

“NO FETISH” FOR PRIVACY, FAIRNESS, OR JUSTICE: WHY WILLIAM REHNQUIST, NOT KEN STARR, WAS RESPONSIBLE FOR WILLIAM JEFFERSON CLINTON’S IMPEACHMENT

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INTRODUCTION

Conventional wisdom would have us believe that the United States Supreme Court and its Chief Justice, William Rehnquist, played, at best, a tangential role in William Jefferson Clinton’s impeachment.¹ Historians ought to assess that judgment with a critical eye. The traditional view, as reflected in media accounts, depicts a zealous prosecutor bent on uncovering the President’s wrongdoing, regardless of the cost. Kenneth Starr’s fervor in pursuing the President, the orthodox perspective explains, was facilitated by the Court’s decisions in *Morrison v. Olson*² and *Clinton v. Jones*.³ In those opinions, the Court rejected the constitutional challenge to the Independent Counsel statute and held that the President could be compelled to defend against a civil suit during his term of office. Accordingly, the traditional view goes, William Rehnquist performed the largely ceremonial role assigned to the Chief Justice as the presiding officer in the trial conducted by the Senate on the Articles of Impeachment.

Beyond simply presiding over the trial, however, William Rehnquist provided the vital legal tools Ken Starr and his subordinates successfully employed to secure the President’s impeachment. Indeed, the Supreme Court paved the way for Starr’s relentless and far-ranging investigation of the President’s private life, culminating in the salacious and detailed report on the intimate details of the sexual behavior between the President and Monica Lewinsky. The Rehnquist Court also enabled the Independent Counsel to subject Lewinsky, without the benefit of legal counsel, to intense pressure in the hopes of turning her into a witness against the President. The manner in which witnesses were handled at

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¹ See, e.g., EDWARD LAZARUS, CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE MODERN SUPREME COURT v (Penguin Books ed., 1999) (arguing that the Court played a “minor role” and Chief Justice Rehnquist was a mere “figurehead” in President Clinton’s trial).

² 487 U.S. 654 (1988).

³ 520 U.S. 681 (1997).

the grand jury stage of the investigation reflected decisions by the Court that eroded any protections still afforded by that putatively "independent" body.

Rather than focusing on Starr and his tactics, historians should instead emphasize the manner in which the Rehnquist Court systematically eliminated privacy from the lexicon of Fourth Amendment jurisprudence. Further, historians should look with suspicion on a Court that has transformed the right to counsel into a privilege rather than a hallowed right. Breaks in the secrecy that enshrouds the grand jury should not surprise historians in light of the Court's opinions that allow prosecutors to violate grand jury rules with impunity. By failing to sanction the government when it withholds exculpatory evidence from the grand jury, the Rehnquist Court has fostered a milieu in which the Independent Counsel could in effect view the grand jury as his own fiefdom.

Not only did Rehnquist pave the way for the President's impeachment, he also underscored the Supreme Court's distance from the public's perception of fairness in the adversarial criminal justice system. Implicit in the public's rejection of Starr's unrelenting investigation of the President is the repudiation of the tactics he employed to achieve those ends. Uncomfortable with the toll on human emotions, privacy, and dignity exacted by Starr's investigative strategies, the public excoriated the President's behavior while simultaneously rejecting the notion that his conduct should result in removal from office.⁴ As members of a cultural and socioeconomic elite⁵ whose outlook is divorced from the "real world"⁶ of criminal law, both Rehnquist and Starr (a former jurist) could not discern the pragmatic implications of their opinions or investigative tactics.

Furthermore, the historical ramifications of President Clinton's impeachment and acquittal betray an irony beyond its immediate results. The unparalleled and runaway prosecution of the President presages the dawn of a police state in which law enforcement agencies as well as prosecutors perceive few if any constraints upon their ability to trample upon the privacy, dignity, and property rights of ordinary citizens. Para-

⁴ See, e.g., Dan Balz & Claudia Deane, *Poll: Most Oppose Continuing Trial*, WASH. POST, Jan. 31, 1999, at A21 (revealing that only 33 % of those polled supported President Clinton's conviction and removal from office as opposed to 64% who believed the President's conduct did not warrant removal from office).

⁵ See Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 Nw. U. L. REV. 145, 189-91 (1998) (discussing the "culturally elite biases" of judicial review).

⁶ In *Lee v. Illinois*, Justice Blackmun chided his colleagues for emphasizing the theoretical aspects of criminal procedure and neglecting "the significant realities that so often characterize a criminal case." 476 U.S. 530, 547-48 (1986) (Blackmun, J., dissenting). Justice Blackmun succinctly observed, "[t]here is a real world as well as a theoretical one." *Id.* at 548. See generally ALFREDO GARCIA, *THE SIXTH AMENDMENT IN MODERN AMERICAN JURISPRUDENCE: A CRITICAL PERSPECTIVE* (1992).

doxically, both the public and the President have failed to grasp the link between their zeal for enhancing the power of law enforcement and the inevitable loss of autonomy and freedom that that perspective entails.⁷ Freedom is "a protean concept" that is subject to change depending on the tenor of the times.⁸ A Court whose goal is to eradicate the perceived crisis engendered by crime may only accomplish that goal at a price—liberty, dignity, and property rights must take a back seat to a purportedly omniscient and powerful government untrammelled by any significant checks and balances.

In this article, I interweave the Rehnquist Court's "criminal justice" jurisprudence with the Clinton impeachment trial to demonstrate the nexus between the excesses committed by the Office of the Independent Counsel and the doctrinal basis for that governmental action. First, I compare the extent to which the Court has undermined privacy rights through the pervasive intrusion of the Independent Counsel into the private lives of Lewinsky and Clinton. Next, I critique the way Lewinsky was drawn into the controversy by the Office of the Independent Counsel without the benefit of the advice of counsel. In doing so, I focus on the Rehnquist Court's devaluation of the right to counsel as the hallmark of our criminal justice system. Finally, I examine the grand jury's role in the impeachment process and juxtapose that story with the manner in which the Rehnquist Court has converted the institution into the prosecutor's unfettered domain.

Before engaging in this exercise, let me issue an important caveat. This Article does not address the morality of the President's behavior. Simply put, the President's conduct was reprehensible. As Michael J. Klarman notes, "[i]t is an equally accurate description of the President's conduct to say that he behaved immorally, that he lied, that he lied under oath, that he lied under oath about a sexual affair, that he lied under oath about a sexual affair that was not material to the proceedings in which the question was asked, and so on."⁹

My aim is to place the "affair," and the constitutional crisis it engendered, in a broader perspective. In short, the Starr investigation illustrated the Rehnquist Court's extreme deference to law enforcement objectives, to the detriment of the liberty interests of American citizens and the legitimacy of its own jurisprudence.

⁷ With respect to this myopia on President Clinton's part, see ALAN M. DERSHOWITZ, *SEXUAL MCCARTHYISM: CLINTON, STARR, AND THE EMERGING CONSTITUTIONAL CRISIS* 150-53 (1998).

⁸ ERIC FONER, *THE STORY OF AMERICAN FREEDOM* xiv-xviii (1998).

⁹ Michael J. Klarman, *Constitutional Fetishism and the Clinton Impeachment Debate*, 85 VA. L. REV. 631, 644 (1999).

I. PRIVACY AND FREEDOM—WHAT'S LEFT?

“If the personal life of the most powerful man in the nation can be violated so wantonly by a Government-appointed prosecutor, then we are all at risk [I]f liberty means the right to privacy and to do as we wish as long as we do not violate the rights and privacy of others, then we no longer live in a free state.”¹⁰

The Clinton impeachment saga demonstrated how defenseless a powerful leader can feel when the most intimate aspects of his private life are meticulously revealed not only to the nation but to the world at large. We may viscerally attribute this phenomenon to the President's unwillingness or inability to tell the truth. Similarly, we may explain it by stressing Starr's obsession with the task with which he was entrusted: “investigating and perhaps prosecuting a particular individual,”¹¹ that is, the President of the United States. From an institutional perspective, we may focus on the inherent flaws attending the independent counsel statute.¹² After all, that statute invites abuse to the extent it involves “picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.”¹³ Finally, we may ascribe the Clinton impeachment to the Rehnquist Court's holding in *Clinton v. Jones*, which failed to insulate the President from a civil suit during his term of office.¹⁴

Conspicuously missing from such analyses is the role the Supreme Court has played in narrowing the definition of privacy. It is noteworthy that Judge Richard Posner, who is not one to “fetishize privacy,” condemns the “Starr report's *unnecessary* invasions of the President's privacy.”¹⁵ What Posner fails to point out is the evident nexus between divulging unnecessary facts and the erosion of privacy engendered by the Supreme Court's narrow interpretation of what constitutes a “reasonable expectation of privacy”¹⁶ in modern American society. Instead, Posner

¹⁰ Orlando Patterson, *What Is Freedom Without Privacy?*, N.Y. TIMES, Sept. 15, 1998, at A27.

¹¹ *Morrison v. Olson*, 487 U.S. 654, 730 (1988) (Scalia, J., dissenting).

¹² See generally Ethics in Government Act of 1978, 28 U.S.C. §§ 49, 591–598 (1994 & Supp. 2001).

¹³ *Morrison*, 487 U.S. at 730 (Scalia, J., dissenting) (quoting Jackson, J.).

¹⁴ 520 U.S. 681 (1997).

¹⁵ RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT AND TRIAL OF PRESIDENT CLINTON 80–83 (1999) (criticizing the report's revelations of lurid aspects of the sexual encounters between the President and Lewinsky) (emphasis in original).

¹⁶ This is the modern standard for determining whether a Fourth Amendment violation has occurred. It was set forth in *Katz v. United States*, 398 U.S. 347, 360–62 (1967) (Harlan, J., concurring).

merely recites the judicial fiction that such "prosecutorial misconduct" is irrelevant in both criminal and civil law.¹⁷

One must ponder a relevant question in determining whether Ken Starr exceeded the bounds of prosecutorial decency in exposing the Clinton-Lewinsky affair: could Starr have uncovered evidence of the relationship without having Linda Tripp's tapes to corroborate the affair? By shifting the time, the circumstances, and the focus of the affair, the answer is surprising. In fact, the Rehnquist Court's definition of privacy may have made it possible to uncover the affair without resorting to use of the Tripp tapes. Let us examine that distinct possibility.

A. LOOKING THROUGH THE WHITE HOUSE BLINDS: ONE WAY TO "GET" BILL CLINTON WITHOUT THE TRIPP TAPES

Imagine the following scenario: A security officer who patrols the grounds of the White House inadvertently peers through open blinds into the Oval Office and gets a glimpse of the President and Lewinsky engaged in sexual relations.¹⁸ He reports the observation to his superiors, who in turn contact the Office of the Independent Counsel and provide Starr with the information. Starr's office debriefs the officer about the incident and instructs him to obtain more information and details by deliberately looking through the opening in the blinds. Further, Starr provides the officer with a camera to record the activity. The officer peers through the blinds one more time, observes the activity, and records it. Subsequently, the officer turns the film over to the Independent Counsel.

Starr approaches Lewinsky and shows her the film. She is shocked and incensed by the flagrant violation of her, as well as the President's, right to privacy. What really disturbs her is Starr's suggestion that if she does not become a witness against the President, she will be charged with a violation of the District of Columbia statute that prohibits adultery.¹⁹ Although this crime is merely a misdemeanor, the embarrassing and shocking nature of having the intimate encounter revealed to the world makes Lewinsky seriously ponder Starr's offer.

At first glance, it might appear that the President has an expectation of privacy in his "office" and that Lewinsky should be accorded the same right. The officer's actions seem to constitute a clear violation of both parties' expectations of privacy, as defined in the seminal case of *Katz v.*

¹⁷ POSNER, *supra* note 15, at 83. Posner notes that "one cannot defend against a criminal prosecution on the ground that the prosecutor has made public disclosure of more details of your private life than he had to do in order to carry out his prosecutorial duties." *Id.*

¹⁸ Although the definition of sexual relations was controverted in the Clinton impeachment case, for purposes of this article I would define sexual relations to include oral sex.

¹⁹ See D.C. CODE ANN. § 22-301 (1981).

United States.²⁰ Upon a more careful analysis, however, the conclusion that Lewinsky is entitled to privacy seems questionable.

As the Court has acknowledged, “[w]ithin the workplace context . . . employees may have a reasonable expectation of privacy against intrusions by police.”²¹ A person “has standing to object to a search of his office, as well as of his home.”²² Presumably, the President would expect that his privacy in his office would not be invaded at night. Against this privacy interest, however, the court must weigh the reasonableness of the governmental invasion. In the workplace context, the Court has held that neither a search warrant nor probable cause is necessary to investigate “work-related” misconduct. Rather, a reasonableness standard supplants the Fourth Amendment’s traditional requirements.²³ Reasonableness is in turn linked to “the inception and the scope of the intrusion.”²⁴ Significantly, however, the standard presupposes that the search is undertaken by an employer for a noncriminal purpose.²⁵ Under these standards, the President may have a valid argument that the officer was unjustified in peeking into the Oval Office to begin with.

Who is the President’s employer? Of course, it is the American people. If the American people have a vested interest in preserving the dignity and decorum associated with the Oval Office, they have a corresponding interest in uncovering behavior that detracts from and undermines those characteristics. The weight of “special needs beyond law enforcement” has led the Court to suspend probable cause and warrant requirements and to conclude that the privacy of the employee must sometimes give way to an effective and efficient workplace. In my hypothetical, then, one could argue that the President’s privacy interest is outweighed by the public’s interest in preventing immoral conduct that undermines the effectiveness of the Presidential office. If the security officer is a representative of the people, who employ the President, then he might be considered an employer rather than a law enforcement agent. Hence, one may plausibly argue that neither the initial action by the officer nor the search conducted at the Independent Counsel’s urging violated the Fourth Amendment.

²⁰ 389 U.S. 347 (1967). The Fourth Amendment provides protection to anyone “exhibit[ing] an actual (subjective) expectation of privacy” where that expectation is “one that society is prepared to recognize as ‘reasonable.’” *Id.* at 361 (Harlan, J., concurring).

²¹ *O’Connor v. Ortega*, 480 U.S. 709, 716 (1987), *citing Mancusi v. DeForte*, 392 U.S. 364 (1968).

²² *Mancusi*, 392 U.S. at 369.

²³ *O’Connor*, 480 U.S. at 725–26.

²⁴ *Id.* at 726.

²⁵ *See id.* at 724 (distinguishing the interests of public employers from those of law enforcement officials and deeming a probable cause requirement for public employers too burdensome “when the search is not used to gather evidence of a criminal offense”).

Under the standard set forth in *O'Connor v. Ortega*,²⁶ the search is justified at its inception "when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose."²⁷ Perhaps the President could contend that the officer did not have any reasonable grounds to believe that he was engaged in work-related misconduct. On the other hand, given some suspicion that the President might have been violating workplace rules, the officer may have been justified in attempting either to corroborate or to dispel his suspicions.²⁸ Such suspicions, moreover, need not rise to the level of probable cause, which requires a "probability or substantial chance"²⁹ of the suspected wrongdoing, but need only amount to some intermediate level between a mere "hunch" and a "fair probability."³⁰

The second prong of the *O'Connor* test relates to the scope of the intrusion. From a common-sense perspective, filming the most intimate encounter between two adults would offend most people's sense of privacy. Nevertheless, the *O'Connor* plurality, along with Justice Scalia, who concurred in the result, found that the thorough search of a public employee's office, desk, cabinets, and the seizure of highly personal items, such as a Valentine's Day card, a photograph, and a book of poetry,³¹ did not necessarily violate the Fourth Amendment.³² Reasoning by analogy, the filming of the encounter would be an acceptable means of providing concrete evidence that the President violated workplace standards by engaging in such activities in his office, however personal those actions may have been.

Orlando Patterson's telling criticism comes to life in the preceding scenario. A public employee's place of work is not so private under the Court's Fourth Amendment analysis. Indeed, the *O'Connor v. Ortega* opinion underscores how vulnerable a public employee's private affairs are in the face of minimal suspicions of workplace violations. Although

²⁶ 480 U.S. 709 (1987).

²⁷ *Id.* at 726.

²⁸ The reasonable suspicion benchmark was established by the Court in *Terry v. Ohio*, 392 U.S. 1 (1968).

²⁹ *Illinois v. Gates*, 462 U.S. 213, 244 n.13 (1983).

³⁰ See *Alabama v. White*, 496 U.S. 325, 329-31 (1990) (defining the reasonable suspicion standard).

³¹ *O'Connor*, 480 U.S. at 713.

³² The plurality in *O'Connor* remanded the case in part because the lower court made no findings as to the scope of the search. They intimated that the search would have been justified if there had been a "reasonable belief that there was government property in Dr. Ortega's office" assuming that the scope of the search was reasonable. *Id.* at 728. Justice Scalia would have held that government searches to investigate work-related violations do not violate the Fourth Amendment. *Id.* at 732 (Scalia, J., concurring).

the President's behavior was reprehensible, to the extent that it occurred in the "office" and not in the "home," it was automatically divorced from the traditional protections embedded in the text of the Fourth Amendment.³³ One may avoid such searches by simply leaving personal items, or personal matters, at "home." How practical such a suggestion may be is another matter.³⁴

Since the President could allege that the search was either not work-related or undertaken to uncover evidence of criminal misconduct, he could circumvent *O'Connor's* relaxed standards and void the searches for lack of a warrant.³⁵ This would be a hollow victory, however, because even if the "search" by the official occurred, for instance, not in the Oval Office but in the Lincoln bedroom, the evidence would not be suppressed. The President's expectation of privacy in his house is violated, yet he is unable to protect against the prying eyes of the government because his short-term guest, Lewinsky, may not have standing to contest the validity of the search.³⁶ Before we explore this not-so-improbable scenario further, we must analyze the policy implications flowing from the Supreme Court's latest interpretation of the Fourth Amendment's reach.

B. BEWARE OF WHOM YOU INVITE INTO YOUR HOUSE OR "INTIMATE" ACTIVITIES MAY BE SUBJECT TO GOVERNMENTAL SURVEILLANCE!

In *Minnesota v. Carter*,³⁷ the Supreme Court attempted to determine the privacy interest that a guest who was not staying overnight³⁸ should be accorded in her host's home. Although it did not issue a "bright-line" rule, the majority in *Carter* gave law enforcement a significant victory,³⁹ one that may be as significant and far-reaching as the Court's decision in *Rakas v. Illinois*.⁴⁰ What *Carter* portends is ominous: the ability of the

³³ *But see id.* at 739 (Blackmun, J., dissenting). Justice Blackmun was prescient in recognizing the reality that work and home have become indistinguishable for many working Americans. *Id.*

³⁴ *See id.*

³⁵ *See O'Connor*, 480 U.S. at 717 ("The operational realities of the workplace . . . may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official."). Justice Scalia disagreed with the plurality's premise that the reasonableness of the expectation of privacy differs when the search is by a supervisor rather than a law-enforcement agent. *Id.* at 731 (Scalia, J., concurring).

³⁶ *See* discussion *infra*, Part I.B.

³⁷ 525 U.S. 83 (1998).

³⁸ In *Minnesota v. Olson*, 495 U.S. 91 (1990), the Court held that an overnight guest has an expectation of privacy in his host's premises.

³⁹ *See Minnesota v. Carter*, 525 U.S. at 91 (holding that "respondents had no legitimate expectation of privacy in the apartment . . .").

⁴⁰ *Rakas v. Illinois*, 439 U.S. 128 (1978). In *Rakas*, a slim majority of the Court revolutionized the law of standing by holding that in order to claim standing to contest the validity of

government to strip a resident of her privacy by virtue of whom she invites into her abode. As Justice Ginsburg aptly noted in dissent, *Carter* "undermines . . . the security of the home resident herself."⁴¹ The dissent's response to the majority's holding, however, did not adequately deal with the potential ramifications of the decision.

In *Carter*, a police officer, after receiving a tip from an informant, looked through a gap in the closed blind of an apartment window and observed three people, including the lessee, "bagging" cocaine.⁴² The officer peered through the gap in the blind for "several minutes."⁴³ At the time he looked through the drawn blinds, the officer was unaware of the status of the occupants. As the majority acknowledged, "[t]he police later learned that while Thompson was the lessee of the apartment, Carter and Johns lived in Chicago and had come to the apartment for the sole purpose of packaging the cocaine."⁴⁴ Ultimately, the officer used the observations to obtain a search warrant for the apartment, but both Carter and Johns were arrested after they left the premises by car and before the warrant was issued.⁴⁵ The police discovered a handgun in the car; a later search of the car revealed, among other things, cocaine.⁴⁶

Chief Justice Rehnquist, writing for the Court, focused on three factors that deprived both Carter and Johns of an expectation of privacy in the lessee's apartment: (1) the "commercial nature of the transaction," (2) the brief period of time (two and a half hours) Carter and Johns spent in the apartment, and (3) their lack of a previous connection to the premises.⁴⁷ These factors left the petitioners with no standing to contest the validity of the peering officer's observations.⁴⁸ In a concurring opinion in which he derided *Katz v. United States* and other case law for delineating a "fuzzy" standard for gauging Fourth Amendment safeguards, Justice Scalia, joined by Justice Thomas, resorted to the text of the amendment, its history, and the common law to arrive at the same result as the majority.⁴⁹ Because he concluded that the Amendment did not extend protection to people in other people's homes,⁵⁰ Scalia left the

a search, the claimant must demonstrate a personal and reasonable expectation of privacy in the place searched. *Id.* at 143–44. Thus, standing no longer was a discrete issue, but rather, inextricably entwined with the *Katz* analysis.

⁴¹ *Carter*, 525 U.S. at 106 (Ginsburg, J., dissenting).

⁴² *Id.* at 85.

⁴³ *Id.*

⁴⁴ *Id.* at 86 (emphasis added).

⁴⁵ *Id.* at 85.

⁴⁶ *Id.*

⁴⁷ *Id.* at 86, 91.

⁴⁸ *Id.*

⁴⁹ *Id.* at 91–96 (Scalia, J., concurring).

⁵⁰ *Id.* at 92.

question of further expansion of the Constitution's reach to the legislatures.⁵¹

Faithful to the rationale underlying *Rakas*, Justice Kennedy's concurring opinion rejected the petitioner's standing claim, although not without a strong caveat. Justice Kennedy concluded that "as a general rule, social guests will have an expectation of privacy in their host's home."⁵² Nevertheless, Carter and Johns's brief connection to the Thompson home nullified any expectation of privacy therein.⁵³ Justice Kennedy's fidelity to *Rakas* underscores the rational extension of the doctrine from the automobile to the home. We will return to this theme later.

Finally, Justice Breyer agreed with the dissent's notion that respondents did have standing under the Fourth Amendment.⁵⁴ According to Breyer's analysis, however, the claims raised by Carter and Johns failed because of their inability to establish that the police conducted an unreasonable search for Fourth Amendment purposes.⁵⁵ The police officer who peered into the apartment was in a public place and could see through the window into the kitchen.⁵⁶ Additionally, the people in the apartment failed to take the precautions necessary to prevent the view into the dwelling.⁵⁷ At a more fundamental level, Breyer applies the *Katz* rubric to warn that safety in the home depends upon totally, not partially, closed blinds.⁵⁸ This is especially true for an apartment dweller whose unit faces a publicly traveled street.⁵⁹

Having summarized the rationale behind *Carter*, let us now apply it to the Clinton-Lewinsky affair. The first intimate encounter between the parties occurred in Presidential adviser George Stephanopoulos's office.⁶⁰ Lewinsky flirted with the President, and he responded by promptly inviting her into his private office.⁶¹ At that point, they kissed, and a short time later Lewinsky performed oral sex on the President.⁶² Assume that these two encounters were viewed by the officer patrolling the White House grounds through a small gap in the blinds. What is the legal outcome of this police conduct under *Carter*?

⁵¹ *Id.* at 98.

⁵² *Id.* at 102 (Kennedy, J., concurring).

⁵³ *Id.*

⁵⁴ *Id.* at 103 (Breyer, J., concurring).

⁵⁵ *Id.* at 103-06.

⁵⁶ *Id.* at 104.

⁵⁷ *Id.*

⁵⁸ *Id.* at 105

⁵⁹ *Id.*

⁶⁰ KENNETH STARR, REFERRAL FROM INDEPENDENT COUNSEL, H.R. DOC. NO. 105-310, at 29 (1998).

⁶¹ *Id.*

⁶² *Id.* at 29-30.

Under the *Carter* majority's reasoning, Lewinsky simply had no expectation of privacy that would keep her intimate encounter with the President shielded from public exposure in a court of law. Lewinsky had been on the premises for a short period of time and had very little meaningful connection with the President before the encounter. Although the transaction was not purely "commercial," it would fall outside the norm of a typical "social" guest. Moreover, since the Oval Office was a place of business, rather than a "home" per se, one could view the activity as falling within the confines of the workplace. Similarly, under Justice Kennedy's standard, it is easy to find that Lewinsky had, at most, "a fleeting and insubstantial connection" with the place, even if it were to be classified as a "home," where the encounter occurred. Finally, Justice Breyer would find that, by leaving any part of the premises exposed, the President and Lewinsky assumed the risk that a passerby would obtain a glimpse of the interior. Thus, the officer's activity would not constitute a search pursuant to the Fourth Amendment.

Even if the President claimed the Fourth Amendment's protection under my "hypothetical" scenario, it would do him little good. Lewinsky could be prosecuted for violating the District of Columbia code and she would not be able to invoke the protections flowing from the Fourth Amendment because she lacked an "expectation of privacy" in the premises. Accordingly, the President's privacy would still be at risk because Lewinsky would not be able to contest the validity of the officer's intrusion, and his observations would ultimately be exposed in a courtroom.

What has *Carter* wrought with its hackneyed and distorted lens of everyday experience? The most intimate activity occurring within your home is not protected from public view. Anyone who invites a person to his or her house risks the privacy that inheres within the four walls of the structure. This ranges from morally abhorrent but very private behavior to the most innocent and pleasurable experiences. Let us take two examples to illustrate my point.

Assume the homeowner invites a prostitute into the premises after contracting for her services. She had not previously been in the house, the transaction is purely commercial, and there was no previous relationship between the parties. Yet, the householder inadvertently left a gap in the blind, allowing the police officer to peer through the window and observe the most intimate of human encounters. Though the householder's behavior is morally reprehensible, he surely should have expected the activity to be private. Of course, both parties are subject to prosecution for their actions. The householder may be immune from prosecution, especially if the police officer stepped into the curtilage to observe the activity. But if he lives in an apartment fronting a public street, his socioeconomic status may prevent him from claiming the po-

lice officer searched the premises, especially under Justice Breyer's interpretive lens.

The prostitute, however, is precluded from challenging the police conduct altogether. She did not have an expectation of privacy in the house. She was merely a "fleeting" social guest whose entry into a private home for an intimate encounter is not sufficient to accord her an expectation of privacy. More important, the householder cannot shield this activity from being exposed in a public courtroom because the prostitute is powerless in this regard. At bottom, this is the fundamental risk *Carter* engenders: the exposure of intimate activities inside the home because the homeowner is careless in not hermetically sealing the house from public view and invites a guest into the dwelling who lacks a sufficient nexus to the premises.

Let us, however, take a more benign situation to explore the potential ramifications of *Carter*. You are the parent of two young children and wish to give them an eventful birthday party. You make arrangements with either a business or an individual to entertain them with magic tricks, clowns, music, etc. You reach an agreement on the fee for these services with the business or individuals. Unknown to you, one of these people has a prior criminal record and the police believe, though without probable cause or reasonable suspicion, he might possess a controlled substance. You open the door to these individuals, the party begins, and the children begin to enjoy the festivities. You close the curtains or blinds to prevent other uninvited children from barging into the party, but leave a small opening in either the blinds or the curtains.

Acting on their suspicion, police officers have followed these individuals to your home, intrude through the curtilage and into the threshold of the house, and observe the party furtively through the opening in the curtains or blinds. What are the police accomplishing by prying into the confines of your dwelling? Perhaps they may see evidence of drugs protruding from the suspected individual's pocket when he least expects it. Or the police may employ highly sophisticated equipment designed to x-ray an individual's clothing without his knowledge. The motivation or reasons behind the police activity are irrelevant, especially if their investigative tactics yield fruit. The important legal variable is whether the suspects may claim the safeguards of the Fourth Amendment.

Relying on the three variables set forth by *Carter*, it is clear that if the investigation is successful in furnishing probable cause or reasonable suspicion of criminal activity, the entertainers will not have a Fourth Amendment claim. They were on the premises for a short period of time, since it is unlikely that the party lasted for more than two and one-half hours. It is evident that the suspects entered the house for a purely commercial purpose. Finally, we may safely presume the suspects had

no previous connection to the dwelling. What did the homeowners risk by engaging in this "commercial transaction?" They risked the privacy of their dwelling being exposed to the police and the embarrassment of having to explain to their neighbors the commotion generated by the arrest of the suspects, whether the arrest occurs inside or outside of the house.

The crucial mistake you committed, besides not closing the blinds securely, was not undertaking a thorough background check of these individuals before inviting them into your home. What *Carter* presages is the risk that your home will become vulnerable to such unexpected searches depending on whom you invite into that putative sanctuary. You assume the risk that the home is no longer safe from the prying eyes of the police if you fail to delve into the background of your short-term, commercial guests.

The preceding scenarios do not fall within the ambit of "classroom hypotheticals [involving] the milkman or pizza deliverer."⁶³ This is ultimately why Justice Ginsburg's dissent leaves, if you will, too many "gaps." She chose only to "decide the case of the homeowner who chooses to share the privacy of her home and her company with a guest"⁶⁴ As I have demonstrated with two concrete examples, there are a variety of circumstances in which a homeowner may wish to invite someone into her house for a commercial purpose and not thereby jeopardize her privacy. Indeed, given the prevalence of Americans choosing to work within the home, the *Carter* plurality's conclusion that their three-prong standard satisfies the *Katz* "reasonable expectation of privacy" test rings hollow.

For example, would the result under that standard be different if, instead of a "cocaine-bagging" transaction, the parties had entered the premises so that Ms. Thompson could prepare their income tax returns? Suppose the Internal Revenue Service was pursuing these individuals for tax fraud. The suspects contact Ms. Thompson, who is an accountant working out of her home. She has never met them nor have they previously been in her home. The IRS agents look through the blinds, photograph the process of preparation in the hopes of obtaining evidence of fraud against the suspects, and are successful in doing so. Let us say the suspects are in the home for approximately three hours. If Ms. Thompson becomes involved in the fraud, she may have a basis to claim the benefit of the Fourth Amendment's exclusionary rule, but the suspects would not. Thus, her privacy would be compromised by having invited the clients in for what may have initially been a prosaic, commercial, and otherwise innocent arrangement. The *Carter* opinion presumes that

⁶³ *Minnesota v. Carter*, 107 U.S. 83, 107 (1998) (Ginsburg, J., dissenting).

⁶⁴ *Id.*

every American who works out of the home should conduct a background check of every short-term “commercial” guest.

Where Justice Ginsburg’s dissent hits home is in her trenchant criticism of the plurality’s nebulous criteria. A homeowner must guess whether a guest’s duration of stay, purpose, and “acceptance into the household” will be sufficient to “earn protection.”⁶⁵ Conversely, a homeowner must, while conjecturing about her guest’s status, determine whether she should take the leap of inviting her into the dwelling at the price of risking her own privacy. This, of course, presupposes that Americans are steeped in the nuances of the Court’s Fourth Amendment jurisprudence. Herein lies the irony behind *Carter*’s flawed logic: Americans presume their homes are their castles and are protected from government intrusion without the substantive justifications required for a search warrant or a well-established exception to the warrant requirement. That supposition is no longer justified because *Carter* “will tempt police to pry into private dwellings without warrant, to find evidence incriminating guests who do not rest there through the night.”⁶⁶

Further, the facts of *Carter* suggest that the police might be tempted to invade private dwellings even without knowing the status of the occupants. As the opinion notes, the police became aware that Thompson was the lessee only after Officer Thielen had observed the suspects package the cocaine.⁶⁷ Ms. Thompson, moreover, suffered the identical fate as her short-term guests: she was convicted of the same crimes.⁶⁸ The moral of the story is that the police have a motivation for “looking through the blinds,” in the hopes of uncovering evidence; they can ask questions about the occupants’ status later. Not only would short-term guests be powerless to invoke the exclusionary remedy, the homeowner herself may fail to avail herself of the Fourth Amendment’s protection. Justice Breyer’s interpretation may accord with this result.

A counterargument is offered by Justice Scalia’s concurring opinion. Carefully parsing the words of the Fourth Amendment and relying on historical materials, Justice Scalia derides the *Katz* standard as an unbridled weapon through which a majority of the Court’s predilections about “privacy” may be fulfilled. With sarcasm, he observes that the privacy expectations that society deems reasonable “bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.”⁶⁹ Citing an 1816 case, *Oysted v. Shed*,⁷⁰ Justice Scalia notes

⁶⁵ *Id.*

⁶⁶ *Id.* (citing Eulis Simien, Jr., *The Interrelationship of the Scope of the Fourth Amendment and Standing to Object to Unreasonable Searches*, 41 ARK. L. REV. 487, 539 (1988)).

⁶⁷ *Id.* at 86.

⁶⁸ *Id.* at 107 n.1 (Ginsburg, J., dissenting).

⁶⁹ *Id.* at 97 (Scalia, J., concurring).

⁷⁰ 13 Mass. 520 (1816).

that he would not allow the dwelling to become a "sanctuary" for a stranger or a visitor, even at the pain of permitting the "officer [to] break open doors or windows in order to execute his process."⁷¹ Protection from such a practice, in Scalia's estimation, lies with the legislature, not the courts, since the Fourth Amendment does not protect privacy, but rather "persons, houses, papers, and effects."⁷²

Returning to my hypothetical Clinton-Lewinsky scenario, I surmise Justice Scalia would have President Clinton petition a hostile, Republican Congress to pass legislation forbidding "peeking" through the open blinds in order to uncover allegedly criminal transgressions. Ironically, James Madison ultimately became convinced that a federal bill of rights was necessary and wise because it would check majoritarian excesses and guard against arbitrary governmental actions.⁷³ As Gordon Wood deftly put it, Madison and Jefferson were acutely aware that "the people . . . were as capable of despotism as any prince; public liberty was no guarantee after all of private liberty."⁷⁴ To Justice Scalia, privacy is not mentioned in the Fourth Amendment, and the security enumerated in the Amendment only extends to one's home and might quickly evaporate when a short-term guest not staying overnight enters the premises.

At this point, it is worthwhile to meander from the hypothetical world into the real one in order to assess *Carter's* implications. Consider the following "true-life" drama. On a zealous quest to penetrate the Mafia, or La Cosa Nostra, two Federal Bureau of Investigation agents, with the consent of the Justice Department, terminate one Mafia member's parole early in order to use him as an informant.⁷⁵ They learn from him and others of an impending La Cosa Nostra ceremony.⁷⁶ Soon thereafter, they also discover that their new informant has put out a contract for another member of the Mafia to be shot.⁷⁷ The FBI agents violate Attorney General Guidelines in failing to report the information either to the local FBI office, FBI headquarters, state or local law enforcement officials, or the Assistant Attorney General.⁷⁸

Obtaining more details about the induction ceremony from the informant, the agents realize how important recording such an event would be for future prosecutions and for Congressional hearings.⁷⁹ Not wishing

⁷¹ *Carter*, 525 U.S. at 96 (Scalia, J., concurring) (quoting *Oysted*).

⁷² *Id.* at 97.

⁷³ THE FEDERALIST PAPERS, No. 51 at 323 (James Madison) (Clinton Rossiter ed., 1961).

⁷⁴ GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, 410 (1969).

⁷⁵ *United States v. Salemme*, 91 F.Supp. 2d 141, 170 (D. Mass. 1999).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 170-71.

⁷⁹ *Id.* at 171.

to reveal the informant's identity, however, the agents proceed to seek a warrant for a "roving bug" under Title III, which requires that the agents provide to the court "a full and complete statement as why [it] is not practical to specify the place to be bugged."⁸⁰ Although the agents knew the informant would be at the induction ceremony, and they could thereby obtain his testimony about it and also record it, they defiantly concealed this information. As a result, the magistrate issued a warrant based on a false and misleading affidavit and application.⁸¹ Under *Franks v. Delaware*, the warrant would be invalidated if based on information in the application which the government knew to be false (or in reckless disregard for the truth) and the information was material to the decision to issue the warrant.⁸²

Further, before an application for surveillance with a "roving bug" under Title III is submitted, the Supreme Court requires the "mature judgment" of a high-ranking official to approve it.⁸³ Under either *Franks* or *Giordano*, the government would be on shaky footing in establishing the validity of the warrant for the roving bug. Thus, it would likely lose a motion to suppress the evidence regarding the induction ceremony.

Enter the wonderful *Carter* opinion and things just might look rosier for the government. Indeed, this is just what occurred in the *Salemme* case, described above. On the heels of *Carter*, the government swiftly changed its strategy, arguing that one defendant who was overheard and tape-recorded in the La Cosa Nostra ceremony had no expectation of privacy in the house where the ceremony occurred.⁸⁴ In a brief passage, the court accepted the government's contention, emphasizing that the defendant was not an overnight guest and was present merely for "business" purposes.⁸⁵

The *Salemme* case graphically illustrates my position earlier in this exegesis. However insidious and repulsive an induction ceremony into a criminal society might be, it is done with the expectation that it will be an extremely private event. In fact, one of the reasons the FBI agents in the case lied in order to obtain a roving bug was that they would risk revealing the informant's identity if they mentioned the locale of the ceremony in the warrant. The simple reason for this apprehension was that "so few members of [La Cosa Nostra] would have had access to that information."⁸⁶

⁸⁰ *Id.*, citing 18 U.S.C. § 2518 (11)(a)(ii).

⁸¹ *Id.*

⁸² 438 U.S. 154 (1978).

⁸³ *United States v. Giordano*, 416 U.S. 505, 505-06 (1974).

⁸⁴ *Salemme*, 91 F.Supp. 2d at 172.

⁸⁵ *Id.*

⁸⁶ *Id.* at 26.

After *Carter*, however, private activities inside the dwelling are no longer safe from the government's prying eyes or ears. In effect, *Salemme* demonstrates that the government might not only be tempted to look through the blinds, but also to listen with the electronic ear. It can do so, moreover, with immunity as long as the aggrieved party is a "short-term" commercial guest in the home. The resident, of course, bears the indignity of being caught on tape but may take comfort in the fact that the conversations will not be admissible in a criminal proceeding against her. If the case is sufficiently notorious, however, the homeowner may find her conversations being disclosed in the courtroom as well as in the print and broadcast media. One wonders at the naivete or the perversity with which the *Carter* Court failed to recognize the dangerous ramifications of its facile logic.

Although the FBI agents in *Salemme* flouted the law unaware that the Supreme Court would come to their rescue, the case underscores Justice Ginsburg's position in *Carter*. If *Carter* had been in effect at the time the agents acted, it would have furnished them with the incentive to lie in their application for a warrant, knowing they would not face the consequences of their actions in regard to suspects who had no previous connection to the home. This is a recurring theme that the Supreme Court seems to ignore: tell law enforcement agents that constitutional constraints are meant to be circumvented and that values seemingly protected by the Constitution place only superficial obstacles in the path of law enforcement objectives.⁸⁷ In effect, the Court has fostered the ideal that rules are malleable instruments subject to manipulation; the ends of law enforcement justify the means employed in their service.

Ominously, the *Carter* Court represents an extension of the logic underlying *Rakas* to the home. Dissenting in *Rakas*, Justice White observed that the majority had declared "open season" on automobile passengers by stripping them of the ability to contest the validity of an automobile search. By analogy, Justice White's analysis now applies to short-term guests in a house, apartment, or hotel. The police may act in open defiance of Fourth Amendment doctrine as long as the guests inside the house are there merely for "commercial" purposes and have no previous relationship to the premises. Though distinct from automobiles, the regulation and public exposure of which diminish the occupant's expectation of privacy,⁸⁸ the privacy of the home is now vulnerable to illegal

⁸⁷ See Alfredo Garcia, *Toward an Integrated Vision of Criminal Procedural Rights: A Counter to Judicial and Academic Nihilism*, 77 MARQ. L. REV. 1, 23-24 (1993). "[T]he police [are] taught not to internalize Fourth Amendment norms, but rather to openly flout them." *Id.* at 23. See also Alfredo Garcia, *Is Miranda Dead, Was It Overruled, or Is It Irrelevant?*, 10 ST. THOMAS L. REV. 461 (1998) [hereinafter *Is Miranda Dead*].

⁸⁸ The Court's analysis has centered on the automobile's "ready mobility" and reduced expectation of privacy because of its characteristics, use, and pervasive regulation. See, e.g.,

searches as long as a mere short-term commercial guest is admitted. If *Rakas* declared “open season” on automobiles, the verdict is already trickling down to *Carter*: it has announced “open season” on homes as well.

Consistent with its previous jurisprudence in relation to the curtilage,⁸⁹ the Court has now ensured that one’s dwelling is protected from governmental surveillance only to the extent it is hermetically sealed. In *Florida v. Riley*,⁹⁰ for example, the Court held that helicopter surveillance of the suspect’s curtilage did not infringe upon his expectation of privacy because the police officer was able to see through the openings in the greenhouse roof and one or two of its open sides.⁹¹ Despite the fact that Riley “no doubt intended and expected that his greenhouse would not be open to public inspection,” and that he took precautions to protect it from ground level observation, those actions did not shield him from governmental surveillance because he left an opening.⁹²

Indeed, Justice Brennan’s prediction in his *Riley* dissent has materialized in the *Carter* opinion. He foreshadowed that *Riley* might permit the police to look from the helicopter not only into the open curtilage but “through an open window into a room viewable only from the air.”⁹³ As long as police have the incentive to conduct the search in the hopes that a short-time, “commercial” guest might be in the room, *Carter* would give police the green light for such a practice. Quoting from Professor Amsterdam’s seminal article,⁹⁴ Justice Brennan addressed the fundamental issue *Carter* has brought to life: “The question is not whether you and I must discipline ourselves to draw the blinds before we commit a crime. It is whether you and I must discipline ourselves to draw the blinds every time we enter a room, under pain of surveillance if we do not.” What *Carter* portends is precisely what Professor Amsterdam warned against: we are not safe in our abodes if we fail to check on the status of our short-term guests and do not close the blinds tightly when we let them in. The specter brilliantly depicted in George Orwell’s novel, *Nineteen*

Maryland v. Dyson, 527 U.S. 465, 465 (1999); Pennsylvania v. Labron, 518 U.S. 938, 940 (1996); California v. Carney, 471 U.S. 386, 390–394 (1985).

⁸⁹ The Court has described the curtilage as the area immediately surrounding and associated with the home and has acknowledged that Fourth Amendment protection is accorded to the curtilage. See *Oliver v. United States*, 466 U.S. 170, 180 (1984). It has yet to determine just what level of protection the curtilage should be afforded, as opposed to the home itself. See *id.* at n.11.

⁹⁰ 488 U.S. 445 (1989).

⁹¹ *Id.* at 450.

⁹² *Id.*

⁹³ *Id.* at 463 (Brennan, J., dissenting).

⁹⁴ Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974) [hereinafter Amsterdam], quoted in *Florida v. Riley*, 488 U.S. at 464 (Brennan, J., dissenting).

Eighty-Four, has arrived. Though referring to a helicopter, his portrait of the "Police Patrol, snooping into people's windows," has arrived before the millennium.⁹⁵

Law enforcement agencies have much more than the helicopter to conduct surveillance on unsuspecting citizens inside their dwellings at the dawn of the new millennium. The advent of new technology has wrought innovations which permit severe intrusions into the most personal recesses of personal integrity and the privacy of the home. New law-enforcement technologies on the horizon include cameras capable of seeing through clothes and most building materials either at close range or at a distance.⁹⁶ One potential revolutionary device, aptly labeled a "radar skin scanner," reputedly will be able to produce "an anatomically correct image of the body"—an image that one critic maintains will reveal such intimate detail as whether or not a man has been circumcised.⁹⁷ These technological advances will add in the near future to the already rich repertoire of crime-detection tools available to law enforcement today: infrared scanners, satellite photography, heat radiation sensors, and a variety of tracking and detection devices.⁹⁸

Let us return to my original hypothetical involving President Clinton and Lewinsky. Move forward to the year 2002. Modern technology has provided law enforcement agents with the radar skin scanner and a camera capable of seeing through buildings or building materials. Even if the blinds were not inadvertently left partially open, the police or its agents could pierce through the blinds and be able to capture the President and Lewinsky engaged in sexual relations. Since Lewinsky was a short-term guest without an expectation of privacy in the premises, she would not be able to successfully challenge the admission of what the scanner and the camera captured. President Clinton would be powerless to prevent the spectacle depicted in the camera and skin-scanner from being broadcast to the nation. His mistake was in getting "intimate" with a short-term rather than a long-term guest.

It is ironic that in 1967, Alan Westin wrote a book entitled *Privacy and Freedom*, in which he presciently examined the manifold ramifications of emerging technological innovations.⁹⁹ Delving into the Supreme Court's jurisprudence on the scope of the Fourth Amendment, Westin reviewed the case law on electronic surveillance, taking into account the expansion of law enforcement power brought about by the use of surveil-

⁹⁵ GEORGE ORWELL, *Orwell's Nineteen Eighty-Four: Text, Sources, Criticism 2* (Irving Howe ed., Harcourt Brace & World 1963).

⁹⁶ Mark Hansen, *No Place to Hide*, 83 A.B.A. J. 45, 46 (1997).

⁹⁷ *Id.*

⁹⁸ *Id.* at 45.

⁹⁹ ALAN J. WESTIN, *PRIVACY AND FREEDOM* (1967).

lance devices.¹⁰⁰ Westin foresaw the Supreme Court as being “on the brink of a landmark ruling defining a comprehensive, positive right of privacy from unreasonable surveillance.”¹⁰¹ Of course, Westin’s book was published in the year the Supreme Court handed down what has become the baseline of Fourth Amendment law, *Katz v. United States*.¹⁰² How far the Court has traveled since then in either affirming or diverging from the spirit of *Katz* has generated considerable debate.¹⁰³ Perhaps the extent to which some commentators perceived the Court’s deviation from the core of *Katz* was underscored in the pithy title of Professor Wasserstrom’s 1984 article, *The Incredible Shrinking Fourth Amendment*.¹⁰⁴ Whether Professor Wasserstrom’s analysis is still apt or needs further emendation merits analysis beyond the scope of this article.

C. IF THE PRESIDENT IS NOT SAFE, AND NEITHER ARE CITIZENS WITHIN THEIR HOMES, IN THEIR CARS, OR IN THE STREETS, IS THE FOURTH AMENDMENT INCREDIBLY SHRINKING OR IS IT ON LIFE SUPPORT OR DEAD?

I cannot resist, however, the temptation to engage in a cursory appraisal of such a fundamental question, especially in light of the foregoing critique. My assessment is that the Fourth Amendment is in jeopardy. I recently offered a similar diagnosis on the vaunted *Miranda* doctrine, concluding that *Miranda*, the “patient,” was either clinically dead or on life support.¹⁰⁵ Three cases serve to underline such a bleak conclusion for the Fourth Amendment. First, let us discuss *Carter*.

1. *Carter: The Death Knell for the Privacy Lodestar and Why Clinton Was Mistaken When He Thought His Actions Were “Private”*

Lurking behind my hypothetical and real-life examples is a simple outgrowth of *Carter*: the incentive for police officers to dispense with a search warrant for a dwelling. To a certain degree, *Carter* augurs the demise of the warrant requirement for the home because it strips the

¹⁰⁰ See *id.* at 349–60.

¹⁰¹ *Id.* at 360.

¹⁰² 389 U.S. 347 (1967).

¹⁰³ See, e.g., Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of Illinois v. Gates*, 17 U. MICH. J.L. REFORM 465 (1984) (defending the Court’s abandonment of the two-pronged *Aguilar-Spinelli* test when probable cause to search is based on information provided by informants); Wayne R. LaFave, *Fourth Amendment Vagaries (Of Improbable Cause, Imperceptible Plain View, Notorious Privacy, and Balancing Askew)*, 74 J. CRIM. L. & CRIMINOLOGY 1171 (1983) (critiquing the Court’s jurisprudence); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984) (assailing the Court’s jurisprudence) [hereinafter Wasserstrom].

¹⁰⁴ Wasserstrom, *supra* note 103.

¹⁰⁵ See Garcia, *Is Miranda Dead*, *supra* note 87, at 462.

home of its security based upon the status of those invited within. Though some scholars have argued that the text of the Fourth Amendment does not demand a warrant but was historically designed by the Framers to prevent abusive warrants, the current Supreme Court doctrine, based on *Katz*, rejects that proposition. That argument may be rendered moot by the Court's decisions shrinking the privacy accorded both the home and the curtilage, or the area immediately surrounding the house. It is quite evident that the Supreme Court will protect the house or the curtilage only when the occupant makes sure that every nook and cranny is completely sealed from public view, whether that view be furtive or open.

Having a property interest in the house, hotel or apartment searched, moreover, will not necessarily mean that the claimant will be successful in establishing a reasonable expectation of privacy in the premises. Consider the following facts: you give a companion money to rent a hotel room; she registers the room in her name, and you occupy the room jointly. You place clothes, toiletries and other assorted personal items in the room. After renting the room, you leave to run errands and intermittently spend approximately two to three hours in the room. The police receive an anonymous tip that drugs are being sold out of your room. Your companion rented the room at approximately 12:00 p.m. and the search occurred at approximately 9:00 p.m. When police burst into the room, they find drugs inside and arrest you for various drug offenses. At the time of the arrest, you had a key to the hotel room in your pocket. The police had neither a search warrant nor consent to enter the room. The critical question after *Carter* is: do you have a reasonable expectation of privacy in the room or will you be unable to contest the validity of the search because you fail the *Rakas-Carter* test?

Partially modified to fit within my analysis, this is what transpired in Wichita, Kansas on the night of January 11, 1997.¹⁰⁶ Appealing the denial of his motion to suppress in the District Court, Michael Gordon sought a reversal in the Circuit Court of Appeals.¹⁰⁷ Applying *Carter* to the facts of the case, the appellate court found that Gordon had not established an expectation of privacy in the hotel room.¹⁰⁸ Citing the fact that Gordon never claimed the room key found in his pocket was his, the court reasoned that "'mere physical possession or control of property' . . . [is] insufficient to establish a reasonable expectation of privacy."¹⁰⁹ In addition, although Gordon testified that he had given his companion money to rent the room, he gave no testimony confirming his asserted

¹⁰⁶ See *United States v. Gordon*, 168 F.3d 1222, 1224 (10th Cir. 1999).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1226-27.

¹⁰⁹ *Id.* at 1227 (citations omitted).

co-occupancy.¹¹⁰ The court speculated that Gordon may have merely owed or loaned his companion the money to rent the room, and was not staying there as her guest.¹¹¹ Further, Gordon failed to establish that the clothes or toiletries belonged to him; the court again surmised the items could have belonged to another male occupant.¹¹² Analogizing to the facts of *Carter*, the court emphasized that the defendant had confessed he had been in the hotel for an illicit "business" purpose: that is, to deal drugs.¹¹³ Finally, the court stressed the fact that, at best, Gordon had been in the hotel room for a total of two hours.¹¹⁴

The keys to the kingdom will not, in short, give you a sufficient interest in the dwelling. Employing *Rakas*'s language, it would be fair to assume that a short-term, commercial "guest *qua* guest" will never have an expectation of privacy inside a dwelling. And that means that the Court has indeed, as Justice White put it in *Rakas*, declared "open season" on dwellings. Though some may consider this conclusion hyperbolic, I believe that time will confirm my dismal assessment. In fact, both *Salemme* and *Gordon* demonstrate how the government may successfully invoke *Carter*'s logic to justify warrantless searches of dwellings.

Furthermore, what those two cases reveal is that *Carter* may not only invite abuses by law enforcement but also encourage intentional misconduct by police. Indeed, *Carter* seriously undermines the rationale of the Court in *Steagald v. United States*.¹¹⁵ In *Steagald*, the police had no search warrant for Steagald's home but entered his home based on an arrest warrant for a fugitive whom they had some cause to believe was in the home.¹¹⁶ The Court held that an arrest warrant did not sufficiently protect the Fourth Amendment rights of third parties not named in the warrant when their homes are searched without either consent or exigent circumstances.¹¹⁷

It is rather intriguing that the government argued to the Supreme Court that Steagald had no expectation of privacy in the searched home. Justice Marshall, writing for the majority, rejected the government's claim because it had taken diametrically opposed positions in the lower courts, had "acquiesced in contrary findings by those courts," and had "failed to raise such questions in a timely fashion during the litiga-

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ 451 U.S. 204 (1981).

¹¹⁶ *Id.* at 211-13.

¹¹⁷ *Id.* at 213-14.

tion."¹¹⁸ Imagine the incentive the government would have today in raising the issue. If *Steagald* was merely a short-term, commercial guest under *Carter*, he would not be able to invoke the benefits of the Fourth Amendment's exclusionary rule. The government, employing an arrest warrant, would have entered without a search warrant and reaped the benefit of a large cache of drugs: forty-three pounds of cocaine to be precise.¹¹⁹

More important, law enforcement has an incentive to violate a homeowner's privacy, and it is this incentive that provided the impetus for *Steagald's* rationale. Justice Marshall maintained that if the police could search a third party's home for the subject of an arrest warrant, a dangerous invitation to the police would arise. As he eloquently argued, "[a]rmed solely with an arrest warrant for a single person, the police could search all the homes of that individual's friends and acquaintances."¹²⁰ *Carter's* rationale goes beyond what the *Steagald* majority contemplated and sought to forestall. To borrow from *Steagald's* language, armed with nothing but perhaps a hunch that criminal activity may occur inside a particular dwelling, law enforcement may enter the premises as long as they either know beforehand or learn after the search that a third party who enters the dwelling is merely a short-term commercial guest who will not be able to invoke Fourth Amendment safeguards. In the process, law enforcement agents are free to invade the security of the occupant, whose only remedy is the Fourth Amendment *if* she is involved in criminal activity. In the meantime, her privacy has been breached without the substantive justification the Fourth Amendment requires.

Paradoxically, Justice Scalia's acerbic concurring opinion in *Carter* is oblivious to the pragmatic ramifications of the Court's Fourth Amendment jurisprudence. Deriding the *Katz* standard as "fuzzy,"¹²¹ and extolling his "textual" analysis, Justice Scalia observes that the *Katz* expectation of privacy has been perverted to fit the Justices' individual conceptions of what the Fourth Amendment should protect. It is a "self-indulgent" test that in his words "has no plausible foundation in the text of the Fourth Amendment."¹²² In short, reasonable expectations of privacy "bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable."¹²³

¹¹⁸ *Id.* at 209.

¹¹⁹ *Id.* at 207. This is precisely what happened in *Steagald*. The Supreme Court, however, reversed the lower courts' denials of *Steagald's* motion to suppress and held that *Steagald's* Fourth Amendment rights had been violated. *Id.*

¹²⁰ *Id.* at 215.

¹²¹ *Minnesota v. Carter*, 525 U.S. 83, 91 (1998) (Scalia, J., concurring).

¹²² *Id.* at 97.

¹²³ *Id.*

Should Justice Scalia's criticism be taken seriously when there is preciously little left of "reasonable expectations of privacy" that the Court is prepared to recognize? Perhaps Justice Scalia just cannot tell when he has won. It is more elegant, I suppose, to revel in "history" and "text" than it is to rely on a "fuzzy" standard. As Thomas Jefferson would say, Justice Scalia views the Constitution "with sanctimonious reverence," as the "ark of the covenant," "too sacred to be touched." As for Jefferson, he stated well after the founding that what the Framers of the Constitution lacked was the "experience of the present, "and that "forty years of experience in government is worth a century of book-reading" ¹²⁴ Despite Justice Scalia's rejoinder in *Carter*, the American people are surely less "secure" in their homes when the opinion's implications are fully explored. A member of a cultural elite without knowledge of the "real world" of criminal law, however, is hardly expected to appreciate the nuances of his "lofty" opinions. Rather, Justice Scalia's solution is to depend on the whim of the majorities (legislatures) that Madison so viscerally distrusted.

Let us move from Justice Scalia back to President Clinton. During the course of his deposition in the Paula Jones case, the President revealed the paranoia he felt due to the outlandish accusations the "far right" had leveled in the course of the 1996 presidential campaign. ