

NEW DEVELOPMENTS IN FOURTH, FIFTH AND SIXTH AMENDMENT LAW

PANEL
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PROFESSOR BERGMAN: My name is Barbara Bergman, I teach at the University of New Mexico and with me on the panel today are Professor Art LeFrancois and Professor Mimi Wesson. We have taken the Fourth, Fifth, and Sixth Amendments and divided them up. I am doing the Fourth, Art is doing the Fifth, and Mimi is doing the Sixth. We will each take about ten to fifteen minutes to talk with you about what we find most interesting in terms of recent developments, focusing on what the United States Supreme Court did in the 1998-99 term and the term that has just ended. Then we will open it up to discussion to talk about issues or questions that you may have, either involving those cases we touch upon or those that are of interest to you that we don't talk about in the course of this discussion.

The U.S. Supreme Court this last term had a number of interesting Fourth Amendment cases. The three cases that I want to mention briefly that came down this term are the *Bond*¹ case, the *Wardlow*² case, and the *J.L.*³ case out of Florida. Two of these cases, *Wardlow* and *J.L.*, deal with *Terry*⁴ stop issues. The first one, the *Bond* case, deals with a really basic question of whether or not a particular action by a border patrol agent constitutes a search or not.⁵ In other words, the issue in *Bond* was whether or not an individual has a legitimate expectation of privacy in his luggage on a bus.⁶

So let me start with *Bond*. I'll give you some factual background and then discuss what the Court held. *Bond* was a case in which the defendant gets on a bus in California, heading for Arkansas. When the bus gets to Texas, it is stopped at a border checkpoint.⁷ A border patrol agent boards to check the immigration status of the passengers.⁸ He starts at the front and works his way back.⁹ By the time he gets to the back, he is satisfied that everyone on that bus is legally within the United States.¹⁰ He then turns around and starts to walk toward the front of the bus. As he walks, he reaches into the overhead bin where the passengers' luggage has been placed, and he is squeezing the bags rather forcefully, as he admitted when he was being examined at the hearing on the motion to suppress.¹¹

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1. *Bond v. United States*, 529 U.S. 334 (2000).

2. *Illinois v. Wardlow*, 528 U.S. 119 (2000).

3. *Florida v. J.L.*, 529 U.S. 266 (2000).

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

5. *Bond*, 529 U.S. at 335.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Bond*, 529 U.S. at 335.

11. *Id.* at 335, 339.

He comes to a particular piece of luggage, gives it a really hard squeeze, and feels what he describes later as "a brick-like object."¹² He then asks the individual sitting beneath that bag, "Is this your bag?" Mr. Bond acknowledges that it's his bag. The officer asks, "Do you mind if I take a look at it?" (I was always amazed when I used to be a public defender and my clients would say, "Sure, go ahead and look at my drugs, that's fine.") Mr. Bond says, "No problem." The officer opens the bag and finds a brick of methamphetamine, so Mr. Bond is then prosecuted.¹³ In the motion to suppress, Bond argued that this border agent had no reasonable suspicion—certainly no probable cause—for squeezing this bag, and that the squeeze itself constituted a search.¹⁴ The Fifth Circuit said we don't think so.¹⁵ We think what the officer did was justified. It didn't constitute a search because the bag was in public.¹⁶ You put it in the overhead rack, where all kinds of people can touch it, move it, handle it.¹⁷ You don't have an expectation of privacy with your luggage in those circumstances. It's in the public domain, so to speak.¹⁸ So the Fifth Circuit affirmed the conviction.¹⁹

The U.S. Supreme Court took certiorari, and the issue was whether or not the agent's action in physically squeezing that bag constituted a search.²⁰ Did Mr. Bond have a legitimate expectation of privacy in his bag when the officer squeezed it?²¹ The U.S. Supreme Court, in a seven-to-two decision written by Chief Justice Rehnquist, said that the squeeze constituted a search.²² The Court said that the passenger did have a legitimate expectation of privacy that was violated by this agent physically squeezing the bag.²³ Chief Justice Rehnquist drew a distinction between a visual inspection and a tactile inspection, which he explained was more exploratory in nature and therefore more physically intrusive than other kinds of inspections that had been upheld.²⁴ The majority said the agent went too far. This was a search, and the agent didn't have any reasonable justification for that search. On that basis, the Court threw out the methamphetamine and overturned the conviction.²⁵

There was a dissent by Justice Breyer, joined by Justice Scalia, where Justice Breyer seems to be wondering if anyone in the majority had traveled on an airplane recently.²⁶ Has anybody watched what happens to your luggage in those overhead bins? Have you ever seen some of the flight attendants take the bags and shove and push and do all kinds of things to them? If so, then how could passengers on public transportation these days legitimately expect that this sort of thing would not happen

12. *Id.* at 336.

13. *Id.*

14. *Id.*

15. *United States v. Bond*, 167 F.3d 225, 226 (5th Cir. 1999).

16. *Id.* at 227.

17. *Id.*

18. *Id.*

19. *Id.* at 228.

20. *Bond*, 529 U.S. at 335.

21. *Id.* at 338.

22. *Id.* at 339.

23. *Id.* at 338-39.

24. *Id.* at 338.

25. *Bond*, 529 U.S. at 339.

26. *See id.* at 340 (Breyer, J., dissenting).

to their luggage?²⁷ The dissenters would have said that this did not constitute a search, because there was no legitimate expectation of privacy.²⁸

The next two cases are *Terry v. Ohio* cases, and they raise issues that have been the source of much litigation. I'm not sure, however, how much the *Wardlow* case is going to help anyone figure out whether running away from the police in a high crime area is enough to constitute reasonable suspicion or not. In *Wardlow* a caravan of police, about four vehicles, go into a high crime, high drug area.²⁹ Officers in the last vehicle did the search in question. (Interestingly, at the motion to suppress, the officer who testified couldn't remember whether he was in a marked or unmarked vehicle.) Basically when they pull into this area, a man who is holding an opaque bag sees them, makes eye contact, and takes off running.³⁰ The officers go after him. They stop him, pat down the bag, and find a gun.³¹

The defense moved to suppress the gun and the question on appeal was whether "unprovoked flight," as the state of Illinois calls it, in a high crime area constitutes sufficient reasonable suspicion for a *Terry* stop and frisk.³² That issue was left somewhat up in the air in the *Hodari D.*³³ case from a couple of terms ago. Justice Scalia had indicated that he would have liked to have addressed that issue in *Hodari D.*, but the state had not chosen to argue that mere flight alone was enough to justify a *Terry* stop.³⁴ So it was no surprise a couple of terms later, when this case came along, that the Court took certiorari to resolve the question.

Both sides wanted the Court to adopt a per se rule. Illinois argued that there should be a per se rule that when someone runs away in a high crime area from a police officer, it's unprovoked flight, and that should be enough for a stop and frisk.³⁵ The defense argued that there can be all sorts of reasons why people might not want to have a discussion with police officers, so the defense wanted a per se rule that mere flight alone should never be enough for a *Terry* stop.³⁶

All nine justices said we're not giving you a per se rule. A per se rule doesn't work here. When applying *Terry v. Ohio*, you look to the totality of the circumstances. You have to look at all of the factors surrounding what was going on in a particular case. You have to exercise good judgment and common sense and draw logical inferences, and that's how we decide there's reasonable suspicion. They all agreed on that.

What I find interesting about *Wardlow* is they all agreed that's what you do, then five of them took the record of the case and said, we think there's enough here,³⁷ and

27. *Id.*

28. *Id.* at 343.

29. *Illinois v. Wardlow*, 528 U.S. 119, 121 (2000).

30. *Id.* at 122.

31. *Id.*

32. *Id.* at 126 (Stevens, J., concurring in part and dissenting in part).

33. *California v. Hodari D.*, 499 U.S. 621 (1991).

34. *Id.* at 624, n. 1. The state in that case had conceded that the officer did not have reasonable suspicion to conduct a search based on flight alone. *Id.*

35. *Wardlow*, 528 U.S. at 126 (Stevens, J., concurring in part and dissenting in part).

36. *Id.*

37. *Id.* at 121-26 (Rehnquist, J., writing for the majority with Kennedy, O'Connor, Scalia, and Thomas, JJ., joining).

four of them took the same record and said, no, not enough.³⁸ So from a practical standpoint I think the opinion demonstrates the tremendous difficulty in looking at this sort of record and making that kind of judgment. Obviously, here we had nine justices with a close split on the application of the facts to the law. But clearly the standard is totality of the circumstances. The analysis is very fact-based, very much looking at the specific circumstances of every case.

