societal expectation, logic and public good).

597. Id. at 762-63.
599. Id. at 821.
600. Id. at 824.
602. See id.
sense as a matter of logic or societal expectation. The Court does nothing to resolve the inherent conflict between a rule allowing warrantless searches of cars and one requiring a warrant for containers, whether in a car or not. So long as Chadwick is still on the books, this conflict continues. The Court did not revisit or even discuss the reasons why there is a diminished expectation of privacy in cars as compared to containers. As a result, the Court resolved the case before it and established a bright-line rule, but did nothing to justify its opinion as a legitimate rule of law. Not surprisingly, the Court has left yet another anomaly—a briefcase receives the protection of the warrant requirement until the precise moment that it is placed in a car. At that point, there is a metaphysical change in privacy expectation; it diminishes. Not surprisingly, the Court’s reasons for overruling Sanders are unpersuasive. This is to be expected whenever the Court proceeds from result-oriented presumptions, such as presuming that the Carroll doctrine is a proper, controlling rule of law.

One of the Court’s reasons for overruling Sanders was that a container found in a search where there is car-wide probable cause is as easy for the police to store, or for the suspect to destroy, as one found in a search where the probable cause is specific to the container. There is no practical distinction between a container covered by Ross and a container covered by Sanders. While this is true, it only indicates why the containers should be treated the same, not which rule should apply to them.

Additionally, the Acevedo Court overruled Sanders because, as a result of Sanders, officers may be tempted to establish the general probable cause required by Ross. This explanation proceeds from the remarkable premise that an officer may search in order to establish probable cause. Even under Ross, an officer without probable cause to search a vehicle is not permitted to establish that probable cause by searching that vehicle.

Finally, the Court in Acevedo rejected Sanders because Sanders provides minimal privacy protection—a warrant to search a container would be routinely issued anyway, or else the police

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603. Id. at 1988 (“We now agree that a container found after a general search of the automobile and a container found in a car after a limited search for the container are equally easy for the police to store and for the suspect to hide or destroy.”).

604. Id.


would be able to search the container incident to arrest.\textsuperscript{607} But the search incident to arrest exception does not apply to container in the trunk, which is the very fact situation of \textit{Acevedo}.\textsuperscript{608} And the argument that a warrant should be excused because the police would usually have probable cause anyway shows an egregious misunderstanding of the warrant requirement. Warrants are required even if the police have probable cause, so that the police, who are in the competitive enterprise of ferreting out crime, are prevented from making self-interested determinations that probable cause exists.\textsuperscript{609}

In sum, the Court in \textit{Acevedo} has shown that it is not fearful of overruling prior precedent. However, when it does overrule precedent it is reluctant to freshly investigate the entirety of applicable precedent to determine which doctrines are legitimate and which are not. Only Justice Scalia, writing an opinion concurring in the judgment, took a broader view in \textit{Acevedo}. He correctly recognized that the Court's jurisprudence concerning the warrant requirement "lurched back and forth between imposing a categorical warrant requirement and looking to reasonableness alone."\textsuperscript{610} His solution was to return to the "first principle" that the protection of the fourth amendment is generally contiguous with that provided by the common law.\textsuperscript{611} Whatever one thinks of this solution, it is at least a fresh look at the body of fourth amendment law which requires us to re-evaluate our assumptions.

In \textit{California v. Hodari D.},\textsuperscript{612} the 1990-91 Court held that a non-physical show of force becomes a seizure only when the citizen submits to it.\textsuperscript{613} Thus, a suspect who flees from an officer's


\textsuperscript{609} See Johnson v. United States, 333 U.S. 10, 14 (1948) ("[Fourth amendment's] protection consists in requiring that ... inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.").

\textsuperscript{610} \textit{Acevedo}, 111 S. Ct. at 1992 (Scalia, J., concurring).

\textsuperscript{611} \textit{Id.} at 1993 (Scalia, J., concurring).

\textsuperscript{612} 111 S. Ct. 1547 (1991).

\textsuperscript{613} \textit{Id.} at 1550. The case arose when officers encountered a group of youths who were huddled around a car and who fled when they saw the officers. Hodari, one of the group who ran, threw away a small rock as a pursuing officer was about to catch him. The officer tackled Hodari, handcuffed him and radioed for assistance. Subsequently, the officer discovered that the discarded rock was crack cocaine. Hodari claimed that the pursuit was a seizure, and because there was no legal cause for the pursuit, it violated the fourth amendment. The Court held that Hodari had not been seized at the time he threw the rock away, and
show of authority is not seized until he is actually stopped by physical force or submits to a show of authority. A simple example of authority would be: "Stop you are under arrest." Under Hodari, there is no fourth amendment seizure until either the authority uses physical force or until the suspect submits to the authority.  

446 U.S. 544 (1986).

46. Id. at 554 (person seized under fourth amendment when reasonable person would have concluded that he was not free to leave); see, e.g., Immigration & Naturalization Serv. v. Delgado, 466 U.S. 210, 215 (1984) (quoting Mendenhall, 446 U.S. at 554).

617. Hodari D., 111 S. Ct. at 1552.

618. Id. at 1551.

619. Id. at 1549-50.

620. 110 S. Ct. 2901, 2904 (1990) (evidence seized in plain view does not violate fourth amendment even if not found inadvertently).

621. Hodari D., 111 S. Ct. at 1549-51. Adherence to the historical common law approach has the virtue of limiting, to some degree, the judge's subjective preferences. However, an application of common law principles to modern situations can be ambiguous, and hence subject to result-orientation. For a debate on this point, see the majority and dissenting opinions in United States v. Watson, 423 U.S. 411 (1976), both of which purport to apply the common law ap-
In another 1990-91 fourth amendment case, the Court in Florida v. Bostick rejected the lower court's alleged per se rule that suspicionless questioning of passengers inside a bus violates the fourth amendment. By approaching the issue as one involving a per se rule, the Court essentially decided nothing. Certainly, one can envision some questioning on a bus under some circumstances which would constitute a mere encounter. The Court avoided all the hard questions, much as it did in the previous term in the Bouknight case.

In Florida v. Jimeno, the Court held that an officer could reasonably conclude that when a suspect gave general consent to a search of his car, he also consented to a search of a paper bag lying on the floor of his car. Jimeno is a simple application of the objective reasonableness standards applicable to consent searches. Jimeno breaks no new ground and makes no attempt to review old ground.

In County of Riverside v. McLaughlin, the Court held that a jurisdiction that provides judicial determinations of probable cause within forty-eight hours of arrest will usually comply with the reasonableness requirement of the fourth amendment. Previously, the Court in Gerstein v. Pugh had held that the fourth amendment requires a prompt determination of probable cause after a warrantless arrest. Justice O'Connor, writing for

proach to the issue of whether the fourth amendment requires a warrant for a public arrest. The same problem of ambiguity in applying historical common law principles to modern situations can be found in the Court's jurisprudence concerning the civil right to jury trial. See Capra, Discretion Must Be Controlled, Judicial Authority Circumscribed, Federalism Preserved, Plain Meaning Enforced, and Everything Must Be Simplified: Recent Supreme Court Contributions to Federal Civil Practice, 50 Md. L. Rev. 632, 711-15 (1991).

623. Id. at 2389.
624. For a discussion of Bouknight, see supra notes 366-410 and accompanying text. It is notable that both Bouknight and Bostick were written by Justice O'Connor, See also Michigan v. Lucas, 111 S. Ct. 1743, 1748 (1991) (O'Connor, J.) (excluding evidence for defendant's failure to comply with notice and hearing requirement not per se violation of constitutional right to effective defense).
626. Id. at 1804.
627. See, e.g., Illinois v. Rodriguez, 110 S. Ct. 2793, 2800 (1990) (fourth amendment only requires that officer act reasonably in judging whether there was valid consent). For a discussion of Rodriguez, see supra notes 149-84 and accompanying text.
629. Id. at 1670.
631. Id. at 125.
the majority in McLaughlin, framed the question as what did the Court in Gerstein mean by "prompt." The majority applied Gerstein as if it were written in stone. It gave no consideration to common law principles or the historical underpinnings of the fourth amendment. It showed little concern for the individual interests at stake when a presumptively innocent person is arrested. McLaughlin is indicative of the rigid, blind application of precedent that was found in cases from the 1989-90 term such as Alabama v. White and Michigan Department of State Police v. Sitz.

The Court addressed the fifth amendment in Minnick v. Mississippi and held that the protections of Edwards v. Arizona continue even after the suspect consults an attorney. The Court in Edwards had adopted a per se rule that once the suspect invokes his right to counsel, police-initiated interrogation in the absence of counsel is impermissible. Edwards had never consulted his counsel before confessing. Minnick had done so extensively, but counsel was not present during his confession. The Court held that the policies behind Edwards—preventing harassment of suspects and providing bright-line regulation—were equally applicable where suspects had consulted with counsel. Minnick is a simple application of fact to law, but at least the Court analyzed the underpinnings of Edwards.

