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Drugs, Ideology, and the Deconstitutionalization of Criminal Procedure

Gerald G. Ashdown

West Virginia University College of Law, gerald.ashdown@mail.wvu.edu

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DRUGS, IDEOLOGY, AND THE DECONSTITUTIONALIZATION OF CRIMINAL PROCEDURE

GERALD G. ASHDOWN*

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* Professor of Law, West Virginia University College of Law. B.B.A., University of Iowa; J.D., University of Iowa.

I. INTRODUCTION

In 1961, when Justice Clark wrote the opinion in *Mapp v. Ohio*,¹ the revolution in criminal procedure was on. Vigorously for the next ten years,² and moderately for another ten,³ the United States Supreme Court utilized various provisions of the first eight amendments to the United States Constitution to formulate a constitutional code of criminal procedure applicable to the states as well as to the federal government.⁴ This was a two-part process—the Court applied particular guarantees in the Bill of Rights to the states by virtue of the Due Process Clause of the Fourteenth Amendment and then interpreted those guarantees to formulate rules governing police conduct.⁵

1. 367 U.S. 643 (1961).

2. Between the decision in *Mapp* in 1961 and the close of the decade, the Court decided such landmark cases as *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring the appointment of counsel for indigent criminal defendants in state felony prosecutions); *Miranda v. Arizona*, 384 U.S. 436 (1966) (Fifth Amendment privilege against self-incrimination requires that certain warnings be given to defendants prior to custodial interrogation); *United States v. Wade*, 388 U.S. 218 (1967) (requiring the presence of counsel at post-charge identification proceedings); *Katz v. United States*, 389 U.S. 347 (1967) (shifting the focus of Fourth Amendment protection from property interests to privacy).

3. Although the five new Justices appointed during the 1970s began to temper the Court's careful scrutiny of the criminal process, criminal defendants continued to enjoy some success before the Court during this decade. *See, e.g.*, *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending the right to appointed counsel to misdemeanor cases involving actual imprisonment); *Gerstein v. Pugh*, 420 U.S. 103 (1975) (requiring that a person arrested without a warrant be taken promptly before a judicial officer); *Brewer v. Williams*, 430 U.S. 387 (1977) (Sixth Amendment right to counsel attaches after the beginning of adversarial judicial proceedings); *United States v. Chadwick*, 433 U.S. 1 (1977); *Arkansas v. Sanders*, 442 U.S. 753 (1979) (warrant required to search luggage).

4. The principle critics of this process were Justice John Harlan, *see Malloy v. Hogan*, 378 U.S. 1 (1964) (Harlan, J., joined by Clark, J., dissenting); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Harlan, J., joined by Stewart, J., dissenting); and Judge Henry J. Friendly of the United States Court of Appeals for the Second Circuit, *see HENRY J. FRIENDLY, BENCHMARKS*, Chap. 11, pp. 235-65; Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 CAL. L. REV. 929 (1965).

5. This was known as the process of selective incorporation. The Bill of Rights, when drafted and ratified, was intended to apply only to the federal government. The Fourteenth Amendment, of course, limits state action. Under the selective incorporation approach, favored by a majority of the Justices during the 1960s, if a particular guarantee in the Bill of Rights was considered fundamental or implicit in the concept of ordered liberty, then it was applied to the states as part of Fourteenth Amendment due process, along with all the

Substantive due process in its individual rights form was reawakened.⁶

Although the constitutionalization of the law of criminal procedure was partially a political phenomenon, it was not brought about by contemporary presidential politics and the appointment process. Of the twelve Justices who sat on the Warren Court during its most active years,⁷ eight were appointed prior to 1960,⁸ four of these by Republican President Dwight D. Eisenhower.⁹ Of the three seats on the Court filled during the 1960s,¹⁰ Justice Byron White, appointed by President John F. Kennedy, turned out to be one of the Court's more conservative members. In fact, the members of the Court during this period came from diverse political and ideological perspectives. For example, Justice John Harlan was a constitutional conservative, Justice Hugo Black was a strict constructionist, and Justice William O. Douglas was somewhat of a nontextual free thinker.

This is not to say, however, that politics played no role in constitutionalizing criminal procedure. Sociopolitical conditions at the time undoubtedly acted as the catalyst for the Court's activism. Although it is presumptuous to speculate on the thought processes and internal workings of any deliberative body, let alone to undertake this effort with respect to the diverse personalities on the Warren Court during the 1960s, certain predilections and emanations from the times

federal decisions interpreting the right. Selective incorporation gradually became near total. Of the rights enumerated in the Bill of Rights which deal with the criminal process, only the Fifth Amendment clause guaranteeing criminal prosecution by grand jury indictment and the Eighth Amendment prohibition against excessive bail have not been applied to the states. See WAYNE R. LAFAVE & JEROLD H. ISRAEL, *CRIMINAL PROCEDURE* §§ 2.5-6 (2d ed. 1992).

6. Substantive due process in its economic form, see *Lochner v. New York*, 198 U.S. 45 (1905), met its demise in the 1930s. See, e.g., *Nebbia v. New York*, 291 U.S. 502 (1934); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *United States v. Carolene Prods. Co.*, 304 U.S. 144 (1938).

7. Chief Justice Warren, and Associate Justices Black, Douglas, Frankfurter, Clark, Harlan, Brennan, Stewart, Goldberg, White, Fortas, and Marshall.

8. Chief Justice Warren, and Associate Justices Black, Douglas, Frankfurter, Clark, Harlan, Brennan, and Stewart.

9. Chief Justice Warren, and Associate Justices Harlan, Brennan, and Stewart.

10. Justices White and Marshall; Justices Goldberg and Fortas, who occupied the same seat on the Court.

prove insightful. Fear of domestic communism had subsided and in 1960 John Kennedy was sworn in as President on a note of optimism. Rock-and-roll was transforming modern music and, most importantly, the civil rights movement was forever transforming the American sociopolitical scene. It was probably this last cultural phenomenon that affected the Court's criminal process decisions during this period more than any other factor. Then, as now, a disproportionate number of criminal defendants were both poor and black.

The other main impetus behind the Supreme Court's criminal procedure decisions in the 1960s and early 1970s was a desire for uniform protection throughout the states for the individual rights of criminal defendants. Other than through the adoption of a uniform code of criminal procedure,¹¹ which would remain the option of reluctant legislative prerogative, the only means of achieving uniformity and consistency in the safeguarding of individual rights against police investigatory abuses was through constitutionally mandated rules.¹² It was this philosophy that fueled the application of various provisions of the Bill of Rights to the states through the process of selective incorporation.¹³

The application of general guarantees in the Bill of Rights to the states, such as the protection against unreasonable searches and seizures and the privilege against self-incrimination, was not sufficient, however, to achieve uniformity. A history of state court refusal to follow a general fundamental fairness approach to due process protection of individual rights led the Court to fashion relatively precise

11. The A.L.I. Model Code of Pre-Arrest Procedure was not available until 1966.

12. If the modern critic of Warren Court decisions is skeptical about intrusive and abusive police practices during this period, they only have to examine the facts in a few of the Court's decisions during this time to be disabused of the skepticism. *See, e.g.,* *Mapp v. Ohio*, 367 U.S. 643 (1961) (officers who were looking for gambling equipment and a bombing suspect forcibly entered the Mapp home after being denied admittance, struggled with and ultimately handcuffed Ms. Mapp, and finally seized obscene material after an extensive warrantless search of the premises); *Spano v. New York*, 360 U.S. 315 (1959) (a poorly educated, emotionally unstable 25-year old was continually interrogated for eight hours throughout the night in the face of his refusal to answer based on the advice of counsel and the denial of his requests to speak with his lawyer).

13. *See supra* note 3 and accompanying text.

rules for application in the criminal processes of the state courts.¹⁴ Thus, by the end of the 1960s, virtually all of the provisions in the Bill of Rights respecting the criminal process, along with particularized rules interpreting these rights, had been applied to the states via the Due Process Clause of the Fourteenth Amendment. The result was a rather uniform set of procedural rules that applied equally in federal and state prosecutions.

This constitutional process, once initiated and developed, was not quiescent. On the contrary, the particular rules formulated through the incorporation mechanism were subject to elaboration, change, and retrenchment. The change and retrenchment began with the shift in presidential politics which has occurred during the past two decades. The Republican dynasty ushered in by Richard Nixon in 1968 marked the beginning of the contemporary ideologization of the Supreme Court. Although the impact of the conservative politicizing of the Court has been much debated, at least one statement respecting the Court's philosophy can now unequivocally be made—the appointment of Chief Justice Warren Burger and Associate (now Chief) Justice William Rehnquist during Richard Nixon's first term signaled the initiation of a crime control mentality that the Reagan/Bush years in the White House have seen flourish with a vengeance. This is epitomized by the fact that the only member of the Court not appointed by a Republican president during the last twenty years is Justice White, who consistently votes in favor of the government in criminal cases.

Fueled by the so-called "war on drugs," the success of Republican presidents in determining the composition of the Court has resulted in the virtual dismantling of Fourth Amendment law, an outcome-oriented jurisprudence focusing on guilty verdicts rather than procedural viola-

14. The failure of state courts to follow the fundamental fairness approach to due process in appointing counsel in felony cases, *see* *Betts v. Brady*, 316 U.S. 455 (1942), in part led the Court to overrule *Betts* in *Gideon v. Wainwright*, 372 U.S. 335 (1963), requiring the appointment of counsel for indigent criminal defendants. Likewise, the refusal of state courts to follow the fundamental fairness rule in deciding on the admissibility of confessions following police interrogation led the Supreme Court to adopt its *McNabb-Mallory* rule requiring prompt presentment before a magistrate following a warrantless arrest, and to decide *Escobedo v. Illinois*, 378 U.S. 478 (1964), and ultimately *Miranda v. Arizona*, 384 U.S. 436 (1966).

tions, and particular decisions that astonish proponents of individual rights and titillate law-and-order advocates. Although the Court has not reversed the incorporation process, it has deconstitutionalized criminal procedure by liberalizing permissible police practices in some areas to the point where application of a particular provision of the Bill of Rights to the states, or for that matter the exclusionary rule of *Mapp*, is simply irrelevant. The only possible survivor in this crime control juggernaut is protection for the accused in the interrogation process.¹⁵

II. DISMANTLING FOURTH AMENDMENT LAW

A. *The Shift in Perspective—From Property to Privacy to Places*

In *Katz v. United States*,¹⁶ both the petitioner and the government characterized the controlling issue as whether a telephone booth was a "constitutionally protected area."¹⁷ This characterization was based on Fourth Amendment precedents that required a physical penetration or trespass in the property law sense before the Fourth Amendment was implicated.¹⁸ Justice Stewart's majority opinion rejected this formula-

15. It is possible, of course, to attribute the reactivism of the current Supreme Court to the activism of the Warren years and to describe it as the "who's ox is getting gored" phenomenon or "what's good for the goose is good for the gander." There are at least three differences, however, between the Warren years and the Rehnquist era. First, the various members of the Warren Court were not political appointees like a majority of the members of the current Court, appointed to fulfill a particular political agenda. Second, the Justices now on the Court have less impressive backgrounds than former Justices. On the Court led by Earl Warren in the 1960s there was a governor (Warren), a U.S. Senator (Hugo Black), two lawyer's lawyers (John Harlan and Abe Fortas), a head of the SEC and New Deal reformer (William O. Douglas), and a deputy attorney general (Byron White). Contrastingly, besides White, the Court is now made up of a former Justice Department official (William Rehnquist), and eight former lower court judges, some of whom served only a brief tenure. Lastly, the Warren Court protected and expanded individual rights against governmental power, the purpose for which the Bill of Rights was designed. The Rehnquist Court, on the other hand, favors governmental decision-making and the majoritarian process, often at the expense of under-represented minority interests. Unfortunately for this latter group and their advocates, they cannot simply "take their ball and go home." "Home" may turn out to be either economically or culturally impoverished or, at worst, jail.

16. 389 U.S. 347 (1967).

17. *Id.* at 349, 351.

18. *See, e.g., Silverman v. United States*, 365 U.S. 505, 509 (1961).

tion of the issue, stating that "the Fourth Amendment protects people, not places," and held that Katz had a justifiable expectation of privacy in the telephone booth from which he made his calls.¹⁹ Accordingly, the authorities were required to comply with the Fourth Amendment warrant procedure in electronically monitoring his conversations. Although this shift from a property to a privacy rationale was intended to expand constitutional protection against police search and surveillance practices, ironically, the Court has recently used the expectation of privacy formula to drastically curtail the scope of the Fourth Amendment. This twist can be attributed, in large measure, to governmental zealotry over the drug problem.

The Court was able to stand the *Katz* decision on its head in later cases, not by relying on the majority opinion in *Katz*, but instead by referring to Justice Harlan's narrower concurring opinion which stated, "[m]y understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as reasonable."²⁰ Although a wholly subjective standard would be misguided,²¹ even Justice Harlan assumed that the second part of his rule, the objective portion, would be applied reasonably.²² Nevertheless, during the last fifteen years, the Supreme Court has seized the latter aspect of Justice Harlan's statement of the rule to fashion a justifiable or legitimate expectation of privacy formula so narrow in its scope that the Fourth Amendment is now only a minor obstacle to law enforcement officers. The profundity of this result can be appreciated when one realizes that in the many cases in which the Supreme Court has concluded that no legitimate expectation of privacy exists, there are abso-

19. *Katz*, 389 U.S. at 353.

20. *Id.* at 361.

21. A purely subjective approach would have to consider personal claims to privacy that were clearly unreasonable, and a purely subjective expectation could be destroyed by the government announcing hourly on television that all homes were subject to random searches without a warrant. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 383-85 (1974).

22. See *United States v. White*, 401 U.S. 745, 784-93 (1971), where Justice Harlan chastised the majority for refusing to recognize a privacy expectation that persons to whom one speaks would not be electronically recording or transmitting the conversation.

lutely no Fourth Amendment controls, i.e., the Fourth Amendment does not apply to the police behavior involved. Consequently, governmental authorities are free to act on whim, hunch, or rumor without even a hint of suspicion, let alone probable cause or a warrant. It is this feature of current Fourth Amendment law which I find most disturbing.