The third case is *Florida v. J.L.* It's another *Terry* case—an anonymous tip case. Police receive a tip saying there's a young black male at a particular location, wearing a plaid shirt and oh, by the way, he's got a gun.³⁹ Within six minutes of that call being dispatched, the officers arrive at the location and they see three young black males at this bus stop area "hanging around," according to the officers' description.⁴⁰ They see nothing in terms of the behavior of these individuals, including the young man wearing the plaid shirt, that would indicate criminal activity.⁴¹

They go up to the fellow in the plaid shirt, they stop him, and they pat him down and find a gun.⁴² So the question is whether or not the anonymous tip, with no confirming evidence of criminal activity, is enough to justify a *Terry* stop.⁴³ The U.S. Supreme Court, in a unanimous decision written by Justice Ginsburg, said it wasn't enough.⁴⁴ The Court explained that, standing alone, the corroborating evidence, such as the information in the tip such as the clothing, the race, and the location, confirmed nothing except clothing, race and location.⁴⁵ The police had no indication of any additional criminal activity. So the Court said you have to have something to indicate that the allegation of illegal activity is reliable.⁴⁶

Justice Kennedy wrote a concurring opinion, joined by Justice Rehnquist, pointing out that there are all kinds of things we could look to in order to evaluate the reliability of the anonymous tip.⁴⁷ We have Caller ID,⁴⁸ we have maybe a caller who's called on numerous occasions and the person taking the call recognizes the voice and knows they've gotten reliable information in the past, even though they don't know the caller's name. There are all kinds of other factors that could be considered. But on the facts of this case, that's not enough.⁴⁹ So Kennedy and Rehnquist said there was no reasonable suspicion.⁵⁰

One of the arguments that had been raised was the question of a possible firearm exception.⁵¹ The argument was that when you get a tip about a gun, because guns are so dangerous and there is so much concern about controlling them, the

38. *Id.* at 125-40 (Stevens, J., concurring in part and dissenting in part with Breyer, Ginsburg, and Souter, J.J., joining).

39. *Florida v. J.L.*, 529 U.S. 266, 268 (2000).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *J.L.*, 529 U.S. at 268.

45. *Id.* at 271-72.

46. *Id.*

47. *Id.* at 274-75 (Kennedy, J., concurring).

48. Caller ID, also known as Calling Number Display, provides a digital display attachment to telephones that identifies the name and phone number of a caller.

49. *J.L.*, 529 U.S. at 274.

50. *Id.*

51. *Id.* at 272.

anonymous tip ought to be enough.⁵² The Supreme Court clearly said it was not creating a firearm exception under *Terry*.⁵³ The Court said it would look to all relevant factors, not just the fact that the tip mentioned the presence of a gun. If the tip is not sufficiently reliable, that's it, and it doesn't matter that the tip is about a gun. Justice Ginsburg said the gun exception argument would lead to a slippery slope, because there is also an argument that drug dealers often have guns and are armed.⁵⁴ So, if you have a tip about drugs, does that mean, therefore, that you must incorporate by inference that there might be a gun involved and therefore that is enough? Ginsburg said the Court wasn't going there. The Court was not going to carve out that kind of exception under *Terry*.⁵⁵

So those are the three cases that have come down during the 1999-2000 term on the Fourth Amendment that I find of most interest. There are three cases pending before the Supreme Court next term raising Fourth Amendment issues. Not all of them in a criminal context—one is a civil lawsuit—but all of them implicate the interpretation of the Fourth Amendment.

One is *City of Indianapolis v. Edmond*.⁵⁶ This is a case where the city of Indianapolis had in place drug checkpoints.⁵⁷ They would set up these drug checkpoints and they would stop every car that came along, ask for a driver's license and proof of insurance, and then they had a drug dog walk around the car.⁵⁸ If the dog alerted them, they went further. If the dog did not alert them and everything else checked out, the person went on their way.⁵⁹ Basically these stops lasted less than five minutes, unless there was reason to keep someone longer.⁶⁰ It had a tremendously successful rate of arrests. The result was that 9.4% of the people stopped were arrested either for drugs or for some other violation, mostly traffic violations.⁶¹ In other words, it was a very effective program. In fact, in a dissent to the Seventh Circuit opinion, Judge Easterbrook emphasized that this was a great program that had really worked.⁶²

The problem was that there was no individualized suspicion,⁶³ and Indianapolis candidly acknowledged that the primary purpose of the checkpoint was law enforcement.⁶⁴ It was crime detection. It was not for safe driving. They weren't trying to get people high on drugs off the streets so they wouldn't be driving. They wanted to get people with drugs off the streets because they were criminals. So the record I think is a good record in the sense that they didn't make any bones about

52. *See id.*

53. *Id.*

54. *Id.* at 272-73.

55. *J.L.*, 529 U.S. at 273.

56. *City of Indianapolis v. Edmond*, 531 U.S. 32, 121 S. Ct. 447 (2000). At the time Professor Bergman gave this presentation, the Supreme Court had not yet decided this case. In a five-to-four majority, written by Justice O'Connor, the court affirmed the decision of the Seventh Circuit Court of Appeals, *Edmond v. Goldsmith*, 183 F.3d 659 (7th Cir. 1999), finding that checkpoints established primarily for crime detection purposes, and not based on individualized suspicion, violated the Fourth Amendment.

57. *Edmond*, 531 U.S. at ___, 120 S.Ct. at 450.

58. *Id.* at ___, 120 S.Ct. at 450-51.

59. *Id.* at ___, 120 S.Ct. at 451.

60. *Id.*

61. *Edmond v. Goldsmith*, 183 F.3d at 666.

62. *Id.* at 666-71 (Easterbrook, J. dissenting).

63. *City of Indianapolis v. Edmond*, 531 U.S. ___, 121 S.Ct. at 451, 455.

64. *Id.* at ___, 121 S.Ct. at 453.

the fact that these checkpoints were for crime detection and drug investigation. It was different than other kinds of checkpoints, where the purpose is to get drunk drivers off the street or address other public safety concerns by checking for licenses and that sort of thing. So this case presented this issue very clearly for the Court to decide.⁶⁵

The Court just granted certiorari on the *Atwater*⁶⁶ case this week.⁶⁷ The *Atwater* case is the soccer mom case, although I know Art doesn't think she is a true soccer mom because she is driving around without a seatbelt and the children are not wearing seatbelts.⁶⁸ But the record shows she's come back from soccer practice with her children and this officer pulls her over for a seatbelt violation—failure to have the children in seatbelts.⁶⁹ Her purse had been stolen a week or so before and the thieves had taken her driver's license and proof of insurance. So she didn't have that on her, and the officer cited her for that, too.⁷⁰ He took her out of the car, handcuffed her, placed her under arrest, called for backup—because, you know, soccer moms can be dangerous—transported her down and locked her up for an hour.⁷¹ The magistrate let her out rather quickly and dismissed the case.⁷² There was reason to believe that this particular officer had some animosity toward this lady—we're not quite sure why—because he'd pulled her over a few weeks before thinking she wasn't wearing a seatbelt, but she was.⁷³ So when he checked her license, he knew she had a valid license and insurance because he had stopped her two weeks before.⁷⁴ Then he stops her this day and places her under arrest. She's suing everybody—the police officer, the city, everybody⁷⁵—and the Supreme Court took certiorari.⁷⁶ The issue that this raises is whether the Fourth Amendment, by incorporating the common law as it existed at the time the Fourth Amendment was framed, prohibits as an unreasonable seizure the warrantless, full custodial arrest of an individual for a fine-only criminal misdemeanor—a fifty dollar fine is the maximum here—that does not involve a breach of the peace.⁷⁷ That was the common law.⁷⁸

65. *E.g.*, Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

66. *Atwater v. City of Lago Vista*, 195 F.3d 242 (5th Cir. 1999).

67. The Supreme Court granted certiorari in *Atwater v. City of Lago Vista* on June 26, 2000, 120 S.Ct. 2715 (June 26, 2000). The case was decided on June 18, 2001. See *Atwater v. City of Lago Vista*, No. 99-1408, 2001 WL 672595 (June 18, 2001).

68. *Atwater*, 195 F.3d at 244.

69. *Id.*

70. *Id.* at 248 (Wiener, J. dissenting).

71. *Id.*

72. *Id.*

73. *Atwater v. City of Lago Vista*, 195 F.3d 242, 248 (5th Cir. 1999) (Wiener, J. dissenting).

74. *Id.*

75. *Id.* at 244.

76. *Atwater v. City of Lago Vista*, 195 F.3d 242 (5th Cir. 1999), cert. granted 120 S.Ct. 2715 (June 26, 2000).

77. The plaintiff, Ms. Atwater, raised this issue when the case was heard en banc before the Fifth Circuit Court of Appeals, but the court did not consider that argument because it had not been raised during the trial or before the three-judge panel that heard the first appeal. *Atwater*, 195 F.3d at 245 n.3.

78. *Id.*

The Supreme Court granted certiorari a couple of terms ago in *Ricci v. Arlington Heights*⁷⁹ because the justices thought this issue was presented in that case. It became clear in oral argument that the same issue was not presented in as good a fashion as they wanted, so they dismissed certiorari as improvidently granted.⁸⁰ This case, the *Atwater* case, re-raises the issue, and I think properly so. I think we're going to get a decision on that issue.

The *Ferguson*⁸¹ case I will just mention in passing. A nurse in South Carolina was concerned about the birth of crack-addicted babies.⁸² So she began working with the hospital and prosecutors. They came up with a program under which the hospital would test the urine of pregnant women who showed indicia of cocaine use.⁸³ If the women tested positive, they were given a choice of participating in a drug treatment program, or the hospital would turn the evidence over to the police for prosecution,⁸⁴ because in South Carolina, in state court, ingestion of drugs had been found to constitute the crime of contributing to the delinquency of a minor.⁸⁵ In that state the fetus was viewed as a living being, and it clearly was under eighteen, and therefore it was a minor for purposes of that statute.⁸⁶ So there was a basis for criminal prosecution. The question is whether that program violates the Fourth Amendment.⁸⁷ One of the patients brought a civil lawsuit on a number of grounds, including the Fourth Amendment. Now I'll turn it over to Art for the Fifth Amendment.

PROFESSOR LEFRANCOIS: The Court decided several Fifth Amendment cases this term. I'd like to devote my time now to discussing the most publicized one. I hope you're not tired of hearing about it by now. I'll be happy to discuss the other cases later in this session, if anyone would like.

On Monday, the Court announced its decision in *Dickerson v. United States*.⁸⁸ This was the case that raised the issue of whether the Court would overturn its 1966 *Miranda*⁸⁹ decision—or rule that Congress already had—or not. The Court decided seven to two for the “or not.” That is, it determined that Congress, for lack of authority, had not overturned *Miranda*,⁹⁰ and that the Court didn't want to, either.⁹¹ This made Justice Scalia very mad. He dissented, joined by Justice Thomas. Justice Rehnquist, of all people, wrote the majority opinion.

79. *Ricci v. Arlington Heights*, 116 F.3d 288 (7th Cir. 1997), cert. granted, 522 U.S. 1038, cert. dismissed, 523 U.S. 613 (1998).

80. 523 U.S. 613 (1998).

81. *Ferguson v. City of Charleston*, 186 F.3d 469 (4th Cir. 1999), cert. granted, 120 S.Ct. 1239 (February 28, 2000). The case was decided on March 21, 2001. See *Ferguson v. City of Charleston*, ___ U.S. ___ 121 S. Ct. 1281 (2001).

82. *Ferguson*, 186 F.3d at 474.

83. *Id.*

84. *Id.*

85. See *State v. Horne*, 319 S.E.2d 703, 704 (S.C. 1984) (holding that a viable fetus was a person within the meaning of South Carolina law); *Whitner v. State*, 492 S.E. 2d 777, 778-84 (S.C. 1997) (upholding criminal conviction for child neglect in a case in which a woman ingested cocaine while pregnant).

86. S.C. CODE ANN. § 44-53-440 (Law. Co-op. Supp. 1997).

87. *Ferguson*, 186 F.3d at 473.

88. *Dickerson v. United States*, 530 U.S. 428 (2000). The *Dickerson* opinion was announced Monday, June 26, 2000.

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

90. *Dickerson*, 530 U.S. at 435-43.

91. *Id.* at 443.

You all know that *Miranda* says that before a person is custodially interrogated, she must be warned of her right to remain silent, that anything she says can be used against her, that she has a right to the presence of an attorney, and that an attorney will be provided even if she can't afford one.⁹²

This is all peachy, but *Miranda* is less than transparent on its source of authority. At the time *Miranda* was decided, the law required that confessions be suppressed if they were involuntary. This started out as a common law rule,⁹³ was later unevenly incarnated as a Fifth Amendment rule,⁹⁴ and then morphed into a due process rule.⁹⁵ But it all amounted to the same thing—the test for the admissibility of confessions was voluntariness.

The *Miranda* Court wasn't satisfied with this, so it said that because interrogation techniques had gotten so sophisticated, a rule more protective of Fifth Amendment rights was needed.⁹⁶ This is where the biggest challenge to *Miranda* became *Miranda*. The case said the warnings were required, but only in the absence of equally protective alternatives—other safeguards that adequately protected the right to silence and its continuous exercise.⁹⁷ After all, the Court didn't mean for the case to be construed as a “constitutional straitjacket.”⁹⁸ If the Court didn't mean to impose a constitutional straitjacket on Congress and the states, then why, and how, was it applying its newly fashioned rule—Justice Scalia calls it the “*Miranda* code”⁹⁹—to three states in one day?¹⁰⁰

As we say in Oklahoma, what's the deal? The deal, we were told eight years later in a case called *Michigan v. Tucker*, was that *Miranda* was a rule that was protective of the Fifth Amendment right against self-incrimination, but not protected by it.¹⁰¹ *Miranda* safeguarded the Constitution, but was not required by it. *Miranda* was sort of transconstitutional law.

There would have been nothing terribly odd about this, had such a rule applied only to federal courts. We all might have thought the Court was exercising its supervisory power over the lower federal courts.¹⁰² But there was the pesky fact that the Court insisted on the *Miranda* rule in case after case coming from state courts, and also in habeas corpus cases that raised constitutional issues.¹⁰³ How could a nonconstitutional prophylactic rule bind the states, or raise cognizable constitutional issues on habeas?

92. *Miranda*, 384 U.S. at 479.

93. *Hopt v. Utah*, 110 U.S. 574 (1884).

94. *Bram v. United States*, 168 U.S. 532 (1897).

95. *Brown v. Mississippi*, 297 U.S. 278 (1936).

96. In 1964, the Court had determined that the Fifth Amendment applied to the states. *Malloy v. Hogan*, 378 U.S. 1 (1964).

97. *Miranda*, 384 U.S. at 467, 479.

98. *Id.* at 467.

99. *Dickerson*, 530 U.S. at 456 (Scalia, J., dissenting).

100. *Miranda* and two of its companion cases applied the rule to state courts. See *Miranda*, 384 U.S. at 491-94, 497-99.

101. *Michigan v. Tucker*, 417 U.S. 433, 444, 446 (characterizing the “prophylactic standards” established in *Miranda* as “not...protected by the Constitution.”).

102. See *Carlisle v. United States*, 517 U.S. 416, 425-26 (1996) (recognizing power of federal courts to prescribe rules of procedure required by neither Congress nor Constitution).

103. See *Dickerson*, 530 U.S. at 439 n. 3 (seeking to demonstrate *Miranda*'s constitutional status by citing habeas cases allowing *Miranda* claims).

As if things weren't interesting enough, two years after *Miranda* was decided, Congress passed a law, 18 U.S.C. § 3501, that sought to return the matter of confession admissibility to the pre-*Miranda* voluntariness standard. Nearly everyone but Justice Scalia ignored this statute on the theory that it was an illegitimate usurpation of the Court's function—because it sought to overturn a constitutional rule. This made sense, except that *Miranda* questioned its own constitutional legitimacy, and the Court in case after case began holding that *Miranda*'s warnings were something other than constitutionally required. To some, it seemed the Court's usurpation of Congress's authority trumped Congress's legitimate attempt to reassert its authority. Justice Scalia says the Court, at least in *Dickerson*, used a power it doesn't have.¹⁰⁴

Section 3501, as I've suggested, had nearly no friends. Seven presidential administrations, including President Nixon's, essentially ignored it. Professional law enforcement associations lauded *Miranda*. The only stinging attacks were launched by liberals, who suggested that, without *Miranda*, we might devise a better alternative. But then the activist Warren Court—long after its demise—met its match in the conservative activism of the Fourth Circuit. That Court of Appeals chided the Department of Justice, in *Dickerson*, for ignoring § 3501 and thus for putting politics higher than law.¹⁰⁵ Such an abnegation of duty, however, would not keep the appellate court from its appointed rounds. The Fourth Circuit had the aid of Professor Paul Cassell¹⁰⁶—one of the lonely friends of § 3501—who briefed the § 3501 issue because neither of the parties raised it and was given time for oral argument as well. With all of this, the Fourth Circuit held that *Miranda* was not required by the Constitution, that Congress could therefore legislatively overturn it, and that Mr. Dickerson's statement made without *Miranda* warnings was admissible because it was voluntary under § 3501.¹⁰⁷ A conservative court had—it seemed—overruled the Supreme Court.

One neat aspect of the case is that *Dickerson* most likely *was* given the warnings prior to his confession—he signed a memo to this effect,¹⁰⁸ but no one really cares. The district court applied a rule of federal civil procedure to show how little it cared for the government's efforts to get this tidbit of evidence in.¹⁰⁹ The government failed to try to introduce this evidence in its initial response to Mr. Dickerson's suppression motion, to show how little it cared about this evidentiary morsel.¹¹⁰ Professor Cassell was quoted as saying this was a perfect case for his § 3501 argument, since there was no *Miranda* violation.¹¹¹ Anyway, the Fourth Circuit was sort of right. The Supreme Court has held that there is a public safety exception to *Miranda*,¹¹² that fruit-of-the-poisonous-tree analysis doesn't apply to *Miranda*

104. *Id.* at 2337 (Scalia, J., dissenting).

105. *United States v. Dickerson*, 166 F. 3d 667, 672 (4th Cir.1999).

106. Professor of Law, University of Utah.

107. *Dickerson*, 166 F.3d at 687-92.

108. *Id.* at 677.

109. *Id.*

110. *Id.* at 679.

111. Roger Parloff, *Miranda on the Hot Seat*, NEW YORK TIMES MAGAZINE, Sept. 26, 1999, at 84, 87.

112. *New York v. Quarles*, 467 U.S. 649, 654 (1984).

violations,¹¹³ and that *Miranda*-violative statements may be used to impeach.¹¹⁴ The Court decided all this on the quite express theory that *Miranda* violations aren't constitutional violations.

So the Fourth Circuit put the Supreme Court in a neat box. To find that § 3501 impermissibly overturns a Supreme Court holding, the Court would have to find that *Miranda* warnings are required by the Constitution. But if the Court so held, it would have to disown all of *Miranda*'s progeny that depend on the warnings being merely prophylactic, and not constitutionally required at all. On the other hand, if the Court found § 3501 to be a legitimate exercise of Congress's authority to promulgate rules of procedure and evidence for the courts, it would have to say goodbye to the entire edifice constructed by *Miranda*. What was the Court to do?

I told my classes this year that the Court would not overturn *Miranda* on its own, or through the § 3501 route, because *Miranda* is the only criminal law case Americans have heard of. Put more politely, its symbolic meaning is too great. I think I was right. Perhaps the Court was, too. The opinion is an exercise in practical wisdom, but it's a bit hard to defend as a matter of law.

Justice Rehnquist's opinion for the Court locates itself in a sort of twilight world, where there are congressionally untouchable, Supreme Court-mandated, constitutional holdings that aren't, well, exactly required by the Constitution. What's the proof that *Miranda* is a constitutional rule? Well, there's the fact that the Court applies it to the states.¹¹⁵ In a passage of considerable subtlety, the majority says that its invitation in *Miranda* to Congress and the states to fashion an alternative safeguard of the Fifth Amendment right underscores the "constitutional basis" of the case.¹¹⁶

What about the cases that say because the rule is not constitutionally compelled, it's okay to impeach defendants with *Miranda*-violative statements, that there's a public safety exception to the rule, and that fruit-of-the-poisonous-tree analysis doesn't apply?¹¹⁷ This just shows the mutability of constitutional rules, says the opinion.¹¹⁸ And § 3501? Here, the Court says, correctly, that this was not an effort to provide an equally protective safeguard of the underlying constitutional right; it was instead an effort to simply return the law to its pre-*Miranda* status.¹¹⁹ Finally, the Court says that, as a matter of stare decisis, there is no special justification for abandoning *Miranda*, and that subsequent cases have not undermined its doctrinal underpinnings.¹²⁰ The Court said this last part, insofar as one can tell, with a straight face. (Maybe that's because *Miranda* had no doctrinal underpinnings.) Put simply, the warnings are part of our "national culture."¹²¹ Finally, the warnings regime is more workable than its voluntariness predecessor.¹²²

113. *Michigan v. Tucker*, 417 U.S. 433, 446-48 (1974); *Oregon v. Elstad*, 470 U.S. 298, 308 (1985).

114. *Harris v. New York*, 401 U.S. 222, 225-26 (1971); *Oregon v. Haas*, 420 U.S. 714, 722-23 (1975).

115. *Dickerson*, 530 U.S. at 438-39.

116. *Id.* at 440.

117. See *supra* text accompanying notes 112-14.

118. *Dickerson*, 530 U.S. at 441.

119. *Id.*

120. *Id.* at 443.

121. *Id.*

122. *Id.*

So, the rule is constitutional—whatever that means. Therefore, Congress cannot overturn it, and since *stare decisis* counsels against the Court abandoning it, the Fourth Circuit judgment is reversed.

Justice Scalia, in a typically excoriating dissent, accuses the Court of contravening an obscure case called *Marbury v. Madison*.¹²³ *Dickerson*, he says, changes *Miranda* (which pretended, he claims, to be constitutionally required) into a “Sphinx . . . of judicial arrogance” by dropping the pretense.¹²⁴ Ordinarily, the kind of tempest created by the *Dickerson* dissent is easily avoided. The majority would claim the Constitution requires the rule it favors; the dissent would claim it doesn’t. The majority in *Dickerson*, however, may have been foreclosed from such discourse because three of its members had written or joined in opinions that depended upon the nonconstitutional status of *Miranda*.¹²⁵

The case does strain notions of separation of powers and federalism. It strains separation of powers because it says the Court can prevent Congress from enacting legislation that seeks to overturn Court-made rules that are not themselves required by the Constitution. It strains federalism because it says the Court can compel the states to abide by Court-made rules that are not themselves required by the Constitution. It is completely unsurprising that these tensions and antinomies have come home to roost, born as they were in an opinion constitutionally at odds with itself. After all, the real meaning of *Miranda*—the Court says as much there—is that, not only does the Fifth Amendment not require *Miranda*, *Miranda* doesn’t require *Miranda*.¹²⁶

Finally, it’s worth noting that the Court refuses to hold that “nothing else will suffice” to satisfy the requirements of the Fifth Amendment.¹²⁷ It’s the old refrain from *Miranda*. But my bet is no one’s going to try to fashion an alternate safeguard. Justice Scalia, for one, won’t need one. He will continue to apply § 3501 until it is repealed.¹²⁸

But we can look for defendants to press for an overturning of the cases that allow *Miranda*-violative statements to impeach, that create a public safety exception to the warnings, and that hold that poisonous fruit analysis is not applicable to *Miranda* violations. Perhaps litigants outside the Fifth Amendment context will press for more prophylactic rules that exceed the scope of other constitutional provisions as well. If either happens, the Court will have the opportunity to explain more fully the nature of a constitutional rule that is the result of the Constitution requiring something, but not necessarily the rule at issue. The Court has yet to explain what’s special about *Miranda* and its curious progeny. *Dickerson*, that is, underscores the enigma of a constitutionally based rule requiring only something as good as itself to protect a constitutional right that does not in turn require the rule.

PROFESSOR MIMI WESSON: I’m not going to talk about all of the aspects of the Sixth Amendment that we might want to discuss because there is not enough

123. *Id.* at 2337 (Scalia, J., dissenting) (discussing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L. Ed. 60 (1803)).

124. *Dickerson*, 530 U.S. at 465 (Scalia, J., dissenting).

125. *See id.*, 530 U.S. at 445 (Scalia, J., dissenting).

126. *See supra* notes 97-100 and accompanying text.

127. *Dickerson*, 530 U.S. at 441.

128. *Id.* at 465 (Scalia, J., dissenting).

time. So I chose one aspect for my focus—the Confrontation Clause. There will be a quiz at the end of this time.

The most important Confrontation Clause case decided by the United States Supreme Court since you last met as a judicial conference is *Lilly v. Virginia*.¹²⁹ *Lilly v. Virginia* raises a question that has troubled the Court from time to time and to which it has given a series of not altogether consistent answers. The question is, What exactly is the relationship between the Confrontation Clause of the Sixth Amendment and the hearsay rule? Now, we know that the hearsay rule and the Confrontation Clause are not identical and that they don't require exactly the same things. One reason we know this is that the Court keeps telling us. The Court said back in 1970, in *California v. Green*,¹³⁰ that the Confrontation Clause does not represent a codification of the rules of hearsay.¹³¹ The Court has since reiterated that principle several times.¹³² In addition, we can think of certain kinds of cases in which the Confrontation Clause would be offended but the hearsay rule would not, or vice versa. One example is posed by a situation that was the subject of the Court's attention in 1989 in a case called *Coy v. Iowa*.¹³³

In *Coy*, the trial judge was concerned about a child-victim-witness and the child's experience of having to testify while gazing into the eyes of that child's alleged molester. The trial judge agreed to the prosecution's request to erect a screen between the defendant and witness so the child could testify but would not be able to see the defendant sitting at the defense table.¹³⁴ Apparently, the screen was one-way so the defendant could see the child-witness. This stratagem was apparently successful enough that the child testified, the jury believed the child, and the defendant was convicted.¹³⁵

When Mr. Coy took his conviction to the United State Supreme Court, the Court held in a curious opinion by Justice Scalia, who's ordinarily not a great friend of the rights of criminal defendants, that the trial judge's use of the screen violated the defendant's right to confront the witness.¹³⁶ So there is a case in which there couldn't be any hearsay violation, because the accuser did testify under oath and was subject to cross-examination, but according to the Court there was a Confrontation Clause violation.

Also, there are Confrontation Clause violations that consist of some restriction imposed by the trial judge on the cross-examination of a testifying witness. For example, in a 1974 case, *Davis v. Alaska*,¹³⁷ one of the prosecution witnesses who testified against the defendant had been in trouble with the law as a juvenile.¹³⁸ Counsel wanted to cross-examine him about his juvenile record, but the trial court prohibited the cross-examination because an Alaska statute made juvenile

129. *Lilly v. Virginia*, 527 U.S. 116 (1999).

130. *California v. Green*, 399 U.S. 149 (1970).

131. *Id.* at 155.

132. *See, e.g., Idaho v. Wright*, 497 U.S. 805 (1990).

133. *Coy v. Iowa*, 487 U.S. 1012 (1988).

134. *Id.* at 1014-15.

135. *Id.* at 1015.

136. *Id.* at 1020-21.

137. *Davis v. Alaska*, 415 U.S. 308 (1974).

138. *Id.* at 311.

convictions confidential.¹³⁹ The defendant was convicted, and the United States Supreme Court said his right to confrontation had been violated.¹⁴⁰ So once again, there was no hearsay violation, because the witness had testified under oath, but there was a violation of the Confrontation Clause.

Then, just to consider the converse situation, we can think of cases in which there would be a violation of the hearsay rule, but not of the Confrontation Clause. Obviously, in any civil case the employment of hearsay without conformity to some hearsay exception would violate the hearsay rule, but the Confrontation Clause could not be violated in a civil case. But even if you focus on prosecution evidence in criminal cases, the situation comes up fairly often in which the prosecution wants to use an out-of-court statement as part of its evidence against the defendant, and the out-of-court statement for some reason is admitted even though it does not conform to some exception to the hearsay rule. So we have a violation of the hearsay rule. But then, suppose the out-of-court declarant later takes the stand as a witness—takes an oath, testifies and is subject to cross-examination. Under those circumstances, the Court has held that there is not a violation of the Confrontation Clause because the defendant, although he might not have had a chance to cross examine the witness at the time he made the out-of-court declaration, did have the opportunity to cross examine later when the declarant became a witness—and the Confrontation Clause was satisfied by that circumstance.¹⁴¹

So we know, because the courts have told us, and also because of these examples that I rehearsed at perhaps too great length, that there's not a perfect identity between the Confrontation Clause and its requirements and the hearsay rule and its requirements. On the other hand, the Supreme Court seems to be, brick by brick, building a structure of identity or near identity between the requirements of the Confrontation Clause (leaving behind these unusual cases that I just mentioned) and the traditional hearsay rule, coupled with its traditional, or as the Court calls them "firmly rooted," exceptions. *Lilly v. Virginia* represents another step in the Court's march toward a not perfect but very powerful identification between the requirements of the Confrontation Clause and those of the hearsay rule. So I'll just say a little bit about *Lilly*, and then after this there really is going to be a quiz. You guys sleeping in the back row better look lively now.

To really understand *Lilly*, you have to understand a case the Court decided about five years before, in 1994, called *Williamson v. United States*.¹⁴² *Williamson* was a federal criminal prosecution and in that case, as in *Lilly*, the defendant was unfortunate enough to have a chatty accomplice.¹⁴³ That is, both Mr. Williamson and Mr. Lilly carried out a crime with the aid of someone else.¹⁴⁴ In each case one of the

139. *Id.* At the time, Alaska Rule of Children's Procedure 23 provided that "No adjudication, order, or disposition of a juvenile case shall be admissible in a court not acting in the exercise of juvenile jurisdiction except for use in a presentencing procedure in a criminal case where the superior court, in its discretion, determines that such use is appropriate." Alaska Stat. § 47.10.080 (g) (1971), repealed by § 55 ch 59 SLA 1996, provided that "The commitment and placement of a child and evidence given in the court are not admissible as evidence against the minor in a subsequent case or proceedings in any other court...."

140. *Davis*, 415 U.S. at 317-18.

141. *E.g.*, *United States v. Owens*, 484 U.S. 554, 559 (1988) (holding that witness's out-of-court statement is admissible even though witness no longer remembers incident in question).

142. *Williamson v. United States*, 512 U.S. 594 (1994).

143. *See Williamson*, 512 U.S. at 596; *Lilly*, 527 U.S. at 120-21.

144. *See supra* note 143.

accomplices was apprehended, warned, questioned and confessed to a slight involvement with the crime. But these accomplices also said the other guy was the real kingpin—in the *Williamson* case, Mr. Williamson, and the *Lilly* case, Mr. Lilly.¹⁴⁵ Actually, in the *Lilly* case, the out-of-court declarant was Mr. Lilly's brother,¹⁴⁶ so it was one Lilly saying it was the other Lilly who did the really bad stuff. In each of these cases, the prosecution sought to use the confessing accomplice's out-of-court statement as part of its evidence against the defendant later at trial, and employed an argument that the hearsay rule was not offended because of the traditionally recognized exception for statements against interest.¹⁴⁷ It's important that in each of these cases the out-of-court declarant later clammed up and claimed a privilege against self-incrimination, and so was not available as a witness.¹⁴⁸

Federal Rule of Evidence 804(b)(3), which has equivalents in various states, provides that in the case of an unavailable declarant, an out-of-court statement that is adverse to the penal interest of the declarant is admissible as an exception to the hearsay rule.¹⁴⁹ In *Williamson*, a federal criminal case, the Court was just interpreting this rule.¹⁵⁰ It didn't have to reach the Confrontation Clause question, because it found that the prosecution's argument for admissibility was wrong and the trial judge was wrong to accept it.¹⁵¹ The Court found that an out-of-court statement by one who says, "Yeah, I had a little bit to do with this crime, but mostly it was the other guy who did it," is not sufficiently against the penal interest of the declarant at the time to satisfy the exception to the hearsay rule for statements against interest.¹⁵² So that's *Williamson*.

Now, along comes *Lilly v. Virginia*. The case is very similar, but begins with a trial in state court.¹⁵³ So the Virginia judge is looking at the Virginia version of the declaration against interest exception to the hearsay rule and interprets it a little more expansively than the Supreme Court had interpreted the federal version in *Williamson*.¹⁵⁴ The trial court in fact says that the Virginia version is expansive enough to accommodate an out-of-court statement made by an accomplice who implicates both himself and the accused in the course of the same statement.¹⁵⁵ The case goes up to the Virginia Supreme Court, which affirms Mr. Lilly's conviction and says that it finds that his accomplice/brother's out-of-court statement, in addition to satisfying the hearsay exception, was particularly reliable under the circumstances.¹⁵⁶

Now, that finding of reliability is important because in the U.S. Supreme Court's evolution of the Confrontation Clause, it has said that there are really two ways to satisfy the demands of the Confrontation Clause when the prosecution seeks to use

145. *Lilly*, 527 U.S. at 120-21.

146. *Id.*

147. *Williamson*, 512 U.S. at 597-98; *Lilly*, 527 U.S. at 121.

148. *Williamson*, 512 U.S. at 597; *Lilly* 527 U.S. at 121.

149. FED. R. EVID. 804(b).

150. *Williamson*, 512 U.S. at 598-99.

151. *Id.* at 599-600.

152. *Id.*

153. *Lilly*, 527 U.S. at 121.

154. *See id.* at 122; *Lilly v. Commonwealth*, 499 S.E.2d 522, 534 (Va. 1998).

155. *See supra* note 154.

156. *Lilly*, 499 S.E.2d at 534.

an out-of-court statement against the defendant. One is to prove that the out-of-court statement satisfies one of the firmly rooted exceptions to the hearsay rule.¹⁵⁷ The other is to prove that despite its failure to satisfy one of the exceptions, the statement is inherently reliable.¹⁵⁸ So the Virginia Supreme Court sought, I believe, to sew up this conviction against the possibility of being overturned in federal court by finding both that the Virginia hearsay exception had been satisfied and that the statement was particularly reliable. Just to make matters a little bit more air tight, the Virginia Supreme Court examined the question of whether this exception to the Virginia hearsay rule was firmly rooted and said that it was.¹⁵⁹

So the case gets to the United States Supreme Court. Now the justices of the United States Supreme Court can't exactly tell the Virginia judges that they were wrong about the meaning of the Virginia hearsay rule because that's a matter of state law and the Virginia judges are the final authority on that. So they have to reach the Confrontation Clause question. When they do, they first discuss their decision in *Williamson*, although noting that it was an interpretation of a Federal Rule of Evidence.¹⁶⁰ They acknowledge that a state is entitled to have different rules of evidence, and different exceptions or more expansive exceptions to the hearsay rule than the federal courts.¹⁶¹ But then they go on to find that this Virginia exception is not, contrary to the Virginia Supreme Court's conclusion, a firmly rooted exception to the hearsay rule.¹⁶² They say Virginia really hasn't had the exception all that long and hasn't really applied it all that many times.¹⁶³ They also contradict the Virginia Supreme Court's decision that this out-of-court statement was particularly reliable.¹⁶⁴ They say there's nothing reliable about a guy who tries to wriggle out from under his share of responsibility for a crime by shoving some of the blame onto someone else, even if it is his brother.¹⁶⁵ So, they find that Mr. Lilly's confrontation rights, under the circumstances, were violated.¹⁶⁶

There's a very interesting concurring opinion by Justice Breyer in which he questions the Court's evolving interpretation of the hearsay rules in a manner that seems to link them so securely with the Confrontation Clause. He suggests that maybe the Court might have taken a wrong turn and should revisit this question.¹⁶⁷ Even more emphatically there are concurring opinions by Justices Scalia and Thomas, taking one of their characteristic original intent stances and suggesting that the Court took a wrong turn a very long time ago and should go back about 150 years and reconstitute the Confrontation Clause as it was originally intended.¹⁶⁸

So, with all of that in mind, I'd like to turn to Federal Rule of Evidence 804(b). Those of you who are federal judges or practice in federal court will surely find this

157. *Ohio v. Roberts*, 448 U.S. 56, 66 (1990).

158. *Id.*

159. *Lilly*, 499 S.E.2d at 534.

160. *Lilly*, 527 U.S. at 132-33.

161. *Id.* at 123-24.

162. *Id.* at 133-34.

163. *Id.* at 134.

164. *Id.* at 137-39.

165. *Lilly*, 527 U.S. at 137-39.

166. *Id.* at 139.

167. *Id.* at 140-43 (Breyer, J., concurring).

168. *Id.* at 143 (Scalia, J., concurring in part and concurring in the judgment); *Id.* at 143-44 (Thomas, J., concurring in part and concurring in the judgment).

familiar business. Rule 804 is a series of hearsay exceptions, each of which requires proof of the unavailability of the declarant, unlike Rule 803 exceptions, which don't require any such proof. Subsection six provides that the following is not excluded by the hearsay rule if the declarant is unavailable: "A statement offered against a party that has engaged or acquiesced in wrongdoing, that was intended to and did procure the unavailability of the declarant as a witness."¹⁶⁹ I will tell you that this rule was enacted in 1997 and became effective December 1, 1997, so it has not been a provision of the Federal Rules for very long.

Now, here's the quiz. Let's suppose that you are a federal judge presiding over a federal criminal prosecution of a gentleman named Don Kingpin. Mr. Kingpin is charged with various federal drug offenses and in his trial the government introduces, as part of the evidence against Mr. Kingpin, an affidavit signed under oath by one Jimmy Snitch. This affidavit describes Mr. Snitch's observation of numerous episodes of drug dealing and other federal drug offenses by Mr. Kingpin. Mr. Kingpin's lawyer is immediately on his feet objecting to this affidavit. You know how it goes. He won't just say, "Hearsay, hearsay." He'll say, "It's the worst kind of hearsay, Your Honor." The prosecution offers to prove to the satisfaction of the court that (a) Mr. Snitch is unavailable and (b) the reason he's unavailable is that his unavailability was procured by Mr. Kingpin.

So, you're the judge, you look up the rule and you realize this is a question of admissibility governed by the standard of Federal Rule of Evidence 104(a).¹⁷⁰ You excuse the jury, which is displaying a rather alarming curiosity about these allegations. You hold a hearing outside the presence of the jury, and you are satisfied by a preponderance of the evidence, which is all that it takes, that as a matter of fact Mr. Kingpin procured the unavailability of Mr. Snitch. You make such a finding on the record and you say to Kingpin's lawyer, "I overrule the hearsay objection. Do you have any other objection?" At which time he says, "Of course, yes, Your Honor. The admission of this evidence would violate my client's rights under the Confrontation Clause."

The question is, How do you rule? Don't I wish I had a seating chart, so I'd know who to call on.

DISCUSSION OF HYPOTHETICAL FROM SESSION ONE

AUDIENCE MEMBER: Well, I don't think it would be a firmly rooted exception.

WESSON: What is it you think makes an exception firmly rooted? From the Court's decisions, whether an exception is firmly rooted has something to do with longevity.¹⁷¹ The Court also uses some language suggesting the firmly rooted exceptions are the exceptions that have been historically shown to guarantee the reliability of the statement,¹⁷² although I myself don't think that's true at all. I can think of many hearsay exceptions—for example, the exception for admissions of a

169. FED. R. EVID. 804(b)(6).

170. Federal Rule of Evidence 104(a) provides that preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence are within the discretion of the trial court, and that the moving party must establish admissibility by a preponderance of the evidence.

171. *E.g., Lilly*, 527 U.S. at 126.

172. *Id.*

party opponent¹⁷³—that don't rest on the proven reliability of such a statement, but on a very different justification for admissibility. In any event, it does seem that since we've only had this rule since 1997, it hasn't really stood the test of time yet. Is there any reason to think that the affidavit given by Jimmy Snitch is particularly reliable?

AUDIENCE MEMBER: Is he under oath?

WESSON: Is he under oath? Yes. Do you think that's enough?

MALE AUDIENCE MEMBER: Well, I don't know, but that's one factor.

MICHAEL KATZ:¹⁷⁴ In my experience, some clients who want to cooperate with the government make all kind of statements in the privacy of the U.S. Attorney's office. To me the failure of that witness to appear—whether or not the defendant on trial engaged in some conduct that encouraged or helped him not appear—that would be an indication to me that this is not a reliable statement. In other words, they don't want to come to court and have to back it up for whatever reason, either they are afraid of some consequences or something else. So I see some distinction between cases where the defendant did something to a person that caused them not to be able to be there as opposed to a witness simply deciding that he doesn't want to be there and taking some money from the person on trial not to be there.

WESSON: I think so. It sounds, Mike, as though you're saying there are different ways of procuring the unavailability of a witness.

KATZ: A lot of my cooperating, informing clients would like to be unavailable at trial and just satisfy the government in the pretrial stage by giving a statement and implicating everybody in the world and getting the hell out.

WESSON: Well, that might be sort of an uphill argument if you're making it before a judge who has already found by a preponderance of the evidence that your client procured the unavailability of the witness.

KATZ: But I'm saying there's another part of procuring, which is, what was the witness's willingness or role in not being available? My client has some wrongdoing, either he made the threat or paid somebody or arranged some transportation. But did that unavailable witness go along with that in some way?

WESSON: Those are all good arguments, but wouldn't you be making those at the hearing when you're trying to persuade the judge not to make the procurement finding? It sounds to me like those are arguments that you've already made and lost if the judge has already made the procurement finding, but maybe you could try to resurrect them again at this setting. You are making me think in a way I haven't before about the subtlety of the term procurement. You know, it's one thing to give a guy a pair of concrete shoes, and it's another thing to give him a few dollars and persuade him it's in his best interest to take a long vacation in Tahiti.

Well, I don't want to take up all of our time because I know some of you might have comments about the other amendments as well. But thanks.

BERGMAN: Does anyone have any questions, issues, or comments?

173. FED. R. EVID. 801(d)(2).

174. Federal Public Defender, Denver, Colo.

QUESTIONS AND COMMENTS, SESSION ONE

JUDGE TERRY KERN:¹⁷⁵ In that last case we were just discussing the cooperation of witnesses. I have an even better example. There were two guys that committed the crime; one pled guilty, and under his plea agreement his obligation is to testify against the other guy. They brought him up from prison, put him in the same cell as the guy he's supposed to testify against the following Monday, leaving them there all weekend and suddenly on Monday he no longer wants to testify. He refused to testify, attempted to take the Fifth Amendment, and I found him in contempt about the whole thing. But in his grand jury testimony, under oath, he corroborated aspects of physical evidence that it seemed no one else could, unless they had been there with the defendant.

WESSON: That very argument was made by the state in *Lilly*—that the younger Lilly's statement was reliable because it was corroborated by the discovery of certain pieces of physical evidence exactly where he said they could find them. The Court said, very interestingly, that corroboration is not the same thing as reliability and that simply because an out-of-court statement is corroborated by tons of other evidence, that doesn't mean that the statement is reliable.¹⁷⁶ The Court said we're talking about intrinsic reliability, that is, something about the features of the statement itself, the circumstances under which it was given, that makes it intrinsically reliable, not just the prospect that it might have been corroborated by other external or extrinsic circumstances.¹⁷⁷ In saying that, the Court was really harking back to a case it decided about ten years earlier called *Idaho v. Wright*.¹⁷⁸

In *Wright*, the out-of-court statement was made by a child victim of sexual abuse, and the statement was admitted under the Idaho portion of the catchall exception, or the residual exception to the hearsay rule.¹⁷⁹ The defendant was convicted, and the conviction got to the Supreme Court. The Court said the residual exception is not a firmly rooted exception of the hearsay rule.¹⁸⁰ So Idaho argued that this child's statement should be admissible because it was so strongly corroborated by other things, including statements of another child who had experienced exactly the same kind of sexual abuse imposed by the same defendant.¹⁸¹ But the Court said corroboration is not the same thing as reliability.¹⁸²

KERN: Of course in my case the prior testimony was made under oath in front of a grand jury.

WESSON: Apart from former testimony where a defendant has an opportunity to cross-examine, it's hard to think of anything that seems more trustworthy than testimony before a grand jury under oath. But I don't think that would be enough for

175. Chief District Judge, United States District Court, District of Oklahoma.

176. *Lilly*, 527 U.S. at 137.

177. *Id.* at 138.

178. *Idaho v. Wright*, 497 U.S. 805 (1990).

179. *Id.* at 811-12. The trial court applied Idaho Rule of Evidence 803(24), which states, "A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purpose of these rules and the interests of justice will be best served by admission of the statement into evidence."

180. *Wright*, 497 at 817.

181. *Id.* at 822.

182. *Id.* at 822-23.

the Court. I don't think that would be enough even if it were coupled with corroboration, frankly. I've never been clear in my mind why the Court is so hostile to the idea that corroboration could be some kind of substitute for intrinsic indicia of reliability. But the Court twice now has very clearly held that it is not.

KATZ: Well in [Judge Kern's] case, it almost looks like the government procured the unavailability of the witness by putting him in the cell with that other guy. I mean, surely they had some responsibility to take care of their witnesses and if they don't then they should suffer the consequences.

JUDGE ROBERT MURPHY:¹⁸³ It seems, in general, the defendant's strongest argument is the right of confrontation, right to cross-examination, right to have the person be there live in front of the jury and to ask those questions. That's what I think the defendant argues.

WESSON: Yes, it is. But it's sort of mysterious, because in many cases of hearsay there really is no opportunity for cross-examination at all.

MURPHY: That's right.

WESSON: I mean, with excited utterances,¹⁸⁴ business records,¹⁸⁵ public records,¹⁸⁶ there's really no opportunity for cross-examination at all. Sometimes the Court describes cross-examination as "the greatest engine ever invented for the discovery of truth."¹⁸⁷ The Court uses that phrase again in *Lilly*.¹⁸⁸ But they are remarkably willing to dispense with the right to cross-examination in the case of some forms of hearsay. Excited utterances, for example, tend to be among the least reliable kinds of utterances known to humankind. But the Court is enamored of this idea that the inventors of the traditional, "firmly rooted" exceptions to the hearsay rule really knew what they were doing.

AUDIENCE MEMBER: Is there anything left of § 3501?

LEFRANCOIS: I think nothing is left of § 3501, although we still have the voluntariness test. Even if the *Miranda* warnings are given to somebody, we may still have to decide whether or not a confession was really voluntary in order to meet due process or to satisfy the Fifth Amendment. But I think there's nothing at all left of § 3501. I think it's the dead letter that it's always been.

WESSON: Art, what do you think of the argument I've been reading in e-mail lately that defendants are really better off under the voluntary standard than under a *Miranda* regime, and that all this kind of energy that the defense bar has poured into the resurrection of *Miranda* has been misdirected?

LEFRANCOIS: I agree with that. I was going to address that more in my remarks. I think the only political attacks on *Miranda* that are of any merit have been liberal attacks. Because lots of folks out there, particularly kind of "left" folks, think that we would have a better system without something like *Miranda*. Whether it's the voluntariness test, I don't know, but I think people could create a regime that is a bit more Fifth Amendment protective. There's something very cute and easy about *Miranda*. You read a card; presumptively we believe that the card is read,

183. Associate District Judge, United States District Court, District of Oklahoma.

184. FED. R. EVID. 803(2).

185. FED. R. EVID. 803(6).

186. FED. R. EVID. 803(8).

187. 5 J. WIGMORE, EVIDENCE § 1367 (3rd ed. 1940).

188. *Lilly*, 527 U.S. at 124.

even if it's not, I'm not sure that people who have the card read to them think, "Now here's an officer who respects my Fifth Amendment rights."

WESSON: Do you think it's true, or maybe we could ask the judges in the audience, that judges are less likely to look really hard at the voluntariness of a statement once they satisfy themselves that *Miranda* was complied with?

LEFRANCOIS: I think that's right. Justice Rehnquist makes that point himself in *Dickerson*. He says that, as a matter of reality, you have a voluntariness problem even when the police have given the *Miranda* warnings.¹⁸⁹ It's really difficult to find cases where a judge has been willing to find involuntariness when the warnings were apparently given.

MURPHY: We rarely see any cases where the warnings weren't given.

JUDGE WILEY DANIEL:¹⁹⁰ I have a question for Professor Wesson. Explain, from your perspective, the difference between your analogy to a full co-conspirator analysis of the Confrontation Clause and the connection, if any, between what you're talking about and the admissibility consideration of co-conspirator statements.

WESSON: Well, the courts seemed to be saying in the 1980s that to satisfy the Confrontation Clause, you would have to prove not only the reliability of the out-of-court statement, but also the necessity for using an out-of-court statement instead of live, in-court testimony. This usually meant proving unavailability. So for a while I thought the prosecution would always have to prove the unavailability of the declarant to use any hearsay exception, whether it's Rule 803 or 804, because otherwise how can you satisfy the necessity prong of the test?

But there was a case in 1986 called *United States v. Inadi*,¹⁹¹ in which the Supreme Court heard the argument that use of the co-conspirator exception to the hearsay rule, which does not require any proof of the unavailability of the out-of-court declarant, violated the Confrontation Clause.¹⁹² The Court held that it did not and in the process discarded altogether what I had thought was an important prong of the Confrontation Clause test—proving the necessity of using the hearsay, or the unavailability of the declarant.¹⁹³ So I don't think we're going to see very many successful challenges under the Confrontation Clause to the use of co-conspirator statements. Defendants are pretty much relegated to arguing about whether the statement really complies with the terms of the exception itself.

VICKY MANDELL-KING:¹⁹⁴ I just have a comment on the *Bond* case, Barb. The Tenth Circuit came out right on that.¹⁹⁵ So we should be really proud of our Circuit. It didn't get reversed.

189. *Dickerson v. United States*, 530 U.S. 428, 444 (2000).

190. District Judge, United States District Court, District of Colorado.

191. *United States v. Inadi*, 475 U.S. 387 (1986).

192. *Id.* at 388.

193. *Id.*

194. Assistant Federal Public Defender, Denver, Colo.

195. Ms. Mandell-King was most likely referring to *United States v. Nicholson*, 144 F.3d 632 (10th Cir. 1998). In that case, a group of police detectives boarded a bus at the Oklahoma City bus depot. One of the detectives picked up a black fabric bag, felt the sides, and then, upon feeling several "large bundles," smelled the bag and detected the odor of marijuana. *Id.* at 634. The Tenth Circuit, reasoning that travelers have a reasonable right to privacy in their personal luggage, held that the search violated the Fourth Amendment. *Id.* at 639.

WESSON: It's all since the advent of soft-sided luggage, right? You wouldn't have seen this case twenty years ago, because we all had those hard suitcases.

KATZ: I'm surprised the Supreme Court wanted to grant certiorari on *City of Indianapolis v. Edmond*. It doesn't seem like it's outrageous.

BERGMAN: There was a split in the circuits on that one, so it was one I think the Court clearly wanted to resolve. It's also one that I think presents an interesting issue. How do we distinguish these regulatory sobriety checkpoints from what was going on here? Is there a bright line we're going to draw?

WESSON: Don't you think there's an interesting tension between opposition to the kind of intrusion of these drug checkpoints and concerns about racial profiling?

BERGMAN: Absolutely. It's interesting because in *Wardlow*, Justice Stevens, in his separate opinion,¹⁹⁶ was talking about the targeting of minorities and racial profiling on the New Jersey Turnpike. He mentioned that a lot of police departments have more presence in high crime areas, which tend often to be minority neighborhoods, and that they tend to pull over people who are minorities more often.¹⁹⁷ Minorities simply are more often the targets of these investigatory procedures. Justice Stevens also noted his concern that there are all kinds of reasons that people would take off when they see police officers, particularly when they see these investigatory caravans and a lot of times they have reasons for not wanting to be stopped by police, unrelated to criminal activity.¹⁹⁸ I hope that courts will be sensitive to this concern about the impact of police investigatory tactics on minorities.

QUESTIONS AND COMMENTS, SESSION TWO

The question and answer session began with a discussion of Professor Wesson's hypothetical.

WESSON: Ms. Sloan, a former student of mine, a terrific student, how would you rule?

MARJORIE SLOAN:¹⁹⁹ I believe you're right; it does satisfy the hearsay rule, but there are confrontational problems. There's no opportunity to cross-examine on the information provided.

WESSON: So do you think that absence of an opportunity for cross-examination always means a confrontation violation? Does that mean that the prosecution can never use hearsay as part of its case against a defendant? Mr. Webber, what do you think?

DANIEL WEBBER:²⁰⁰ It's not firmly rooted, nor has there been showing of reliability.

WESSON: Okay, not firmly rooted. Why?

WEBBER: Because it's fairly new.

WESSON: In *Lilly*, the Court doesn't say exactly what it means by firmly rooted, but it does suggest that it would be important that they've only had this rule for a very short time.

196. *Illinois v. Wardlow*, 528 U.S. 119, 126-40 (2000) (Stevens, J., concurring in part and dissenting in part).

197. *Id.* at 132-36 & nn. 8-12.

198. *Id.*

199. Attorney at Law, Baker & Hostetler, Denver, Colo.

200. United States Attorney, Oklahoma City.

DEAN MARTIN BELSKY:²⁰¹ I disagree with all the other people. I think the Court would uphold it. The *Lilly* decision talked about the historic problem with accomplice testimony—the problem of an accomplice saying bad things about another accomplice and trying to get himself a good break against the other one. At this point, even if you had the situation where it is the individual on trial who has caused the absence of the witness, I think the reliability problem is still there. But, you have to balance that against the need to provide information and evidence against an individual. There are public policy issues here. You just heard Art talk about the policy exception of *Miranda*. Otherwise you would keep an open door to any kind of situation, whether it is organized crime or not, where the defendant is trying to get rid of the witness before the time of trial. So I think the Court would probably say it's okay.

WESSON: Well, the reason the Court had that lengthy discussion about accomplice testimony is because they were suggesting it was unreliable, right? There are reasons to doubt the reliability of a statement given by someone who confesses to complicity in a crime but tends to push most of the responsibility off on someone else. But you really think that an affidavit given by a guy named Jimmy Snitch, who later disappears, is particularly reliable?

BELSKY: I'm not saying it's particularly reliable, but its reliability is enhanced by the fact that they tried to knock this guy off. Plus, you have to consider the public policy issues. I don't think this Court would say we are going to promote a situation where you can knock off your key witnesses. I just don't think that's going to happen.

PROFESSOR WESSON: Someone in the last session made a similar argument, and I thought it was kind of brilliant. There's also an argument that the witness waived his confrontation right by procuring the absence of the witness. I'm not so sure about that. When the Court talks about waiver of constitutional rights, it always says the standard for measuring the validity of a waiver of constitutional rights has to be that it was knowing and intelligent.²⁰² There's no particular reason to think that this guy, Don Kingpin, however bad a thing it is to bump off a witness, understood that by doing that he was waiving his confrontation rights. Mr. Connelly?

SEAN CONNELLY:²⁰³ I'm an assistant U.S. attorney. There's an opinion by Judge Lucero in the last couple of months called *United States v. Cherry*.²⁰⁴ That was a two-to-one decision—Judge Holloway dissented²⁰⁵—in which they upheld this [type of ruling] and applied a *Pinkerton*²⁰⁶ analysis. They said that not only do you have to be Joe Kingpin in your hypothetical, but if Joe Kingpin killed the witness as part of a conspiracy, he is liable under *Pinkerton* analysis for waiver by wrongdoing. I would not analyze this in terms of reliability, but rather on forfeiture

201. Dean, University of Tulsa College of Law.

202. *E.g.*, *Davis v. United States*, 512 U.S. 452, 458 (1994) ("The right to counsel recognized in *Miranda* is sufficiently important to suspects in criminal investigations, we have held, that it requir[es] the special protection of the knowing and intelligent waiver standard.") (internal quotations omitted).

203. Assistant United States Attorney, Denver, Colo.

204. *United States v. Cherry*, 217 F.3d 811 (10th Cir. 2000).

205. *Id.* at 822-23 (Holloway, J., dissenting).

206. *United States v. Pinkerton*, 328 U.S. 640 (1946) (holding that evidence of direct participation in a substantive offense is not necessary for criminal liability under the principles holding conspirators liable for the substantive crimes of the conspiracy).

and waiver. In other words, by engaging in that kind of wrongdoing, and intentionally engaging in wrongdoing, you have waived your confrontation rights, just like you could waive your right to be present in a courtroom by disruptive behavior and waive other constitutional rights, not necessarily under knowing and voluntary waiver, as you would for *Miranda* rights, simply by engaging in misconduct that is not conducive to the trial process. I think Judge Lucero's opinion is the leading case, certainly in this circuit, and probably the first case really interpreting this rule.

WESSON: So, the opinion addresses the confrontation question?

CONNELLY: Yes, it addresses the issue of whether *Pinkerton* analysis applies or whether it has to be personal wrongdoing and determines that a co-conspirator's wrongdoing can be attributed to the actual defendant. But also the opinion goes on to address the Confrontation Clause, and I think applies some Supreme Court cases on waiver by misconduct, not precisely on this set of facts, but in other contexts, like disruptive behavior, or waiving your right to be present in the courtroom. It certainly is a legitimate issue. Judge Holloway did dissent.

WESSON: Judge Murphy?

JUDGE MICHAEL MURPHY:²⁰⁷ I was vote number two in that panel, and I say this in fairness to all the other commoners here today, and that is that Mr. Connelly is prepared for this panel because he argued that case in front of us.

WESSON: Were you successful, Mr. Connelly?

CONNELLY: It was an interlocutory appeal. Judge [Frank] Seay out of Eastern Oklahoma suppressed the evidence. It was a pretrial motion in limine offered affirmatively by the prosecution, saying let us have this [evidence]. Judge Seay said no, that's not a proper interpretation; there would be a Confrontation Clause issue. Or he relied on some precedent from before Rule 804(b)(6).

WESSON: Let me ask you this, Judge Murphy, because you voted on that case. Were you troubled at all by the fact that the trial judge can make this finding by a mere preponderance of the evidence? He can just find it only slightly more likely than not that there was procurement of unavailability of this witness, and yet on this basis he can remove what would otherwise be the confrontation rights of the accused?

MURPHY: The problem is that to answer that question, I'd have to disclose confidential information about the case.

BELSKY: All the suppression issues, whether it's *Miranda*, whether it's Confrontation, are all by preponderance of the evidence.

WESSON: I understand what you're saying. It's just that your argument—the argument that you made earlier—relied so strongly on the importance of the public policy of discouraging this sort of evil, vicious and twisted conduct of bumping off witnesses, and it seemed to rest on a kind of a certainty that that's what happened. Yet we're far from certain when we're using a preponderance standard administered by a trial judge. I don't know the answer myself, certainly, and it will be interesting to follow this *Cherry* case. I don't mean to take all of our time either. You probably have questions about those other amendments.

207. Circuit Judge, United States Court of Appeals, Tenth Circuit.

BELSKY: I have a question for Art, and I'd like to ask Barbara a question, also, if I can. There's been a whole series of arguments that *Miranda* doesn't really matter. Symbolically it matters, but most of the decisions on the Fifth Amendment don't matter. That while we fight over *Miranda*, ninety-nine percent of the cases are still the same. Whether they're saying the confession's voluntary or there was a knowing and intelligent waiver, on the street it doesn't really matter, it's exactly the same issue. So it's become the symbolic issue. Similarly in the search and seizure cases, the Court has widened every once in a while only when something outrageous occurs, like going after a person because they're black, or going for someone's luggage. You used the airplane analogy well, because they weren't worried about the bus station situation. They were worried about upper middle class people on an airplane. The Court seems only concerned in outrageous situations like that, so that the Fourth, Fifth, and Sixth Amendments have become symbolic. In the day-to-day application, courts have given broad leeway to the trial judge, at the state or federal level, to decide and uphold evidence. Any comments?

LEFRANCOIS: Marty, let me just respond to the Fifth Amendment aspect of that. I've always been interested in the fact that the Supreme Court has been more reluctant to carve out exceptions to *Miranda*'s exclusionary rule than it has been to carve out exceptions to the Fourth Amendment exclusionary rule, even though we might have thought the Fourth Amendment exclusionary rule was about the Fourth Amendment and the *Miranda* exclusionary rule was not about the Fifth Amendment, but instead about *Miranda*. Nevertheless, the Court has, in a sense, honored *Miranda* more than it has the Fourth Amendment even though—well, maybe because—the Court sort of made *Miranda* up.

I do think the most compelling criticisms of *Miranda* are those from the left that say that we might do something a bit more effective. We might do something more protective of Fifth Amendment interests if we didn't simply have this silly regime where we all know what the little *Miranda* card says before it's ever read. I suppose the judges are inclined to believe that police officers, because it's a costless thing, typically do read the *Miranda* card. Then you get an inquiry into voluntariness anyway, the inquiry that we would have had before *Miranda*. So I certainly agree with you that the monumental importance, if there is monumental importance, of *Miranda* is absolutely in its iconic, symbolic value. It's an artifact of our national culture.

BERGMAN: In terms of the Fourth Amendment, when I teach criminal procedure, sometimes I tell my students that much of our course is a history course, because we're going to be looking at what used to be the law in terms of Fourth Amendment. I say that somewhat facetiously, but there have been so many exceptions carved out, I think as your comment indicates, to the Fourth Amendment. It is only truly the egregious cases where the Court draws the line. But it does draw the line. There are still cases where the court says this goes too far. The Court did that this term in both *J.L.* and *Bond*. From a defense attorney's perspective—that was my background—I am heartened by the fact that there is still a Fourth Amendment, and there still are arguments that are persuasive to the Supreme Court. We still do have substantial protections under the Fourth Amendment, though not as many as I would like, but there are significant ones there.

WESSON: Some of you may have seen in the *New York Times* an editorial by Scott Turow²⁰⁸ about the symbolic importance of *Miranda*.²⁰⁹ I think it was really good, because I've always sort of wondered to myself, Yes, it has symbolic importance, but what does it symbolize? He's such a persuasive writer that even though I'm not sure I really agree with him, I certainly did the minute I finished reading his article. He said the symbolic importance of *Miranda* is twofold. First, it symbolizes equality—that the poor, uneducated, ignorant, illiterate person has a right to understand the same things about his rights as the person who always understood them, even before getting a warning. Second, it symbolizes civilian control—that it's not just the cops and the accused in the interrogation room. Instead, at some point a civilian is going to look into the interrogation room and find out what happened. Now, whether you really have to have *Miranda* in order to uphold the values, I'm not sure. But certainly that was an eloquent explanation of what it has come to symbolize.

LEFRANCOIS: Thank you all very much.

208: Novelist and partner at Sonnenschein, Natch & Rosenthal, Chicago, Ill.

209: Scott Turow, *Miranda's Value in the Trenches*, N.Y. TIMES, June 28, 2000, at A1.