Finally, the Court in McNeil v. Wisconsin held that the invocation of the sixth amendment right to counsel at an initial appearance before a magistrate was offense-specific and did not constitute an invocation of the suspect’s fifth amendment right to

632. McLaughlin, 111 S. Ct. at 1669.
633. 110 S. Ct. 2412 (1990). For a discussion of White, see supra notes 64-111 and accompanying text.
634. 110 S. Ct. 2481 (1990). For a discussion of Sitz, see supra notes 9-43 and accompanying text.
636. 451 U.S. 477, 482 (1981) (waiver of right to counsel, once invoked, not only must be voluntary, but also must be knowing and intelligent).
637. Minnick, 111 S. Ct. at 491.
638. Edwards, 451 U.S. at 484-85. Once an accused invokes his right to counsel, the police may not interrogate him without benefit of counsel “unless the accused himself initiates further communication, exchanges, or conversations with the police.” Id. at 485.
639. Id. at 479.
640. Minnick, 111 S. Ct. at 488-89.
641. Id. at 491.
643. Id. at 2207. The right is "offense-specific" in that it cannot be invoked once for all future prosecutions. Id.
counsel under *Miranda*. This distinction is determinative because if the suspect invokes his *Miranda* right to counsel, police-initiated interrogation in the absence of counsel is impermissible even if the interrogation concerns a charge other than that for which the defendant has been arrested. Justice Scalia, writing for the majority, reasoned that it would do more harm than good if an invocation of the right to counsel at an initial appearance was presumed to constitute an invocation of *Miranda* rights as well; it would mean that persons in pre-trial custody would be unapproachable by police as to other crimes, "even though they have never expressed any unwillingness to be questioned." 

*McNeil* is admittedly utilitarian, and shows the Court's continued reluctance to expand *Miranda* rights. Still, the Court has retained the prophylactic house of cards that the Warren and Burger Courts erected to regulate police confessions. The patchwork quilt of the law of confessions is evident when *McNeil* is placed in juxtaposition with *Minnick*—the Court gives a strict construction to *Miranda* and what constitutes an invocation of *Miranda* rights in *McNeil*, but gives a broad construction to the protections afforded the suspect who actually invokes the *Miranda* right to counsel in *Minnick*. The Court has never explained why it is establishing significant and admittedly overbroad protection in one area, and none in another.

The interesting question left from *McNeil* is whether a suspect at an initial proceeding can specifically invoke the *Miranda* right to counsel, thereby precluding police-initiated interrogation in the absence of counsel as to any crime. Justice Stevens, dissenting in *McNeil*, found that the majority's ruling would have no practical effect because defendants would be likely to invoke *Miranda* rights at the initial appearance. The practical effect of *McNeil* may lie in a footnote in Justice Scalia's opinion, responding to this argument. He strongly implied that *Miranda* rights could be invoked only in the context of custodial interrogation, not anticipatorily. According to Justice Scalia, a contrary rule would lead to the unacceptable conclusion that *Miranda* rights

644. *Id.* at 2208.
645. See *Arizona v. Roberson*, 486 U.S. 675, 682 (1988) (rejecting argument that *Edwards* rule should not apply when police initiated interrogation following suspect's request for counsel which occurs in context of separate investigation).
647. *Id.* at 2212 (Stevens, J., dissenting).
648. *Id.* at 2211 n.3.
could be invoked in a letter prior to arrest. 649 Justice Scalia did not explain, however, why the sixth amendment right to counsel can be invoked anticipatorily 650 while the fifth amendment right to counsel cannot.

V. Conclusion

The premise of this article is not that the Rehnquist Court should be engaged in a full-scale overruling of Warren or Burger Court precedent. Rather, the Rehnquist Court should fulfill its role as a Supreme Court, and continually evaluate and analyze applicable precedent, rather than mechanically apply it. Constant evaluation of supporting authority serves several important purposes. It forces all to rethink the fundamental premises of legal doctrine. It allows courts and lawyers to resolve, in an honest fashion, the new legal problems that arise in a changing society. It further the current and historical legitimacy of the Court as an institution. It provides for easier resolution of future cases. Finally, direct and honest treatment of applicable law allows for true reconsideration, so that yesterday's mistakes can be terminated without damage to future cases.

With a few notable exceptions, the 1989-90 term shows that the Rehnquist Court has failed to act as a Supreme Court, at least in the area of the fourth and fifth amendments, and that this failure has continued in the 1990-91 term. All too often there appears to be an obsessive single-mindedness to clear the docket, to decide the case before the Court at all costs. But the inevitable result of this short-sighted tactic is that confusion and dissatisfaction permeates the Bench and Bar, leaving even more future docket-cleaning for the Court. It is about time that the Court faces up to its responsibilities. The Court can do so by examining the underlying principles of fourth and fifth amendment law that it has recently taken for granted.

649. Id.