The distortion of *Katz* started innocently enough in 1971 in *United States v. White*,²³ but by the end of that decade, the misapplication of the privacy model had become somewhat more startling. In *White*, the Supreme Court again was faced with the issue of whether there were any Fourth Amendment restraints on the electronic monitoring of conversations when one party to the conversation was wired. In a long line of earlier cases, the Court had held that there were no constitutional limits on this kind of police activity, not only because a participant in a conversation assumed the risk that the other party would divulge the information, but also because there was no physical trespass.²⁴ This latter aspect of these holdings had been rejected by the *Katz* decision and therefore the Court was called upon to reconsider the issue. Writing for four members of the Court, Justice White's plurality opinion conceded that the trespass rationale could not withstand *Katz*. However, he had little difficulty in converting the assumption of the risk of disclosure portion of the earlier cases into the *Katz* privacy formula. Stating that it was not necessarily subjective expectations of privacy but only those that were constitutionally justifiable that would be protected, Justice White's opinion concluded that the Fourth Amendment provided no protection to those who voluntarily confided in others, regardless of whether the conversations were verbally reported or electronically recorded.²⁵ Even then, the victory for

23. *Id.*

24. *See, e.g., Hoffa v. United States*, 385 U.S. 293 (1966) (no matter how strongly a defendant might have trusted an apparent colleague, their seemingly private conversations are not protected by the Fourth Amendment when it turns out that the colleague is a government informant); *Goldman v. United States*, 316 U.S. 129, 134 (1942) (the use of a detectaphone by Government agents in one office to record conversations taking place in defendant's adjoining office not violative of the Fourth Amendment); *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (defendant's Fourth Amendment rights not violated unless there has been an official search and seizure of his person or such a seizure of his papers or his tangible material effects or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure).

25. Justice White's plurality opinion stated:

law enforcement was a narrow one. Justice Black provided the fifth vote for this holding, adhering to the narrow view from his dissenting opinion in *Katz* that the Fourth Amendment simply did not apply to electronic surveillance.²⁶ Justices Douglas, Harlan, Marshall, and Brennan argued that *Katz* recognized that all electronic monitoring should be subject to Fourth Amendment scrutiny.²⁷

Our problem is not what the privacy expectations of particular defendants in particular situations may be or the extent to which they may in fact have relied on the discretion of their companions. Very probably, individual defendants neither know nor suspect that their colleagues have gone or will go to the police or are carrying recorders or transmitters. Otherwise, conversation would cease and our problem with these encounters would be nonexistent or far different from those now before us. Our problem, in terms of the principles announced in *Katz*, is what expectations of privacy are constitutionally "justifiable"—what expectations the Fourth Amendment will protect in the absence of a warrant. So far, the law permits the frustrations of actual expectations of privacy by permitting authorities to use the testimony of those associates who for one reason or another have determined to turn to the police, as well as by authorizing the use of informants in the manner exemplified by *Hoffa* and *Lewis*. If the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case.

White, 401 U.S. at 751-52.

26. *Id.* at 754 (Black, J., concurring). Justice Brennan concurred in the result on the ground that the events in *White* had taken place long prior to *Katz*, and *Desist v. United States*, 394 U.S. 244 (1969), had held that *Katz* applied only to electronic surveillance which took place after the date of that decision. Justice Brennan, however, agreed with Justices Douglas, Harlan, and Marshall that *Katz* outlawed the type of participant monitoring that took place in *White*. *Id.* at 755-56 (Brennan, J., concurring in the result).

27. Justice Harlan, the actual source of the plurality's objective "constitutionally justifiable expectation of privacy" approach, see *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring), viewed electronic monitoring by a police agent, in the absence of a warrant, to be a constitutionally unacceptable police investigatory practice. In some of his most eloquent language, Justice Harlan stated in his dissenting opinion in *White*:

Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society. The critical question, therefore, is whether, under our system of government, as reflected in the Constitution, we should impose on our citizens the risks of the electronic listener or observer without at least the protection of a warrant requirement.

• • • •

The impact of the practice of third-party bugging, must, I think, be considered such as to undermine that confidence and sense of security in dealing with one another that is characteristic of individual relationships between citizens in a

Although the *White* decision did not alter or expand what had previously been a permissible police investigatory practice, one rather surprising result does emanate from the decision. Since *White* stands for the proposition that citizens have no constitutionally protected expectation of privacy in conversations with others, the government is free to use agents or informants to record conversations in which they participate, regardless of whether there is even an inkling of suspicion about the speaker's involvement in criminal activity. In other words, there is simply no constitutional control on government when, according to the Supreme Court, no justifiable or legitimate expectation of privacy exists.

This perversion of the *Katz* privacy formulation of the Fourth Amendment has led to some truly phenomenal results. In the earliest cases, a majority of the Court concluded that there was no constitutionally recognizable expectation of privacy in bank records,²⁸ phone numbers dialed from one's telephone,²⁹ or for a passenger in a vehicle.³⁰ Congress overrode the first of these decisions by statute,³¹ and although modern technology has made the second somewhat more palatable, the *Rakas* decision concerning passengers in vehicles remains inconsistent with the subjective and realistic expectations of most citizens.

More recently, the Court has continued the disingenuous application of the privacy model by holding that there is no legitimate expectation of privacy in farm fields even though posted with "no trespassing" signs³² on the surrounding gate or on the interior of a barn which stands 60 feet from a house.³³ Likewise, there is no privacy protection from aerial surveillance from helicopter flights as low as 400 feet over one's backyard;³⁴ the police can also freely rummage

free society.

White, 401 U.S. at 786-87 (Harlan, J., dissenting).

28. *United States v. Miller*, 425 U.S. 435 (1976).

29. *Smith v. Maryland*, 442 U.S. 735 (1979).

30. *Rakas v. Illinois*, 439 U.S. 128 (1979).

31. Right to Financial Privacy Act, 12 U.S.C. §§ 3401-3422 (1988).

32. *Oliver v. United States*, 466 U.S. 170 (1984).

33. *United States v. Dunn*, 480 U.S. 294 (1987).

34. *Florida v. Riley*, 488 U.S. 445 (1989).

through garbage placed for collection, since these items are outside the sphere of any privacy expectation.³⁵ The fact that the subjective expectations of most citizens are inconsistent with these conclusions seems hardly relevant to the Justices making up a majority of the Court because they simply have made an ideological decision to allow law enforcement authorities to inspect these things without even a modicum of suspicion that the target is involved in criminal activity. Of course, these cases came before the Court in situations where criminal activity had been actually occurring and it should come as no surprise that the criminal activity usually involved drugs.³⁶

The final touch to the Supreme Court's recent privacy ideology is provided by then Associate Justice Rehnquist's opinion in *Rawlings v. Kentucky*,³⁷ yet another drug case. In a decision inconsistent with both the Court's precedents³⁸ and the language of the Fourth Amendment,³⁹ Justice Rehnquist's majority opinion held that a property interest in the items seized did not necessarily provide Fourth Amendment protection. On the arrival of the police, Rawlings had placed a small cache of drugs in his female companion's purse. He contended that even if he did not have an expectation of privacy in the purse, his claimed ownership of the drugs entitled him to challenge the search.⁴⁰ Rawling's contention was emphatically rejected in Justice Rehnquist's opinion, which stated that although property ownership was a factor to be considered, "arcane" concepts of property law did not control one's ability to claim the protection of the Fourth Amendment. The opinion concluded that the Fourth Amendment issue was controlled by the inquiry of whether there was a justifiable expectation of privacy in the

35. *California v. Greenwood*, 486 U.S. 35 (1988).

36. All of the cases concerning Fourth Amendment privacy interests decided by the Supreme Court since 1980 have involved drugs, and in all the Court has found no legitimate expectation of privacy, or at best a diminished expectation, i.e., vehicles, in the area searched.

37. 448 U.S. 98 (1980).

38. *Alderman v. United States*, 394 U.S. 165 (1969); *Jones v. United States*, 362 U.S. 257 (1960); *United States v. Jeffers*, 342 U.S. 48 (1951). Each of these cases recognized that the Fourth Amendment provided protection to property interests.

39. The language of the amendment makes it specifically applicable to "papers and effects" as well as "persons" and "houses." U.S. CONST. amend. IV.

40. *Rawlings*, 448 U.S. at 105.

place searched.⁴¹ Justice Rehnquist ignored the precise language of the Fourth Amendment: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."⁴² Thus, property claims were prevented from being used to circumvent the Court's narrow privacy jurisprudence, again placing the focus on constitutionally protected places, it had been prior to the decision in *Katz*.⁴³

The Court's objective privacy formula has had one primary advantage for law enforcement. It has avoided the exclusion of evidence (usually drugs) from criminal trials and has allowed the Court to discreetly undermine the exclusionary rule of *Mapp v. Ohio*, without directly overruling that decision.⁴⁴ This law enforcement ideology and judicial "war on drugs" has had, however, some unfortunate jurisprudential consequences, the foremost of which is the drastic decline in constitutional protection from undue police search and seizure practices.

A Supreme Court conclusion that a person enjoys no constitutionally legitimate expectation of privacy in, for example, his bank records, telephone records, automobile,⁴⁵ barn, garbage, or with respect to per-

41. *Id.* at 105-06.

42. U.S. CONST. amend. IV. (emphasis added).

43. Although the *Katz* decision applied Fourth Amendment protection to privacy interests, this was intended as an expansion, not as exclusion. Justice Stewart's majority opinion in *Katz* stated, "[t]he Fourth Amendment cannot be translated into a general constitutional 'right of privacy.' That amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all." 389 U.S. at 350.

44. The Court has not been nearly as successful in avoiding another politically controversial issue—legalized abortion—created by the decision in *Roe v. Wade*, 410 U.S. 113 (1973). See, e.g., *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976); *Maher v. Roe*, 432 U.S. 464 (1977); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Harris v. McRae*, 448 U.S. 297 (1980); *H. L. v. Matheson*, 450 U.S. 398 (1981); *Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983); *Planned Parenthood v. Ashcroft*, 462 U.S. 476 (1983); *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990); *Hodgson v. Minnesota*, 497 U.S. 417 (1990); *Planned Parenthood of S.E. Pa. v. Casey*, 112 S. Ct. 2791 (1992).

45. A passenger in an automobile has no expectation of privacy in the vehicle. *Rakas v. Illinois*, 439 U.S. 128 (1978). Whereas, in a series of cases, the Supreme Court has held that an owner/driver has only a diminished expectation of privacy which allows the police

sons with whom he speaks means that the Fourth Amendment is wholly inapplicable and that the police are free to do whatever they please on whom without even a hint of suspicion, let alone probable cause or a warrant. It is this wholesale elimination of Fourth Amendment control on official investigative practices that is both philosophically and pragmatically problematic. No one would suggest that the police should not be able to investigate such things as those listed above, but one would think that *some* justification should be required—such as reasonable suspicion or probable cause—before a person becomes the target of official scrutiny and his affairs or property are invaded. The Court's privacy decisions have permitted circumvention of the exclusionary rule, and they have also left Fourth Amendment law with this troubling legacy.

As a result, and another unfortunate consequence of this line of cases, many state courts have relied on their own state constitutions to provide more realistic recognition of privacy expectations and concomitant legal protection against unjustified invasion of these interests.⁴⁶

to search a vehicle without a warrant. This has been justified on the theory that an automobile moves around in public, that it is possible to see inside, and that it and the driver are subject to regulation by the state. *See, e.g., California v. Carney*, 471 U.S. 386 (1985); *United States v. Ross*, 456 U.S. 798 (1982); *South Dakota v. Opperman*, 428 U.S. 364, 368-69 (1976); *Texas v. White*, 423 U.S. 67 (1975); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

46. *See, e.g., State v. Jones*, 706 P.2d 317 (Alaska 1985) (declining to apply "totality of circumstances" test of *Illinois v. Gates*, 462 U.S. 213 (1983) to search warrant affidavits based on information provided by confidential informants); *People v. Ruggles*, 702 P.2d 170 (Cal. 1985) (warrantless search with probable cause of briefcase in vehicle violates search and seizure clause of state constitution); *People v. Oates*, 698 P.2d 811 (Colo. 1985) (installation and continued presence of beeper to locate chemical drum in residence violates search and seizure clause of Colorado Constitution); *State v. Marsala*, 579 A.2d 58 (Conn. 1990) (rejecting good faith exception to exclusionary rule of *United States v. Leon*, 468 U.S. 897 (1984)); *State v. Bailey*, 523 A.2d 535 (Del. 1987) (Delaware statute provides broader double jeopardy protections than does Sixth Amendment to United States Constitution); *State v. Sarmiento*, 397 So. 2d 643 (Fla. 1981) (Florida Constitution provides broader protection against wiretapping of private telephone conversations than does United States Constitution); *People v. Rogers*, 397 N.E.2d 709 (N.Y. 1979) (once an attorney has entered a proceeding, thereby signifying that the police should cease questioning, a defendant in custody may not be further interrogated in the absence of counsel); *State v. Cavanaugh*, 545 N.E.2d 1325 (Ohio 1988) (under Ohio Constitution, probable cause for search of defendant and seizure of pills found on his person did not exist based on citizen informant's tip); *Commonwealth v. Bussey*, 404 A.2d 1309 (Pa. 1979) (Pennsylvania broadens *Miranda*

This process, sometimes referred to as reverse federalism,⁴⁷ has had the effect of providing state citizens with greater protection against state law enforcement practices than is available in the federal criminal process against invasions of privacy by federal law enforcement agents. It is ironic that this is a state of affairs diametrically contrary to the situation that originally led to the incorporation approach to the criminal process.⁴⁸ Incorporation had been an effort to constitutionalize state rules and make them consistent with more stringent federal standards for the protection of the rights of criminal defendants in state courts. The recent Court-provided leniency to federal law enforcement officials has aided the federal drug enforcement effort, the so-called "war on drugs," and no doubt has made a substantial contribution to the deluge of drug cases on federal courts and the overcrowding of federal prisons with drug offenders.

B. Investigative Practices Not Amounting to Searches or Seizures

1. The No Search Rationale

Closely aligned with the no privacy/no protection cases is the Supreme Court's no search approach to Fourth Amendment law. Although different in theory, the result is the same—no Fourth Amend-

protections by requiring explicit waiver of such rights); *State v. Boland*, 800 P.2d 1112 (Wash. 1990) (Washington's Constitution provides greater protection of defendant's privacy interest in garbage bags left outside the home than does United States Supreme Court in *California v. Greenwood*, 486 U.S. 35, (1988)); *State v. Oxier*, 338 S.E.2d 360 (W. Va. 1985) (prosecutor's cross-examination of defendant regarding pretrial silence and comment on that silence violates due process clause of state constitution); *State v. Pitsch*, 369 N.W.2d 711 (Wis. 1985) (Wisconsin high court adopts more protective standards for defendants complaining of ineffective assistance of counsel than is mandated by United States Supreme Court under Fourteenth Amendment); *State v. Davis*, 686 P.2d 1143 (Wash. Ct. App. 1984) (Washington court expands on Miranda rights afforded to juveniles when suspect engages in post-arrest silence); see also Ronald K.L. Collins & Peter J. Galie, *Models of Post-Incorporation Judicial Review: 1985 Survey of State Constitutional Individual Rights Decisions*, 55 U. CIN. L. REV. 317, 318-19 (1986).

47. See, e.g., Peter Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 57 (1987); Michael G. Collins, *The Right to Avoid Trial: Justifying Federal Court Intervention Into Ongoing State Court Proceedings*, 66 N.C. L. REV. 49, 85-86 nn.201 & 204 (1987).

48. See *supra* notes 3 & 4 and accompanying text.

ment coverage. These cases involve situations in which the Court has recognized some expectation of privacy (luggage and automobiles), but because of the nature of the police activity, the Court has ultimately concluded that there was no search.

The most important of these cases to law enforcement has proved to be *United States v. Place*.⁴⁹ In a conclusion unnecessary to the holding,⁵⁰ Justice O'Connor's majority opinion declared that a canine sniff search of luggage in a public place was so minimally intrusive that it did not amount to a search within the meaning of the Fourth Amendment.⁵¹ This, like the no privacy rationale, means that there are consequently no Fourth Amendment restrictions on this type of official investigatory activity. Not even suspicion is necessary before luggage can randomly (or whimsically, for that matter) be subjected to drug-sniffing dogs. The advantage of Supreme Court tolerance of this practice to law enforcement is the bootstrapping analysis that it initiates. Dogs can meander around luggage until a positive reaction is obtained, which alone or in combination with other factors will provide probable cause to obtain a warrant to search the luggage. Furthermore, as suggested by the majority in *Place*, when supported by specific articulable facts, luggage can be detained while a warrant is being sought.⁵²

The *Place* decision is an archetype of the Court's law enforcement focus. In earlier cases, as well as in *Place* itself, the Court recognized "that a person possesses a privacy interest in the contents of personal

49. 462 U.S. 696 (1983).

50. In *Place*, federal agents stopped the respondent at La Guardia Airport based on reasonable suspicion that he was a drug courier. They seized his luggage and took the bags to Kennedy Airport where they were subjected to a trained narcotics dog who reacted positively to one of them. Justice O'Connor's majority opinion held that this seizure should be judged by the *Terry* standards for a brief investigative detention, and concluded that the 90-minute delay exceeded the *Terry* limits. The dog sniff issue was neither reached by the court of appeals nor briefed and argued in the Supreme Court. The majority's statements about a dog sniff not amounting to a search was thus unnecessary to the holding and is thus dicta, although it has been consistently followed by the federal courts. *Id.* at 719-20 (Brennan, J., joined by Marshall, J., concurring in the result); *id.* at 723-24 (Blackmun, J., joined by Marshall, J., concurring).

51. *Id.* at 707.

52. *Id.*

luggage that is protected by the Fourth Amendment."⁵³ Therefore, it is somewhat surprising that a majority of the Court concluded that the Fourth Amendment did not apply to dog inspections of luggage. Although Justice O'Connor's majority opinion characterized the procedure as limited, both in terms of its intrusiveness and as to the nature of the information obtained, it ignored the fact that the dog inspection reveals something about a place the Court itself has recognized as private. To this extent, *Place* is inconsistent with the Court's notion of privacy, an expectation of which requires at least reasonable suspicion for invasion. The incongruity of this aspect of the *Place* decision with the privacy analysis is revealed by the logical corollary of the decision which would permit authorities to randomly utilize dogs to smell around houses and businesses without any suspicion whatsoever.⁵⁴

The other major "no search" cases are the electronic tracking decisions in *United States v. Knotts*⁵⁵ and *United States v. Karo*.⁵⁶ These cases involved the installation of an electronic "beeper" (a battery operated radio transmitter) into a container of chemicals used to manufacture illicit drugs. Monitoring of the beeper signal was then utilized, along with visual surveillance, to track the container as it was carried in the suspect's vehicle to the place eventually searched. Despite the fact that the Court has recognized a privacy interest in a vehicle, albeit diminished, Justice Rehnquist's majority opinion in *Knotts* held that such electronic tracking did not constitute a Fourth Amendment search since the same ends could have been accomplished

53. *Id.* at 706.

54. This realization has led at least a couple of courts to reject the reasoning of *Place* under their own state constitutions. See *People v. Dunn*, 564 N.E.2d 1054 (N.Y. Ct. App. 1990); and *McGahan v. State*, 807 P.2d 506 (Alaska Ct. App. 1991), both rejecting the *Place* analysis and concluding that the focus should be on whether the investigative procedure reveals the contents of a private place. These decisions consequently held that at least reasonable suspicion that drugs are present is required for a dog sniff search of luggage, a residence or a commercial building. *But see* *United States v. Thomas*, 757 F.2d 1359 (2d Cir. 1985), attempting to distinguish between sniffs of luggage and sniffs of homes. See also Arnold Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1246-48 (1983); Martin Gardner, *Sniffing for Drugs in the Classroom*, 74 NW. U. L. REV. 803, 844-47 (1980).

55. 460 U.S. 276 (1983).

56. 468 U.S. 705 (1984).

by visual surveillance from public places.⁵⁷ This ignores, of course, the fact that this kind of electronic tracking enhances (and perfects) visual monitoring, making it much more effective and precise; this is exactly why it is used. It is rather easy for a visual observer to lose a vehicle in traffic or in an unfamiliar neighborhood, but the electronic tracker is virtually infallible and will always reveal its whereabouts. The implication from *Knotts* is unsettling in that the police can place an electronic tracking device on a vehicle and trace its every movement without even thinking about the Fourth Amendment.

The conclusion in *Knotts* is also inconsistent with the follow-up decision in *United States v. Karo*, which limited the *Knotts* holding, although not in a terribly meaningful way.⁵⁸ Noting that it would be unquestionably unreasonable to enter a residence without a warrant to verify that an object was located inside, Justice White's majority opinion concluded that it was equally unreasonable to utilize an electronic device to obtain this information in the absence of a search warrant.⁵⁹ The difference for the majority in *Karo* was that the surveillance went beyond what could be obtained by visual observation in public and entered a private residence protected by an expectation of privacy.

There is also, however, some privacy expectation in an automobile.⁶⁰ The *Knotts* majority chose to ignore the fact that placing a beeper in an object which is then tracked inside a vehicle, like in

57. Although in *Karo* the Court held that *Knotts* did not permit electronic tracking inside a residence in the absence of a search warrant, the effect of that decision is rather limited in light of *Knotts*. All law enforcement agents need do to take advantage of *Karo-Knotts* is stop gathering the information relied upon in application for the warrant at the point where the container enters a private residence. In fact, the additional information obtained in *Karo*—that the container of chemicals is inside the home—is superfluous to the issuance of the warrant where law enforcement personnel have witnessed the container being taken inside. The only time when this additional information would be important is where there has been some lapse of time in applying for the warrant and probable cause would require some assurance that the chemicals are still inside.

58. See *supra* note 51.

59. 468 U.S. at 714.

60. The Court has concluded that the expectation of privacy in a vehicle is diminished. This allows an automobile to be searched without a warrant, but does not dispense with the Fourth Amendment or probable cause requirement. See, e.g., *California v. Carney*, 471 U.S. 386 (1985); *United States v. Ross*, 456 U.S. 798 (1982); *New York v. Belton*, 453 U.S. 454 (1981).

Karo, tells authorities something about what is in the vehicle and whether it remains there. This is something that cannot clearly be accomplished by visual surveillance, especially when the vehicle is making stops. Although the Supreme Court has shown characteristic leniency toward the search of vehicles, it had never before held the Fourth Amendment completely irrelevant with respect to police detection practices aimed at them.⁶¹

2. The No Seizure Rationale

The cousin of the “no search” notion is the “no seizure” rule. Again, it should come as no surprise that this concept had its genesis in drug courier cases. The Drug Enforcement Administration’s “drug courier profile” presented the federal courts with the issue of whether the various factors used in the profile provided the reasonable suspicion necessary to stop an individual for investigation.⁶² In the first such case to reach the Supreme Court, *United States v. Mendenhall*,⁶³ Justice Stewart’s plurality opinion avoided that issue by concluding that when federal drug agents approached Ms. Mendenhall in an airline terminal, identified themselves, and asked to see her ticket and identification, she had not been seized within the meaning of the Fourth Amendment.⁶⁴ This meant that since there had been no seizure, the

61. Although in *Rakas v. Illinois*, 439 U.S. 128 (1978), the Court held that a passenger in an automobile had no expectation of privacy in the vehicle, it is highly unlikely that the police would randomly stop a vehicle in the hope of finding contraband which could be linked to a passenger. In any event, at least reasonable suspicion for the stop would be necessary. See *Terry v. Ohio*, 392 U.S. 1 (1968). In *Michigan Dep’t of State Police v. Sitz*, 496 U.S. 444 (1990), where drunk driving checkpoints were upheld without the need for individualized suspicion, the Court nevertheless engaged in a Fourth Amendment balancing process and required that a standardized procedure be followed.

62. See *Terry v. Ohio*, 392 U.S. 1 (1968) and discussion *infra* text accompanying notes 89-100. Factors utilized in the profile include such things as the cities to and from which the suspect is traveling, age and style of dress, whether luggage is carried or claimed, method of payment for ticket, and point at which the suspect leaves the plane.

63. 446 U.S. 544 (1980).

64. Justice Stewart defined a “seizure” in the following manner: “We conclude that a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *Id.* at 554.

agents needed no justification, reasonable suspicion or otherwise, for stopping Ms. Mendenhall.⁶⁵

Justice Stewart's rather revolutionary "no seizure" analysis in *Mendenhall* seemingly garnered the support of a majority of the Justices in the next drug courier case to come before the Court. Although Justice White's plurality opinion in *Florida v. Royer*⁶⁶ concluded that Royer had been effectively seized, he intimated that merely approaching the suspect and asking to examine his driver's license would not have amounted to a seizure.⁶⁷ Justice Rehnquist's dissenting opinion, which was joined by Chief Justice Burger and Justice O'Connor, agreed "with the plurality's intimation that when the detectives first approached and questioned Royer, no seizure occurred and thus the constitutional safeguards of the Fourth Amendment were not invoked."⁶⁸

Finally, in the "factory survey" case, *Immigration & Naturalization Service v. Delgado*,⁶⁹ a majority of the Justices plainly accepted the "no seizure" rule. Under the factory survey procedure, INS agents, with a general warrant or the consent of the employer, would survey

65. Rehnquist, J., joined this part of the Stewart opinion. Powell, J., joined by Chief Justice Burger, and Blackmun, J., concurred, noting that although they did "not necessarily disagree" with the Stewart analysis, they preferred to uphold the action on the ground that reasonable suspicion was present. White, J., joined by Brennan, Marshall, and, Stevens, JJ., dissented, objecting that the government should not be allowed to raise the no-seizure issue for the first time before the Supreme Court.

66. 460 U.S. 491 (1983) (joined by Marshall, Powell, and Stevens, JJ.).

67. Although the plurality concluded that Royer had been seized under Justice Stewart's test in *Mendenhall*, Justice White's plurality opinion also stated law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions If there is no detention—no seizure within the meaning of the Fourth Amendment—then no constitutional rights have been infringed.

. . . .

. . . [A]sking for and examining Royer's ticket and driver's license were no doubt permissible in themselves

460 U.S. at 497-98, 501.

68. *Id.* at 523.

69. 466 U.S. 210 (1984).

the entire work force, asking questions of the workers and if the answer was unsatisfactory or alienage was admitted, asking for immigration papers. Although the Court of Appeals for the Ninth Circuit had held first that the entire work force was seized during the survey because stationing agents at the doors meant that "a reasonable worker would have believed that he was not free to leave," and second, that questioning of individual workers was a seizure requiring individualized reasonable suspicion,⁷⁰ Justice Rehnquist's majority opinion concluded that "the encounters were classic consensual encounters rather than Fourth Amendment seizures."⁷¹

It seems to me that any honest and sensible person would have to seriously question the "no seizure" logic and the Court's conclusion in *Delgado*. Justice Rehnquist argued in *Delgado* that the worker's freedom was constrained by their obligations to their employer and that the agents poised at the doors were there only to ensure that everyone was questioned. He stated that the agents posed no reasonable threat of detention to the workers as they moved around the factory on their job assignments. He also noted that the agents at the doors did not prevent anyone from leaving and "the mere possibility that [workers] would be questioned if they sought to leave . . . should not have resulted in any reasonable apprehension by any of them that they would be seized or detained in any meaningful way."⁷² It certainly would not be difficult for any court which utilized this logic also to conclude, as did the *Delgado* majority, that individual questioning did not constitute a seizure either, because it was only a brief encounter and it was obvious that the INS agents were only questioning people.⁷³ Not even Chuck Norris or Mike Tyson would believe this, let alone garment or migrant workers, some of whom were resident (if not illegal) aliens. The *Delgado* decision is pure law enforcement fiction.

Nevertheless, *Delgado* became the springboard for firmly establishing the "no seizure" principle in (or outside of) Fourth Amendment

70. *Id.* at 214.

71. *Id.* at 220.

72. *Id.* at 210.

73. *Id.*

jurisprudence. The ensuing decision in *Florida v. Bostick*⁷⁴ is a classic encounter with the deconstitutionalization phenomenon. In *Bostick*, the Court not only made it clear that “even when officers have no basis for suspecting a particular individual, they generally may ask questions of that individual, ask to examine the individual’s identification, and request consent to search his or her luggage,”⁷⁵ the majority also concluded that this all may take place within the confines of a bus. Confronted with *Bostick*’s argument that his situation was different than the other police encounter cases because he was approached by armed officers within the confines of a bus at a time when the bus was about to depart from an intermediate stop in the journey, Justice O’Connor’s majority opinion trotted out *Delgado*. Recognizing that *Bostick* was somewhat confined and would not have felt free to leave a departing bus, Justice O’Connor argued that, as in *Delgado*, the lack of freedom of movement was due to *Bostick*’s own voluntary choice—his decision to take the bus—and not necessarily the police conduct at issue. Under such circumstances, the majority concluded that the appropriate inquiry was not whether a reasonable person would feel free to leave, but “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”⁷⁶

Not only is the *Delgado-Bostick* rule disingenuous, the entire “no seizure” line of cases is based on a fictitious premise. First, in both *Delgado* and *Bostick*, the defendant’s predicament obviously was caused by voluntary individual choices, but the Court allowed the police to take advantage of those choices to create confinement where it otherwise would not have existed (and here I am equating confinement with being seized, i.e., a reasonable person would not believe they were free to leave or otherwise terminate the encounter). Does the *Delgado-Bostick* rule now mean that law enforcement officials, without suspicion, can go to a person’s home, station officers at all exits, question those present, and ask for identification and permission to search?⁷⁷ Is it only a matter of time until the drug courier profile

74. 111 S. Ct. 2382 (1991).

75. *Id.* at 2386.

76. *Id.* at 2387.

77. *Id.* at 2394 (Marshall, J., joined by Blackmun and Stevens, JJ., dissenting).

investigation and the bus survey extends to the passenger compartment of commercial airplanes?⁷⁸ Justice O'Connor's majority opinion in *Bostick* stated, in fact, that "[o]ur Fourth Amendment inquiry in this case—whether a reasonable person would have felt free to decline the officer's requests or otherwise terminate the encounter—applies equally to police encounters that take place on trains, planes and city streets."⁷⁹

Second, and more importantly, the no seizure notion is unadulterated sophistry. Hardly anyone who is confronted and questioned by armed officers, asked for identification and permission to search, believes he is free to do much of anything, certainly not refuse to answer or walk away. Anyone with a lick of sense knows that doing these things will only aggravate the situation and cause him more trouble. Despite Justice O'Connor's instruction that "a refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure,"⁸⁰ no one knows this or would believe it if he did.⁸¹ Practically speaking, even assuming someone had the savvy to exercise his constitutional rights and the encounter intensified into a seizure, any discovery of contraband and hindsight would surely provide the necessary justification the detention or seizure. Even if a defendant were ultimately to prevail under Justice O'Connor's admonition, he would have to await arrest, charges, and a successful motion to suppress. We know the likelihood of the latter in the current legal and political climate. If, on the other hand, contraband is not revealed during the intensified encounter, the citizen is of course spared prosecution, leaving him with only a substantial invasion of his privacy for which there is no practical remedy.

78. The *Bostick* procedure already has been applied to train passengers. See *Guadalupe v. United States*, 585 A.2d 1348 (D.C. 1991). One would think, however, that in the case of commercial flights, the consent of the carrier would have to be obtained.

79. *Bostick*, 111 S. Ct. at 2388.

80. *Id.* at 2387.

81. Somewhat inconsistent with Justice O'Connor's admonition that a refusal to cooperate cannot provide justification for intensification of the investigation is *California v. Hodari D.*, 111 S. Ct. 1547 (1991), where Justice Scalia's majority opinion concluded that chasing a suspect who decides to leave the scene at the sign of approaching police does not amount to a seizure.

The irony in the "no seizure" rule is that the fatuous logic on which it is based is unavailing in the very circumstance which is the basis for its justification, i.e., where the option to leave or otherwise terminate the encounter is exercised. Officers are free to persist and pursue, and as long as the person does not submit or is not subdued, he has not been seized. In *California v. Hodari D.*,⁸² the Supreme Court held that a juvenile who left the scene when a cruiser approached was not seized until he was actually tackled by Officer Pertoso after the officer had pursued him. Even though the issue was whether Hodari D. had been seized, Justice Scalia's majority opinion often spoke of an "arrest" and defined this point as either an application of physical force or submission to the assertion of authority.⁸³ Confronted by the respondent's argument that the officer's show of authority by pursuing him conveyed the message that he was not free to leave, and he had therefore been seized under Justice Stewart's *Mendenhall* test, Justice Scalia responded that the "not free to leave" standard was "a necessary, but not a sufficient condition for a seizure."⁸⁴

The convolution in all this is that the *Mendenhall-Bostick* "no seizure" rule does not even mean what it says. After *Hodari D.*, even if a citizen resists the efforts of law enforcement officers and tries to leave, the officers can persist. If evidence then turns up⁸⁵ or consent to search is ultimately obtained, there is no Fourth Amendment obstacle.⁸⁶ Taken literally, the *Hodari D.* opinion means that the police

82. *Id.*

83. *Id.* at 1551.

84. *Id.* To be sure, *Hodari D.* does not represent the typical police/citizen encounter. *Hodari D.* ran on seeing the police cruiser prior to actually being confronted by Officer Pertoso. But Justice Scalia's majority opinion makes clear that this fact did not affect the analysis; that "an arrest requires either physical force . . . or, when that is absent, submission to the assertion of authority." *Id.* In fact, Justice Scalia suggests that even the actual application of physical force might not be sufficient where the suspect does not yield. *Id.* at 1550.

85. In *Hodari D.* the respondent tossed away a "rock" of crack cocaine as he was being pursued by Officer Pertoso.

86. See *State v. Shahid*, 813 S.W.2d 38 (Mo. Ct. App. 1991), holding that an officer who drew his weapon and ordered the suspect to raise his hands did not effect a "seizure" under *Hodari D.* at a point where the suspect discarded a quantity of cocaine before fully complying with the officer's command. *But see United States v. Wilson*, 953 F.2d 116 (4th

can fire their weapons at a fleeing suspect and if he is not hit, there has been no seizure. This "show of authority" would be "a necessary, but not a sufficient condition for a seizure." However, this clearly contradicts both the Court's earlier holding in *Tennessee v. Garner*⁸⁷ that the Fourth Amendment bars the police, even when acting with probable cause, from shooting a fleeing, nondangerous felon, and Justice Stewart's own description of a seizure in *Mendenhall*.⁸⁸

The above analysis may suggest that unless shot while fleeing, the guilty have no rights. Justice O'Connor's majority opinion virtually admits as much when she says that the "reasonable person" test presupposes an "innocent person."⁸⁹ This kind of mentality ignores at least three things. First, our Constitution and philosophical ideals suggest that those accused of crime are supposed to have rights. Second, not everyone exposed to a "voluntary consensual encounter" is carrying drugs and if no drugs are detected in the encounter there will be no arrest and criminal prosecution to test the legality of the police actions. Third, someday the "drug problem" will no longer be the political phenomenon that it is now and the "war on drugs" will be over,⁹⁰ leaving the no search/no seizure rules to facilitate the targeting of other offenses in derogation of the Fourth Amendment.

In this regard, the most striking thing about the *Mendenhall-Royer-Delgado-Bostick* line of cases is that they virtually overrule one aspect of *Terry v. Ohio*.⁹¹ In *Terry*, the Court relied on the Fourth Amendment's Reasonableness Clause and its recently adopted balancing test⁹² to justify police investigatory practices on less than proba-

Cir. 1991) (holding that persistent police efforts to gain consent to search after an initial refusal followed by pursuit of the fleeing suspect amounted to a seizure).

87. 471 U.S. 1 (1985).

88. "Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, *the display of a weapon by an officer*, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J., plurality opinion) (emphasis added).

89. *Bostick*, 111 S. Ct. at 2388.

90. It should come as no surprise that all of the no search/no seizure cases, except one (*Delgado*), involved drugs.

91. 392 U.S. 1 (1968).

92. *See Camara v. Municipal Court*, 387 U.S. 523 (1967), employing the Fourth

ble cause. The Court held that where an officer is investigating criminal activity and has reasonable grounds to believe that the suspect is armed and dangerous, he is justified in making a limited patdown search for weapons. Although in *Terry* the Court said it was "decid[ing] nothing . . . concerning the constitutional propriety of an investigative 'seizure' upon less than probable cause,"⁹³ this was implicit in the holding,⁹⁴ as later cases came to recognize.⁹⁵ Thus, until Justice Stewart articulated his "no seizure" concept in *Mendenhall*, *Terry* stood for the proposition that a person could be detained for investigation on less than probable cause, but only if the detaining officers had articulable suspicion or "a particularized and objective basis for suspecting the particular person stopped of criminal activity."⁹⁶ This minimal level of justification for an investigative stop no longer is necessary following the advent of the "no seizure" rule, unless, according to Justice O'Connor's language in *Florida v. Bostick*, "the officers . . . point guns at [the suspect] or otherwise threaten him."⁹⁷ This type of police activity, however, sounds more like an arrest rather than a *Terry* stop and seemingly writes the need for a *Terry* analysis out of Fourth Amendment seizure law, i.e., there is either no seizure or there is an arrest.⁹⁸ Revealingly, Justice Scalia's

Amendment's Reasonableness Clause and "balancing the need to search [or seize] against the invasion which the search [or seizure] entails" to conclude that area-wide probable cause would justify the issuance of a warrant to investigate for housing and building code violations.

93. 392 U.S. at 19.

94. The Court appears to adopt a standard less than probable cause for an investigative stop when in the holding it refers to a situation "where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." *Id.* at 30. Justice Harlan also pointed out in his concurring opinion that "if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, to make a *forcible* stop I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime." *Id.* at 32-33 (Harlan, J., concurring) (emphasis in original).

95. See, e.g., *Alabama v. White*, 496 U.S. 325 (1990); *United States v. Cortez*, 449 U.S. 411 (1981); *Adams v. Williams*, 407 U.S. 143 (1972).

96. *Cortez*, 449 U.S. at 417-18.

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

98. See generally Thomas K. Clancy, *The Future of Fourth Amendment Seizure Analysis After Hodari D. and Bostick*, 28 AM. CRIM. L. REV. 799 (1991).

opinion in *California v. Hodari D.* analyzes the seizure issue in terms of the common law of arrest, consistently referring to the point at which an "arrest" occurs.⁹⁹

Of course, *Terry* will still be useful to law enforcement as an escalating mechanism where the initial stop and questioning arguably produce actual articulable suspicion justifying further and more lengthy detention (and probably a frisk).¹⁰⁰ The focus of Fourth Amendment seizure law, however, should be on the original encounter where, as in *Terry* and its progeny, reasonable suspicion is required in order for law enforcement officers to invade one's space and privacy. This aspect of the *Terry* decision has largely been eliminated from search and seizure law by the new "no seizure" rule, and has relegated that part of the case to a bootstrapping device permitting intensified investigation following the initial "no seizure" stop. It is instructive to note that the "no seizure" rationale originated and evolved in drug cases, and is generally unnecessary outside of that context;¹⁰¹ this is another example of the drug "tail" wagging the constitutional "dog." Irrespective of the reasons for the rule, a person is no longer seized when he is stopped by police, asked questions, asked for identification and permission to search his possessions, and even chased if he decides to leave,¹⁰² unless guns are drawn or there is other more threatening behavior.¹⁰³

99. *Hodari D.*, 111 S. Ct. at 1550-51. This led to Justice Steven's response in dissent that the majority was ignoring the teachings of *Terry*. He remarked, "One consequence of [the Court's] conclusion is that the point at which the interaction between citizen and police officer becomes a seizure occurs, not when a reasonable citizen believes he or she is no longer free to go, but rather, only after the officer exercises control over the citizen," *id.* at 1559-60, i.e., an arrest.

100. The reasonable suspicion requirement would also still seemingly apply to the stopping of vehicles. *See Delaware v. Prouse*, 440 U.S. 648 (1979); *Alabama v. White*, 496 U.S. 325 (1990).

101. Most drug offenses, being possessory in nature, produce little observable evidence other than through informants and undercover agents and generalizations about the patterns and practices of drug offenders (the so-called drug courier profiles). The "no seizure" investigation eliminates the need to rely on these.

102. *See California v. Hodari D.*, 111 S. Ct. 1547 (1991) (holding defendant, who fled upon seeing an approaching police car, not seized when chased by police officer).

103. *See supra* text accompanying note 82.

C. *Balancing and Disingenuity*

Needless to say, when the Court has been called upon in some fashion to consider and weigh individual privacy against the interests of law enforcement, the result is preordained. Contemporary use of the *Camara-Terry* balancing test in the administrative search area has amounted to outright vindication of whatever law enforcement practice happens to be challenged. Interestingly, and clearly inconsistent with the situations in *Camara* and *Terry*,¹⁰⁴ in recent cases the government has argued, and the Court has held, that no particularized justification whatsoever is necessary for the intrusion. This is consistent, however, with the Court's no privacy/no search/no seizure thinking and means that a considerable area of law enforcement investigatory practices are beyond constitutional control.

The drug testing cases typify the new balancing perspective. In *National Treasury Employees Union v. Von Raab*¹⁰⁵ and *Skinner v. Railway Labor Executives Assoc.*,¹⁰⁶ a majority struck the *Camara* balance by completely discounting the individual privacy interest and upholding two suspicionless blood and urine testing programs. Even though the Court recognized the obvious privacy interest of the employees involved, albeit characterizing it as diminished because of the nature of the employment¹⁰⁷ (and thus ignoring the overall intrusiveness of the practice), it was given virtually no weight in the balance. This was the case even though the asserted overriding nature of the governmental interests was questionable.

In *Von Raab*, the majority concluded that urinalysis testing of Customs Service employees, who applied for positions involving the interdiction of drugs or the carrying of a firearm, served the compelling governmental interest of protecting the integrity of the nation's borders and the life of the citizenry.¹⁰⁸ However, as Justice Scalia

104. See *Camara v. Municipal Court*, 387 U.S. 523 (1967); *Terry v. Ohio*, 392 U.S. 1 (1968).

105. 489 U.S. 656 (1989).

106. 489 U.S. 602 (1989).

107. *Id.* at 627.

108. *Von Raab*, 489 U.S. at 672.

pointed out in his dissenting opinion, there was absolutely no evidence of drug usage by Customs Service employees or that drug use had compromised the drug enforcement effort or resulted in the misuse of weapons.¹⁰⁹ The real reason for the drug testing rules at Customs was admitted in the Government's brief—to set an example and show the public that the government is serious about drug enforcement and that its enforcement officers are clean.¹¹⁰ Likewise, in *Skinner*, the safety justification given for the Federal Railroad Administration's drug testing regulations is undermined by the fact that the testing is mandatory only *after* train accidents or incidents.¹¹¹

Although the Supreme Court's balancing in these cases was infected by the claim that the programs were not designed to serve law enforcement goals, the government's interest was outweighed and then balanced against an undervalued individual privacy interest in order to permit suspicionless drug testing practices. The remarkable thing about *Von Raab* and *Skinner* is not that drug testing was constitutionally sanctioned, but that it was given the Court's blessing without the requirement of individualized suspicion. All of the earlier cases balancing the individual against the law enforcement interest had dispensed with the formal probable cause and warrant requirements, but nevertheless had demanded some justification for the intrusion.¹¹² Regardless,

109. *Id.* at 680.

110. *Id.* at 687.

111. The heavy reliance the Court placed on the safety factor in *Skinner* and *Von Raab* of course applies to other activities and professions, e.g., airline pilots, airline traffic controllers, athletes physicians.

112. *See, e.g.,* *Railway Labor Executives' Ass'n v. Burnley*, 839 F.2d 575 (9th Cir. 1988) (regulations mandating testing of railroad employees without requiring individualized suspicion held violative of employees' Fourth Amendment rights); *Lovvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988) (city's mandatory urinalysis testing of its fire fighters, on a department-wide basis, without reasonable cause or suspicion to believe that fire fighters tested or used controlled substances, violated their Fourth Amendment rights); *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935 (D.C. Cir. 1987) (enjoining Department of Defense from implementing mandatory urinalysis drug-testing program for certain civilian employees); *National Treasury Employees Union v. Yeutter*, 733 F. Supp. 403 (D.D.C. 1990) (government's interest in integrity of its borders and protecting sensitive information could not justify proposed random urinalysis testing of plant protection officers, quarantine officers, or computer specialists); *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380 (E.D. La. 1986), *vacated*, 816 F.2d 170 (5th Cir. 1987), *aff'd in part & vacated in part*, 489 U.S. 656 (1989) (drug-testing program held to be an uncon-

the United States Supreme Court remained faithful to its drug enforcement policy and permitted additional drug detection practices without any justification for the particular individual intrusion in question.

Similarly, when the sobriety checkpoint issue reached the Supreme Court, the result of the balancing process was entirely predictable.¹¹³ Again the issue was framed in terms of whether a suspicionless investigatory practice was permissible. Although Justice Rehnquist's majority opinion in *Michigan Dep't of State Police v. Sitz*¹¹⁴ characterized the checkpoint stops as a "seizure," he had no difficulty in balancing away the need for suspicion as a prerequisite—the state's profound interest in controlling drunk driving clearly outweighed the minimal intrusion at the checkpoint. The difficulty with this conclusion, which reads as almost perfunctory, is that it again overvalues the state interest and undervalues individual privacy.

No one would question the importance of preventing drunk driving. This is not, however, the correct state interest to be balanced in the *Sitz* equation. More particularly, the relevant government interest in *Sitz* is the significance or effectiveness of sobriety checkpoints in combating the drunk driving problem. Because of this improper focus, Justice Rehnquist's majority opinion overemphasized the state's side of the balance. There was little evidence that the checkpoints were successful in getting drunk drivers off the road¹¹⁵ or that they were more successful than conventional law enforcement techniques for detecting drunk driving, where reasonable suspicion is the linchpin.

It is the availability of traditional law enforcement techniques which distinguishes the sobriety checkpoints in *Sitz* from the permanent highway checkpoints to detect illegal aliens involved in *United States v. Martinez-Fuerte*,¹¹⁶ the case on which Justice Rehnquist primarily

stitutional search and seizure, violative of Sixth Amendment prohibition against self-incrimination, penumbral rights to privacy, and Due Process Clause).

113. The Supreme Court's decision was predictable even though lower courts had split on the constitutionality of this procedure.

114. 496 U.S. 444 (1990).

115. *Id.* at 454.

116. 428 U.S. 543 (1976). In addition to the fact that checkpoints are virtually the only way to detect the transportation of illegal aliens, the immigration checkpoints in *Martinez-Fuerte* differ from the sobriety checkpoint in *Sitz* in at least three other ways. First, the

relied. There is very little outwardly observable evidence involved in smuggling illegal aliens, which necessitates the use of checkpoints as a detection practice. Drunk driving, on the other hand, is by its very nature observable, certainly so when it becomes dangerous. That is what makes it illegal. Thus, the lack of evidence of the utility of the checkpoint procedure,¹¹⁷ as well as the need for it, diminishes the value of the governmental interest.

On the other side of the balance, Justice Rehnquist termed the intrusion at these checkpoints slight.¹¹⁸ His majority opinion downplayed the conclusion of the Michigan Court of Appeals that the subjective intrusion on motorists was substantial because of the potential to generate fear and surprise. He concluded that “[t]he ‘fear and surprise’ to be considered are not the natural fear of one who has been drinking but rather, the fear and surprise engendered in law abiding motorists by the nature of the stop.”¹¹⁹ Be that as it may, it begs the question, for Justice Rehnquist fails to consider carefully “the fear and surprise engendered in law abiding motorists” by being stopped at a sobriety checkpoint at night.

The inconsistency in the Court’s Fourth Amendment analyses is exposed in *Sitz* by Justice Rehnquist’s characterization of the sobriety checkpoint as a “seizure,”¹²⁰ thus admitting that it is more intrusive than the so-called “no seizure” encounter, but at the same time describing it as “slight.”¹²¹ It is fair to say that a certain amount of anxiety (if not fear) and surprise would be engendered in most *pedestrians* who were stopped by a law enforcement officer, questioned and

immigration checkpoint is permanent and fixed instead of mobile and thus the element of surprise is reduced. Second, checking a driver’s license or identification papers at an immigration checkpoint is much more standardized than discretionary efforts to detect drunk driving at a sobriety checkpoint. Lastly, many of the stops at the permanent checkpoint take place during the daylight hours whereas the sobriety stops are almost always at night, thereby increasing their intrusiveness. *Sitz*, 496 U.S. at 464 (Stevens, J., joined by Brennan, J., and Marshall, J., dissenting).

117. *Sitz*, 496 U.S. at 470 (Stevens, J., joined by Brennan, J. and Marshall, J., dissenting).

118. *Id.* at 451.

119. *Id.* at 452.

120. *Id.* at 540.

121. *Id.* at 451.

asked for identification. However else it might be explained, the surprise and intrusion resulting from having one's vehicle unexpectedly pulled over at night by the police (admittedly more invasive than the street encounter) is more than "slight."

Comparing the situation with the checkpoint to detect illegal aliens involved in *United States v. Martinez-Fuerte* is, as pointed out by Justice Stevens, at best disingenuous. The checkpoint in *Martinez-Fuerte* was permanent and most of the stops were made in the day-light hours, removing much of the elements of anxiety and surprise.¹²² Additionally, the detection of illegal aliens involves the exercise of far less discretion than does the detention of motorists suspected of drunk driving.¹²³ Finally, checkpoints are a necessary investigative practice with respect to the smuggling of illegal aliens, whereas they are not essential to the discovery of driving under the influence.¹²⁴

The Supreme Court's recent balancing cases actually do not involve balancing at all because all the weight is placed on the government's side of the scale. They are, however, absolutely consistent with the Court's no Fourth Amendment coverage approach, where no particularized justification, i.e., not even suspicion, is needed for police investigatory practices. There is consequently no real need to attack or overrule the exclusionary rule of *Mapp v. Ohio*. For if the dictates of the Fourth Amendment do not apply, there is no constitutional violation, and no need to consider the exclusion of evidence. The balancing cases complete a nice quadrangle of such theories: no privacy, no search, no seizure, no balancing.

D. Good Faith, Probable Cause, and Open Season on Automobiles

The demise of constitutional control or influence over search and seizure law can truly be appreciated when the cases and theories dis-

122. *Id.* at 463 (Stevens, J., joined by Brennan, J., and Marshall, J., dissenting).

123. Checking for illegal aliens involves the standardized practice of inspecting drivers licenses and identification papers whereas detecting drunk driving at a sobriety checkpoint permits virtually unlimited discretion with respect to what kind of suspicion will result in further detention of a motorist. *Id.* at 464-65.

124. See *supra* text accompanying notes 98-100.

cussed above are considered in conjunction with the Court's decisions regarding the good faith exception to the exclusionary rule,¹²⁵ the watered-down probable cause standard,¹²⁶ and the lack of the need for a search warrant in the law enforcement scrutiny of anything connected with an automobile.¹²⁷ These latter holdings stand for nothing less than the propositions that in some situations the Warrant Clause is irrelevant, the probable cause requirement is to be liberally construed, and that when some constitutional violations do occur, they will be excused.

Although excused violations under the good faith rule occur only when a warrant has been obtained (reasonable reliance on a regularly executed search warrant), the new "totality of the circumstances" test for determining probable cause operates as a kind of good faith mechanism in nonwarrant cases. The probable cause issue, which generally revolves around information provided by informants, was formerly controlled by the *Aguilar-Spinelli-Draper* two-prong test which required a showing of: (1) the informant's reliability, and (2) his basis of knowledge, i.e., how he came about his information.¹²⁸ Largely to accommodate the anonymous informant,¹²⁹ and again in a decision unnecessary to uphold the search,¹³⁰ a majority of the Court in *Illinois v. Gates* abandoned the two-prong standard in favor of the more fluid totality of the circumstances test.

Although Justice Rehnquist's majority opinion did not reject the relevance of the veracity and the basis of knowledge of persons sup-

125. *United States v. Leon*, 468 U.S. 897 (1984).

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

127. *See supra* text accompanying notes 119-138.

128. In lieu of these requirements being particularly satisfied, probable cause could be established by police corroboration of detail provided by an informant. Although prior to *Gates* lower courts had held that corroboration could only satisfy the veracity prong and detail could only satisfy the basis of knowledge prong of the two-prong test, this seems inconsistent with the Supreme Court's analysis in *Draper v. United States*, 358 U.S. 307 (1959) and *Spinelli v. United States*, 393 U.S. 410 (1969).

129. The reliability of an anonymous informant is unknown and unknowable and his basis of knowledge for the tip is seldom communicated. This was the situation in *Gates v. Illinois*, 462 U.S. 213 (1983).

130. *Gates* could have easily been decided under the corroboration of detail theory of probable cause. *See id.* at 267-74 (White, J., concurring).

plying hearsay information, the amorphousness, flexibility, and breadth of the new standard is revealed by the way Justice Rehnquist further defined it. He described the probable cause question as "a practical, common-sense decision whether, given all the circumstances . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place."¹³¹

To be sure, *Gates* was a warrant case. Nothing in the majority opinion, however, limits the new probable cause standard to cases where warrants are issued.¹³² There has never been an articulated double standard for warrant and nonwarrant cases.¹³³ In fact, the more fluid and flexible test for probable cause became largely superfluous to warrant cases following the adoption of the good faith exception to exclusion where officers obtain a search warrant.¹³⁴ Now, in those limited situations where probable cause is required,¹³⁵ police

131. *Id.* at 238.

132. *See, e.g.,* United States v. Blackman, 904 F.2d 1250 (8th Cir. 1990) (totality of circumstances test set forth in *Gates* applied to measure probable cause in case of warrantless search of an automobile—application not limited to measuring probable cause to obtain warrant); United States v. Smith, 797 F.2d 836, 840 (10th Cir. 1991); United States v. Reed, 733 F.2d 492, 502 (8th Cir. 1984) (holding there to be no binding authority for the proposition that warrantless searches and arrests require a higher showing of probable cause than do those conducted with warrants); United States v. Mendoza, 722 F.2d 96 (5th Cir. 1983) (sufficient probable cause was established under totality of circumstances standard to justify warrantless search of automobile); (holding that probable cause justifying a warrantless search is identical with that required to justify issuance of a search warrant); State v. Goyette, 594 A.2d 432 (Vt. 1991) (standard for sustaining the validity of a warrantless search met where police had probable cause to search automobile where cocaine was found under car seat); Hawkins v. State, 565 So. 2d 1193 (Ala. Crim. App. 1990) (authorizing the warrantless search of a vehicle where the police initially have probable cause to believe that the vehicle contains contraband or evidence of a crime and if exigent circumstances exist—exigent circumstances said to exist whenever an object to be searched is mobile or moveable, such as an automobile).

133. *Draper v. United States* was itself a nonwarrant case. Although the Supreme Court has historically expressed a preference for search warrants, *see* United States v. Ventresca, 380 U.S. 102 (1965), speaking realistically and honestly, this is no longer the case.

134. It should be recognized, however, that a combination of the fluid totality standard from *Gates* and the good faith notion from *Leon* virtually insulates a warrant based search from constitutional attack based on a claim of lack of probable cause.

135. The most prevalent situations not requiring probable cause are the no privacy/no search/no seizure cases. *See supra* text accompanying notes 14-86. Probable cause is also unnecessary in the case of administrative and consent searches and in the case of a *Terry*

officers will be constitutionally justified in acting without a warrant on the basis of an informant's tip (or other information) if they have made a practical, common-sense determination that there is a fair probability that contraband or evidence will be located in a particular place.

The area where this should be most advantageous to law enforcement is vehicular searches and the search of anything connected with them. Practically since their invention, automobiles have been exempted from the demands of the Warrant Clause. The original justification was based on the exigency of mobility, i.e., the delay involved might result in the movement and loss of the vehicle.¹³⁶ Although the focus has now changed to a diminished expectation of privacy,¹³⁷ the so-called automobile exception to the warrant requirement is livelier than ever.

Shortly after the Supreme Court adopted its privacy analysis, it was confronted with the question of what expectation of privacy applied to containers, such as luggage, placed in automobiles. Although a diminished privacy interest attached to vehicles, and they therefore could be searched without a warrant, it had been consistently held that repositories of personal effects, e.g., luggage, purses, and backpacks, enjoyed a complete or legitimate expectation of privacy. Consequently, both probable cause and a warrant were required in order to search these items,¹³⁸ and although originally this remained true even when

detention. Probable cause is now required only in the case of searches of privately owned buildings, vehicles, and personal containers, and a warrant is generally required only in the first of these cases. *See California v. Acevedo*, 111 S. Ct. 1982 (1991).

136. *See Carroll v. United States*, 267 U.S. 132 (1925).

137. *See, e.g., California v. Carney*, 471 U.S. 386 (1985); *United States v. Ross*, 456 U.S. 798 (1982); *Chambers v. Maroney*, 399 U.S. 42 (1970). The shift to the privacy theory was necessitated by the realization that in most cases the vehicle that was in police control had been effectively immobilized. Nevertheless, it was easy for the Court to fit automobiles into its restrictive privacy formula—the expectation of privacy in an automobile was viewed as diminished because automobiles travel around in public, you can see inside them, and they are subject to regulation by the state. Therefore, since privacy is diminished, only probable cause (and not a warrant) is necessary for an automobile search.

138. *See United States v. Chadwick*, 433 U.S. 1 (1977); *Arkansas v. Sanders*, 442 U.S. 753 (1979).

the closed container was found in a vehicle,¹³⁹ the warrant protection quickly began to erode where an automobile was involved.

The first case to assimilate containers with the vehicle in which they were found was a search-incident-to-arrest case.¹⁴⁰ It did not take the Court long, however, to apply the automobile exception wholesale to all items found inside vehicles, including the trunk.¹⁴¹ This conclusion was reached even though the justification for a warrantless search of an automobile—a diminished expectation of privacy—did not apply to a closed container. Justice Stevens rationalized this holding of *United State v. Ross* by analogizing to the authorized search of fixed premises or a footlocker. His majority opinion noted that the permissible scope of such searches extended into the entire area where the object of the search might be found, including closets, chests, drawers, and packages. He noted that what was absent in the case of a vehicular search was the warrant requirement; the scope of the probable cause search, he reasoned, remained the same. Consequently, containers found in the vehicle were subject to the vehicular search. What his opinion ignores, however—and it is crucial—is that a warrant is generally required to search fixed premises and footlockers in the first instance. These places are accorded fully protected privacy interests. Any further openings following the initial entry are thus protected by the warrant requirement initially. Why an item loses some of its aura of privacy when placed in a vehicle is not entirely apparent. It is, of course, more expedient to search without a warrant, and it should come as no surprise that all of the Court's recent car search cases involved drugs.¹⁴²

Irrespective of the *Ross* decision, the full expectation of privacy and the greater protection of the warrant requirement continued to apply to luggage and other such items which were the objects of police investigatory interest prior to being placed in an automobile. In

139. *Id.*; see also *Robbins v. California*, 453 U.S. 420 (1981).

140. *New York v. Belton*, 453 U.S. 454 (1981). Although *Belton* was argued and decided as a search-incident-to-arrest case, the facts would have supported its consideration on a probable cause to search the vehicle theory.

141. *United States v. Ross*, 456 U.S. 798 (1982).

142. The permissible scope of the inventory procedure was also eventually applied to suitcases and backpacks found in a vehicle. See *Colorado v. Bertine*, 479 U.S. 367 (1987).

other words, luggage and other depositories of personal effects, which police desired to search, did not sacrifice any privacy interest simply by being placed in a vehicle.¹⁴³ Where the focus of probable cause was on the container, and not the automobile, a warrant was required to search it.

Not surprisingly, the Supreme Court recently brought an end to warrant protection for anything located in a vehicle, no matter what the circumstances or when the item became the object of police attention. *California v. Acevedo*¹⁴⁴ involved precisely the situation which formerly would have required a search warrant; a brown paper bag which police had reason to believe contained marijuana was placed in the trunk of Acevedo's car. After he drove off, the police stopped him, opened the trunk and the bag and found marijuana.

In its essence, Justice Blackmun's majority opinion states that because the Court decided in *Ross* that containers found during an automobile search could be examined without a warrant, no warrant was necessary here as well. A bag, briefcase, or suitcase which police believe to contain contraband and which is placed in a automobile is "[no] more private, less difficult for police to seize and store, or in any other relevant respect more properly subject to the warrant requirement, than a container that police discover in a probable-cause search of an entire automobile."¹⁴⁵ This is disingenuity at its best, for it is the argument made by the dissenters in *Ross* in favor of applying the warrant requirement to containers found in vehicles under all circumstances. Specifically, the *Ross* dissenters had stated that the expectation of privacy surrounding these items is entitled to respect regardless of

143. See *supra* note 121.

144. 111 S. Ct. 1982 (1991).

145. *Id.* at 1988. Justice Blackmun's majority opinion also stated:

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. In fact, we see no principled distinction in terms of either the privacy expectation or the exigent circumstances between the paper bag found by the police in *Ross* and the paper bag found by the police here.

Id.

whether they are found or placed in an automobile.¹⁴⁶ Nevertheless, the majority opinion in *Acevedo* concluded that because of the *Ross* rule, there was no need to treat a container placed in a vehicle differently from one found there simply because the focus of probable cause was on the container. Viewed from the perspective of the *Ross* dissent, this can be translated as “bad law makes worse.”

The *Acevedo* majority supported its position by arguing that the *Chadwick-Sanders* rule provided only minimal protection for privacy and might actually hinder privacy interests. Respecting the latter, the majority opinion provided, “[i]f the police know that they may open a bag only if they are actually searching the entire car, they may search more extensively than they otherwise would in order to establish the general probable cause required by *Ross*.”¹⁴⁷ This statement, of course, ignores the fact that such an extensive search would be illegal if the police lacked probable cause to search the entire automobile, circumstances the Court admitted were lacking in the *Acevedo* case itself.¹⁴⁸ To the extent that the conflict between *Chadwick-Sanders* and *Ross* has created confusion, one would both hope and intuit that the police would err on the side of legality, thus in most cases avoiding the unjustified privacy intrusion mentioned by the Court.

Regarding confusion caused by the discrepancy between the two rules, Justice Blackmun asked, “when an officer, who has developed probable cause to believe a vehicle contains drugs, begins to search the vehicle and immediately discovers a closed container, which rule applies?”¹⁴⁹ But assuming probable cause to search the entire vehicle, there should be no confusion here. *Ross* permits the search to pass beyond the immediately discovered container to the rest of the vehicle. Actually, the *Acevedo* rule is more likely to create confusion than the interplay between *Chadwick* and *Ross*. Justice Blackmun might well have asked, “When an officer, who has developed probable cause to search a closed container, discovers that the container has been placed in a vehicle, which rule applies—*Acevedo* or *Ross*?”¹⁵⁰ In other

146. 456 U.S. at 832.

147. 111 S. Ct. at 1988.

148. *Id.* at 1991.

149. *Id.* at 1989-90.

150. Justice Blackmun’s majority opinion acknowledged that “[t]he facts in the record

words, when a container which the police believe contains contraband is placed in a vehicle, can only that container be searched or has probable cause now been provided to search the entire vehicle?

The conclusion that the *Chadwick-Sanders* rule provided only minimal protection to privacy is also unsatisfying. Justice Blackmun stated that because the police “by hypothesis” have probable cause, the container could be seized and a warrant would be “routinely forthcoming” in any event. This statement ignores the precise function of a search warrant—to have a judicial officer make the probable cause determination prior to the invasion rather than the police. Moreover, even if a warrant is “routinely forthcoming,” the subsidiary (if not primary) purpose served by the warrant procedure is the establishment of a record of probable cause prior to the search, rather than having it based on the post hoc evaluation of the circumstances by the police after the search proves fruitful. Justice Blackmun also suggested that regardless of the *Chadwick-Sanders* rule, a container could often be searched incident to a lawful arrest under *New York v. Belton*,¹⁵¹ a search-incident-to-arrest case in which containers were assimilated with the vehicle in which they were found. However, Blackmun’s suggestion assumes probable cause to arrest and ignores that a search incident to a vehicular arrest extends only to the interior of the automobile. Both of these limitations would have been fatal to the application of such a theory to the facts in *Acevedo* itself.¹⁵²

The real reason for the demise of the privacy protection provided to briefcases, handbags, and luggage by the *Chadwick-Sanders* rule is the final one given by the majority—the rule is anomalous, confusing,

reveal that the police did not have probable cause to believe that contraband was hidden in any other part of the automobile and a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment.” 111 S. Ct. at 1991. Although this suggests that probable cause to search a container placed in a vehicle does not supply probable cause to search the entire vehicle, one wonders why a reasonable officer could not reach a contrary conclusion.

151. 453 U.S. 454 (1981).

152. There would not have been probable cause to arrest Acevedo until it was determined that the bag which he placed in the automobile contained marijuana. He also had placed the bag in the trunk of the automobile.

and impedes effective law enforcement.¹⁵³ This explanation and justification would have been more honestly stated if the Court had said that anomaly and confusion are to be decided in favor of law enforcement. The elimination of the anomaly in *Acevedo* only created another one. A briefcase suspected of containing contraband is protected on the street by the warrant requirement, but once it is placed in a vehicle, that protection is no longer available. It will come as no surprise if this particular anomaly is also soon eliminated.¹⁵⁴

The most breathtaking aspect of *Acevedo* is the way Justice Blackmun concludes the majority opinion. He states:

It remains a "cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'"¹⁵⁵

This statement is now preposterous. Justice Scalia recognized as much in his concurring opinion.¹⁵⁶ It would have been more honest and accurate for Justice Blackmun to have said, "It [no longer] remains a cardinal principle that" Practically speaking, a warrant is currently required only for the search of a privately owned building.¹⁵⁷ Additionally, probable cause (but not a warrant) is necessary only where a vehicle or any closed container inside the vehicle is searched. In most other cases, the police can investigate and inspect without probable cause and, in many cases, no measure of suspicion or justification for the intrusion need be provided.

153. 111 S. Ct. at 1991.

154. Elimination of this anomaly was, in fact, the basis of Justice Scalia's concurrence. His view was that a closed container (e.g., a briefcase, handbag, or a suitcase), located outside a privately owned building, was simply not subject to the warrant requirement. *Id.* at 1994 (Scalia, J., concurring).

155. *Id.* at 1991 (quoting *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967))).

156. *Id.* at 1992-93 (Scalia, J., concurring).

157. Although theoretically the warrant requirement might still apply to a briefcase, luggage, or handbag, etc., practically speaking, law enforcement officers will seldom need a warrant to search these items. They are either likely to be found in a vehicle or searched incident to arrest. Justice Scalia's concurring opinion in *Acevedo* plainly advocated application of the Warrant Clause only to privately owned buildings. *Id.* at 1992-94.

E. Reliability of Outcome Versus Deterrence

The Supreme Court's treatment of the Fourth Amendment is consistent with its predominant theme respecting the criminal process. The Court has been rather satisfied with convictions as long as they are factually reliable regardless of constitutional error.¹⁵⁸ This philosophy is revealed by the Court's treatment of ineffective assistance of counsel,¹⁵⁹ a prosecutor's failure to provide the defense with potentially exculpatory material,¹⁶⁰ errors occurring before the grand jury,¹⁶¹ misjoinder problems,¹⁶² and, most recently, coerced confessions.¹⁶³ Regardless of these errors, a majority of the Court has been willing to let convictions stand if the defendant could nevertheless be viewed as guilty. Although a variety of devices and standards have been utilized (no prejudice, no reasonable likelihood of an effect on the outcome, and harmless error analysis), the result is exactly the same—a guilty verdict can stand irrespective of errors, constitutional or otherwise, in the way in which it was obtained.

The Supreme Court's Fourth Amendment jurisprudence is consistent with its policy of preserving convictions which are in some sense thought to be reliable. Restricting the scope of Fourth Amendment protection limits the operation of the exclusionary rule and consequently avoids the exclusion of generally reliable¹⁶⁴ physical evidence.

158. This theme has been well documented by the commentators. See Charles Whitebread, *The Burger Court's Counter-Revolution in Criminal Procedure: The Recent Criminal Decisions of the United States Supreme Court*, 24 WASHBURN L.J. 471 (1985); Charles Whitebread & John Heilman, *The Interpretation of Constitutional Rights—Reflections on the Burger Court's Counterrevolution in Criminal Procedure*, 1986 DET. COL. L.R. 935; Tom Stacy, *The Search for the Truth in Constitutional Criminal Procedure*, 91 COLUM. L. REV. 1369 (1991).

159. *Strickland v. Washington*, 466 U.S. 668 (1984).

160. *United States v. Bagley*, 473 U.S. 667 (1985).

161. *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988); *United States v. Mechanik*, 475 U.S. 66 (1986).

162. *United States v. Lane*, 474 U.S. 438 (1986).

163. *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991); see Charles Ogletree, *Arizona v. Fulminante: The Harm of Applying Harmless Error to Coerced Confessions*, 105 HARV. L. REV. 152 (1991).

164. Although the Supreme Court consistently speaks of evidence seized in violation of

Nevertheless, there is conflict here with another of the Court's historical themes in the criminal procedure arena—the deterrence of illegal police behavior.

The predominant policy, and more recently the exclusive policy, which has driven the exclusionary rule is the deterrence of police illegality. It is surely apparent to even the casual observer that the Supreme Court has been drastically more lenient with the police over the last decade and has allowed law enforcement substantially more room to maneuver in the investigatory process. The Court is now sending a clear, overall nondeterrent message to the police. The attitude and concomitant atmosphere is not now one of deterrence and scrutiny of search and seizure practices, but instead one of general permissiveness. The teaching of the Supreme Court is now that all is fair in, among other things, crime detection.

The argument that there is little incremental deterrent effect in requiring federal courts to review individual Fourth Amendment claims, after they have been passed upon by state courts, is plausible.¹⁶⁵ Similarly, there may be little deterrent effect in applying the exclusionary rule to grand jury proceedings,¹⁶⁶ civil tax enforcement cases,¹⁶⁷ deportation cases,¹⁶⁸ or to cases in which officers have relied in good faith on a regularly executed search warrant.¹⁶⁹ However, when these conclusions are viewed along with the other decisions that restrict Fourth Amendment protection by concluding that there is no expectation of privacy, no search, or no seizure, the overall harm to the deterrent impact of Fourth Amendment law on police behavior is clear. Dissenting from the majority's adoption of the "good faith" exception to the exclusionary rule, recently retired Justice Brennan noted:

the Fourth Amendment as being reliable, this is not so where the evidence or contraband is erroneously associated with the defendant.

165. See *Stone v. Powell*, 428 U.S. 465 (1976).

166. See *United States v. Calandra*, 414 U.S. 338 (1974).

167. See *United States v. Janis*, 428 U.S. 433 (1976).

168. See *Immigration & Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032 (1984).

169. See *United States v. Leon*, 468 U.S. 897 (1984).

To be sure, the rule operates to some extent to deter future conduct by individual officers who have had evidence suppressed in their own cases. But what the Court overlooks is that the deterrent rationale for the rule is not designed to be, nor should it be thought of as, a form of "punishment" of individual officers for their failure to obey the restraints imposed by the Fourth Amendment Instead, the chief deterrent function of the rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally. Thus, as the Court has previously recognized, "over the long term, [the] demonstration [provided by the exclusionary rule] that our society attaches serious consequences to violation of constitutional rights is thought to encourage those who formulate law enforcement policies, and the officers who implement them, to incorporate Fourth Amendment ideals into their value system." . . . It is only through such an institutional mechanism that information concerning Fourth Amendment standards can be effectively communicated to rank-and-file officers.¹⁷⁰

As the Supreme Court repeatedly limits the exclusionary rule and restricts the substantive scope of Fourth Amendment protection, whatever institutional mechanism the Fourth Amendment formerly served as a control on police investigatory practices is lost. The institutional message now being received by law enforcement personnel from the United States Supreme Court is that the Fourth Amendment is not much of an obstacle to their work and that the theory of deterrence only applies to cases of punishing criminals and nuclear weapons.

Ironically, criminal defendants are getting much more protection from state courts around the country who are utilizing their own state constitutions to place limits on police investigatory practices beyond that which the United States Supreme Court is willing to provide under the United States Constitution.¹⁷¹ Unfortunately, the rights guaranteed to the citizens of the various states are not uniform—the controls placed on law enforcement are not the same in New York as they are in Ohio—but the restrictions on police behavior are greater than they are under the federal constitution and concomitantly greater than those that apply to federal officers.¹⁷² The double irony in this

170. *Id.* at 897, 953-54 (Brennan, J., joined by Marshall, J., dissenting).

171. *See supra* note 40 and accompanying text.

172. *See, e.g.,* *People v. Rogers*, 397 N.E.2d 709 (N.Y. 1979); *State v. Cavanaugh*, 545 N.E.2d 1325 (Ohio 1988).

is that the incorporation process—the application of the Bill of Rights to the states through the due process provision of the Fourteenth Amendment—was designed to bring the states into compliance with more rigorous federal standards and to make the criminal process uniform. Now, the generally better trained federal agents are granted more freedom than their state counterparts¹⁷³ and interestingly, this comes at a time when both substantive federal criminal law and its enforcement are expanding. Just to mention the irony in all this once more, this is the situation that the anti-federalists most feared at the time the Constitution was adopted and, of course, it was this concern that led to the adoption of the Bill of Rights.

III. THE SURVIVOR—INTERROGATION AND CONFESSIONS

A. *Toying with Miranda*

Although during the past twenty years the shifting majority of the Supreme Court has tugged at the seams of the landmark *Miranda*¹⁷⁴ decision, the Court has shown no inclination to completely unravel it. In fact, to the contrary, any weakened threads of *Miranda* have been covered by even livelier Sixth Amendment fabric.

The *Miranda* holding, requiring that various warnings be given to a suspect prior to custodial interrogation, was based on the Fifth Amendment privilege against self-incrimination at a time when the Court was poised to require, under the Sixth Amendment, the presence of counsel at all custodial interrogation sessions. In *Massiah v. United*

173. This phenomenon is similar to the fear consistently expressed by Justice Harlan with respect to the incorporation doctrine. He argued that forcing federal rules on the states would eventually lead to dilution of federal rights as the Court made an effort to accommodate the varying and different interests of the states in criminal law enforcement. See *Williams v. Florida*, 399 U.S. 78, 129-38 (1970) (Harlan, J., concurring and dissenting).

The two things that Justice Harlan did not foresee, however, were, one, that the Court would directly dilute federal rights, not necessarily to accommodate state interests, but in the name of the war on drugs, and two, that the states would respond by providing more protection to criminal defendants under their own constitutions. Consequently, and ironically, we now have the dual federal and state system that Justice Harlan favored, but, contrary to the Harlan view, with the states offering more extensive safeguards.

174. *Miranda v. Arizona*, 384 U.S. 436 (1966).

*States*¹⁷⁵ and especially in *Escobedo v. Illinois*,¹⁷⁶ the Supreme Court had held that the Sixth Amendment was violated when the police interrogated the defendants in the absence of their lawyers. Although Massiah had been indicted and Escobedo had asked for and been denied the opportunity to speak with his attorney (and the holdings could be limited in these ways), the Court appeared to be on the verge of applying the right to counsel to all interrogation sessions. *Miranda v. Arizona* actually diverted the court to a new constitutional path based on the Fifth Amendment rather than the Sixth. Instead of requiring counsel's presence during custodial interrogation, a rule which had the potential to drastically reduce, if not eliminate, out-of-court statements, the Court held that criminal suspects must be warned of the Fifth Amendment privilege against self-incrimination, the right to speak with a lawyer, and the right to have a lawyer present during interrogation; the latter right to have counsel present during interrogation designed to protect the former right to silence.

Thus, rather than demanding the presence of an attorney at post-arrest interrogation, the Court required certain warnings regarding the Fifth Amendment privilege not to talk. These rights, Chief Justice Warren noted, could be (and often have been) waived.¹⁷⁷ The Court chose to level the playing field in favor of criminal defendants through obligatory warnings about constitutional rights, reducing the coercive environment of police interrogation in this way, rather than by requiring counsel's presence in the interrogation room. This latter right, if recognized, would have proven a much more difficult (and obstructive) thing to waive. Viewed from this perspective, *Miranda v. Arizona* was never the ultimately liberal Warren Court decision that it might have been, and for which it was given credit. This may be one reason why the present Supreme Court, with a different ideological bent, continues to honor it.

To be sure, *Miranda* has been undercut in some ways, at least two of which are significant. First, the impeachment decisions provide ruthless interrogators with an incentive to violate *Miranda*. Although

175. 377 U.S. 201 (1964).

176. 378 U.S. 478 (1964).

177. *Miranda*, 384 U.S. at 476.

New York v. Harris,¹⁷⁸ holding that out-of-court statements given in the absence of complete warnings could be used to impeach the defendant if he testifies, is not surprising or profound, the follow-up case of *Oregon v. Hass*¹⁷⁹ is relative dynamite. In *Hass*, after complete warnings had been given, Hass asserted his right to counsel. The questioning officers nevertheless persisted and eventually obtained incriminating statements. As in *Harris*, the Court held that although the statements could not be used in the prosecution's case-in-chief, they could be used for impeachment purposes when and if the defendant testified.

The Court then went one step further in *United States v. Havens*.¹⁸⁰ Although in his direct testimony Havens had avoided any reference to the illegally seized evidence, a 5-4 majority, per Justice White, permitted the prosecution on cross-examination to ask him questions about and then impeach him with the previously inadmissible evidence as long as the questions on cross-examination were "reasonably suggested by the defendant's direct examination."¹⁸¹ *Havens* involved a Fourth Amendment violation; however, the theory and holding would apply equally well in the Fifth Amendment context. If a defendant, who has made inadmissible statements taken in violation of *Miranda*, opts to testify and attempts to avoid impeachment by staying clear of the area encompassed by his out-of-court remarks, he can nevertheless be questioned about these statements on cross-examination and impeached with them if the questions were "reasonably suggested" by his testimony on direct. It is, in fact, difficult to imagine a case in which the defendant's direct testimony would not reasonably suggest earlier, out-of-court incriminating statements.¹⁸²

178. 495 U.S. 14 (1990).

179. 420 U.S. 714 (1975).

180. 446 U.S. 620 (1980).

181. *Id.* at 627-28. This sounds like a lenient version of the rule limiting cross-examination to the scope of the direct. *See* FED. R. EVID. 611(b). In *Havens*, the defendant denied being involved with his codefendant in the transportation of cocaine. On cross-examination, he denied involvement in sewing a pocket in which drugs were found into his codefendant's clothing or having in his suitcase the fabric from which the pocket was cut. The Supreme Court permitted impeachment of his testimony by admission of the cloth illegally seized from his suitcase.

182. For example, in *James v. Illinois*, 493 U.S. 307 (1990), James was located at his mother's beauty parlor sitting under a hair dryer; his hair was black and curly. When ques-

Although understandably based on a policy of preventing perjury, the *Harris-Hass-Havens* trilogy offers aggressive officers a tool to circumvent *Miranda* entirely. If a suspect asserts his rights, the police have nothing to lose and perhaps something to gain if they continue to question him. If he ultimately relents in the face of persistent police pressure, he simply cannot testify in his own behalf. If he does, he will surely be impeached by his otherwise inadmissible out-of-court statements. And, of course, if the defendant does not (because he cannot) testify, his fate is generally sealed.

The other decisions imposing notable limitations on the effectiveness of *Miranda* relate to the manner in which the warnings must be given. In recent years, the Court has been quite lenient with the police regarding the information which must be conveyed to the suspect. Only the essence of the *Miranda* requirements have been deemed necessary; thorough compliance has not been demanded. The most significant thing about these cases is that they seem to dispense with the heart of the *Miranda* opinion—effectively warning the arrestee regarding the right to talk with an appointed attorney prior to custodial interrogation and the right to have the attorney present during questioning.¹⁸³ In *California v. Prysock*,¹⁸⁴ the Court upheld warnings which conveyed only the general right to a lawyer *sometime*, without

tioned about his prior hair color, James told the police that it had been reddish-brown, long, and combed straight back, and that he had his hair dyed and curled to change his appearance. Because James had been illegally arrested, these statements were suppressed. At the trial, five witnesses testified that the killer had long, reddish hair, worn in a slicked-back style, and that James had earlier had this hair color and style.

Assuming that James testified at his trial that he was not involved in the murder and that he had an alibi, under *Havens*, the prosecutor would surely have been able to impeach him with his previously inadmissible statements about his changed appearance. (In *James*, a witness actually testified that James' hair was black and curly on the date of the shooting. He was then impeached with James' earlier statements. The Supreme Court reversed the conviction, refusing to extend *Harris* to defense witnesses.) See also Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 100 HARV. L. REV. 1436, 1442-43 (1987).

183. *Miranda* was based on the Fifth Amendment privilege against self-incrimination. The warnings regarding the right to counsel were designed to protect this right, and were not independent Sixth Amendment rights in themselves.

184. 453 U.S. 355 (1981).

even indirectly suggesting that the right attached immediately, prior to and during custodial interrogation.¹⁸⁵ More importantly, in *Duckworth v. Eagan*,¹⁸⁶ a majority of the Justices upheld warnings in which Eagan was told that his right to a lawyer matured only later at a judicial proceeding, rather than prior to police interrogation.¹⁸⁷ In both *Prysock* and *Eagan*, the Court said that only the general thrust of *Miranda* must be complied with and that technical adherence to the various warnings was not necessary to inform the suspect of his rights.

These cases, I think, are meaningful. They tell interrogating officers that they need not exercise care while informing the suspect that he has a right to a lawyer free-of-charge before he can be questioned, and indeed, this can be circumvented entirely if the other warnings are essentially adequate. To the extent that *Miranda* protects suspects from sealing their own fate, it is likely the immediate availability of a lawyer, rather than an announced right to silence, that suggests to the suspect that he has a legal ally and deters out-of-court statements to the police. To the extent that *Prysock* and *Eagan* are utilized, either intentionally or inadvertently, the effectiveness of *Miranda* as an insulator is undercut.

Other decisions have limited (or refused to expand) *Miranda*, albeit not as significantly as the impeachment cases or *Prysock-Eagan*. For example, *New York v. Quarles*¹⁸⁸ not surprisingly established the notion that police do not have to give the warnings during the heat of battle. *Quarles* established the so-called "public safety" exception to *Miranda*, avoiding the necessity of giving the warnings when the situation has not been diffused and some immediate threat to the public might still exist. Additionally, both *Moran v. Burbine*¹⁸⁹ and *Colorado v. Spring*¹⁹⁰ simply refused to expand *Miranda*. In *Burbine*, the Court refused to require the police to tell Burbine that an attorney was

185. *Id.* at 361.

186. 492 U.S. 195 (1989).

187. *Id.* at 204.

188. 467 U.S. 649 (1984).

189. 475 U.S. 412 (1986).

190. 479 U.S. 564 (1987).

trying to contact him and intervene in his behalf during the interrogation. Justice O'Connor's majority opinion concluded that the *Miranda* warnings struck the appropriate balance (leveled the playing field) and that more was not necessary. Similarly in *Spring*, the Court concluded that warning the defendant of the particular offense under investigation was not a required part of the warnings. Although both pieces of information might have been helpful to the defendants in these cases—in terms of a knowing waiver—both would have actually expanded the *Miranda* requirements. As such, even though these decisions might be viewed with disfavor by liberal advocates of individual rights, they are hardly serious limitations on *Miranda* itself.

Although the custody requirement of *Miranda* has largely been equated with arrest,¹⁹¹ the Supreme Court has provided an expansive definition of interrogation. *Miranda* could be viewed as prohibiting only express interrogation in the absence of the warnings; however, the Court in *Rhode Island v. Innis*¹⁹² made it clear that the definition of interrogation was not so limited. Justice Stewart's majority opinion defined interrogation as including "any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect."¹⁹³ Even though this decision was not liberally applied in *Innis* itself,¹⁹⁴ it clearly goes beyond direct questioning to ploys which are designed (or are reasonably likely) to bring a response. Such ploys include confronting the suspect with an accomplice's confession (fictitious or otherwise), the weapons used in the offense, or the fruits of a burglary or robbery. Certainly many of the techniques described in the interrogation manuals would be covered by the *Innis* definition.

191. See, e.g., *Beckwith v. United States*, 425 U.S. 341 (1976); *Oregon v. Mathiason*, 429 U.S. 492 (1977); *California v. Beheler*, 463 U.S. 1121 (1983); *Minnesota v. Murphy*, 465 U.S. 420 (1984).

192. 446 U.S. 291 (1980).

193. *Id.* at 300.

194. There were three officers in the cruiser with the arrestee *Innis*. Although the exact seating arrangement was somewhat unclear, one of the officers, using words like "Gee" and "God forbid," worried out loud about the fact that a school for handicapped children was nearby the murder scene and how awful it would be if one of the handicapped children found the weapon and hurt herself with it. *Id.* at 294-95.

More significantly, in *Edwards v. Arizona*,¹⁹⁵ the Court expanded the *Miranda* requirement by holding that once a defendant requests an attorney, he cannot be questioned further until he has been provided with a lawyer unless the defendant himself reinitiates contact with the police. Most important, in the last few years, the Court, in the face of its new ideological philosophy toward the criminal process, has expanded the *Edwards* rule. In the 1988 decision of *Arizona v. Roberson*,¹⁹⁶ a 6-2 majority held that *Edwards* also bars questioning about crimes and investigations separate from the one for which the defendant had originally requested counsel.¹⁹⁷ In 1990, the Court in *Minnick v. Mississippi*¹⁹⁸ held in a 6-2 majority opinion written by Justice Kennedy that the *Edwards* and *Roberson* requirements were not satisfied by merely providing the defendant with the opportunity to speak with an attorney (Minnick had spoken with an appointed attorney on "two or three occasions"). The Court held that *Edwards* means that the defendant has the right to have counsel *present* during any police-initiated interrogation (Minnick had been approached and questioned by a deputy sheriff without his lawyer present). The *Edwards-Roberson-Minnick* cases thus represent a continuing inclination on the part of the Court to protect criminal defendants in the interrogation process.

Consequently, during the past fifteen years or so, although the Supreme Court has flirted with undermining *Miranda*, it has by-and-large backed off and has even expanded the decision's effectiveness. Perhaps the clearest indication of the Court's continuing attitude toward interrogation and confessions is the fact that the Justices have been willing to go beyond *Miranda* and the Fifth Amendment in providing criminal defendants with protection from the extraction and use of incriminating statements.

195. 451 U.S. 477 (1981).

196. 486 U.S. 675 (1988).

197. Justice Steven's majority opinion reasoned that when an arrestee requests a lawyer in response to the warnings, he is expressing his belief that he needs an attorney to assist him during the interrogation process generally, and not just for the particular crime for which he has been arrested. *See id.*

198. 498 U.S. 146 (1990).

B. *Revival of the Sixth Amendment Right to Counsel*

As indicated earlier, before the Supreme Court decided *Miranda v. Arizona*, they had been focusing on the Sixth Amendment.¹⁹⁹ After *Massiah* and *Escobedo*, the Court was poised to require the presence of an attorney during all interrogation sessions unless the defendant knowingly and intelligently refused the presence of counsel. *Miranda* switched the Court to the less drastic and demanding Fifth Amendment track.

In 1978, during Chief Justice Burger's tenure, the Supreme Court, now a much more conservative body, revived *Massiah* in a rather horrible murder case. In the somewhat notorious case (at least in criminal procedure circles) of *Brewer v. Williams*,²⁰⁰ the Court held that an Iowa detective violated the Sixth Amendment when he utilized the infamous "Christian burial speech" to get Williams to show him the location of ten-year-old Pamela Powers, whom he had kidnapped and murdered. Although the Sixth Amendment foundation of *Williams* was clear, the parameters of the decision were not as obvious.

Williams could have been decided as a Fifth Amendment case under *Miranda*. Justice Stewart's opinion described Detective Leaming's "Christian burial" talk as interrogation²⁰¹ and Williams was clearly in custody. Nevertheless, something motivated the Court to rest the decision on the Sixth Amendment. It could have been because Williams already had spoken with a lawyer (actually two lawyers) or because the police had made an agreement with Williams' lawyer not to question Williams. The Court may also have based its decision on the Sixth Amendment because Williams had appeared before a magistrate or because the Court felt that waiver of the Sixth Amendment right to counsel would be more difficult than waiver of Fifth Amendment rights.²⁰²

199. See *supra* text accompanying notes 167-68.

200. 430 U.S. 387 (1977).

201. *Id.* at 400.

202. The Court has recently rejected a more demanding standard for waiver of the Sixth Amendment right in the interrogation context. In *Patterson v. Illinois*, 487 U.S. 285 (1988), the Court held that the giving of the warnings required by *Miranda* were sufficient

Irrespective of this collage of facts, later cases make it clear that *Williams* was not fact dependent. In a number of post-*Williams* decisions, the Court has indicated that the crucial fact in *Williams* was that adversary judicial proceedings had begun.²⁰³ At this point, the adversarial positions of the parties solidify and the government must deal with the defendant through his lawyer.

The point at which adversarial proceedings commence is the initial appearance before the magistrate.²⁰⁴ The significance of the Court's recent Sixth Amendment decisions is that, after this stage in the process, the government is prohibited from deliberately eliciting information from the defendant in the absence of his lawyer. Unlike the situation in *Miranda*, custody and interrogation are not necessary because once formal criminal proceedings have begun, the Sixth Amendment right to counsel will be violated when the government utilizes an informant, undercover agent, or codefendant to prompt the defendant into making extra-judicial statements.²⁰⁵

This foray back into Sixth Amendment jurisprudence in the interrogation context reveals the Supreme Court's continuing commitment to leveling the self-incrimination playing field in favor of criminal defendants. Although the decisions involving out-of-court statements

for both Fifth and Sixth Amendment waivers.

203. See, e.g., *Kuhlmann v. Wilson*, 477 U.S. 436 (1986); *Maine v. Moulton*, 474 U.S. 159 (1985); *United States v. Henry*, 447 U.S. 264 (1980).

204. See *Kuhlmann v. Wilson*, 477 U.S. 436 (1986); *Brewer v. Williams*, 430 U.S. 387 (1977); *Kirby v. Illinois*, 406 U.S. 682 (1972).

205. The decision in *Kuhlmann* somewhat clouds the meaning of deliberate elicitation. The police placed Wilson in a cell overlooking the scene of the robbery and murder for which he had been charged. An informant was also present in the cell, and although the police had told the informant, Benny Lee, not to question Kuhlmann about the crime, when Kuhlmann told Lee the same story that he had told the police, Lee responded by advising Wilson that his story "didn't sound to good" and that "things didn't look to good for him." Wilson later changed his story and admitted to Lee his involvement in the crimes. Nevertheless, the majority in *Kuhlmann* characterized Lee as a passive listener, and concluded that he had not deliberately elicited information from Kuhlmann.

This conclusion appears inconsistent with *United States v. Henry*, 447 U.S. 264 (1980), where an informant cellmate was also told not to question Henry about the crime, and there had been no showing that he had. Here the majority concluded that the informant was not just a listener; that he had some conversations with Henry, and that Henry's incriminating statements were the product of those conversations.

are clearly not one-sided, they display a markedly different attitude than the *carte-blanche-to-the-police* philosophy evident in Fourth Amendment cases.

IV. CONCLUSION

Anyone who has studied the United States Supreme Court's criminal procedure decisions over the past fifteen years or so is left with the impression that the Court is in the process of removing the federal Constitution from predominant influence in the criminal process. Not only is this most evident in the Fourth Amendment area, but also these search and seizure cases may provide the explanation for such a trend. No one would deny that the Court has been gravitating toward being generally much more conservative. However, the Court's reactivism and retrenchment in the criminal arena has been fueled, if not driven, by the war on drugs. Virtually all of the Court's relatively contemporary Fourth Amendment decisions are drug cases, and in virtually all of them, a majority of the Court has decided in favor of the prosecution in order to avoid the suppression of the corpus of the offense. The result has been a drastic restriction in the scope of Fourth Amendment protection generally. Of course, this restriction applies to all criminal investigations, not just those involving narcotics. Although the Court has shown no inclination (as of yet) to overrule *Mapp v. Ohio*,²⁰⁶ effectively the same result has been accomplished. The Court has circumvented the exclusionary rule by limiting the situations in which it applies by narrowing Fourth Amendment protection. These Court decisions have been aimed at ensuring the admissibility of narcotics taken from a defendant, thus guaranteeing a conviction.

Even in the interrogation and confessions arena, the one area in which the Court has continued to show some sensitivity to the interests of criminal defendants, arguably reveals its anti-drug agenda. At least two explanations for the continuing scrutiny of the interrogation area, although possibly somewhat cynical, are consistent with the anti-drug

206. Regardless of the Court's drug enforcement philosophy, overruling *Mapp* would clearly send the wrong message to law enforcement. Exclusion of evidence has been avoided in any event through restriction of the Fourth Amendment.

policy. First, persons in possession of contraband or evidence of crime naturally tend to hide and secret that which could land them in jail. This realization has led to a judicial philosophy granting law enforcement more freedom to detect that which is not readily exposed; there is essentially a judicial imprimatur on search and seizure practices. On the other hand, in the interrogation and confession context, criminal defendants have a tendency to talk; they reveal what they know and incriminate themselves. The studies of the effects of the *Miranda* decision on the incidents of incriminating out-of-court statements bear this out.²⁰⁷ Consequently, a pro-law enforcement judicial philosophy can nevertheless afford to provide defendants with some constitutional protection in the interrogation arena. Not much is lost.

A second explanation for the disparity in judicial treatment between search and seizure, on the one hand, and interrogation and confessions, on the other, is that self-incrimination is not all that valuable a tool in the war on drugs. The case against most drug defendants is made by the search for and seizure of the contraband. An admission that the narcotics belong to the arrestee, although helpful, is often largely superfluous.²⁰⁸ Again, with drug prosecutions driving judicial policy, the Court can afford to retain some constitutional supervision over the interrogation process.

207. See, e.g., Project, *Interrogations in New Haven: The Impact of Miranda*, 76 YALE L.J. 1519 (1967) ("*Miranda* warnings had little impact on suspect's behavior"; "in almost every case" police had adequate evidence to convict without interrogation"); Richard Medalie et al., *Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968) (rate of statements given to police "remarkably uniform" before and after *Miranda*"); Lawrence Leiken, *Police Interrogation in Colorado*, 47 DENVER L.J. 1 (1970); David Neubauer, *Confessions in Prairie City*, 65 J. CRIM. L. & CRIMINOLOGY 103 (1974); Cyril D. Robinson, *Police and Prosecutor Practices and Attitudes Relating to Interrogation as Revealed by Pre- and Post-Miranda Questionnaires*, 1968 DUKE L.J. 425; James Witt, *Non Coercive Interrogation and the Administration of Criminal Justice*, 64 J. CRIM. L. & CRIMINOLOGY 320 (1973). But see Richard Seeburger & R. Stanton Wettick, *Miranda in Pittsburgh—A Statistical Study*, 29 U. PITT. L. REV. 1 (1967) (confessions did drop significantly after *Miranda*, but clearance and conviction rates remained virtually unchanged).

208. This is not to say, however, that interrogation of drug offenders is never useful. Questioning of drug arrestees may be helpful, for instance, in revealing the involvement of others in drug organizations or conspiracies.

Of course, the Court's reaction to publicity about the drug problem cannot explain everything. There are other crimes to investigate and solve. When physical evidence is seized from a suspect, only his external sphere of privacy is invaded.²⁰⁹ Extracting incriminating statements from the mind and mouth of an arrestee, however, involves a greater personal intrusion, and is generally conclusive. Other constitutional guarantees, such as the right to a trial, become essentially meaningless. Ruthless tactics in this latter realm thus appear over-reaching. The Supreme Court's permissive attitude toward law enforcement generally (and search and seizure practices in particular), but continued supervision of the interrogation process, can possibly be explained by the adage "play hard, but fair."

Regardless, much of the Supreme Court's recent criminal procedure jurisprudence is unfortunate. To the extent that it is driven by a perceived or real drug problem in this country, someday the war on drugs will be over—won or lost—leaving us with a draconian lack of constitutional insulation from criminal investigation and prosecution with respect to other crimes. The reaction of the state courts has been helpful but uneven, resulting in a practical patchwork of procedural protection depending entirely on jurisdictional proclivities. It is possible that now is the time for the states to seriously consider the adoption of a uniform code of criminal procedure, such as the Model Code of Pre-Arrestment Procedure, to restore some kind of balance and uniformity to criminal processes. However, given philosophical and political disagreement over the balance between individual rights and law enforcement, optimism over such an initiative hardly seems warranted.

209. And this is realistically true regardless of Supreme Court conclusions that there is no "constitutionally legitimate expectation of privacy."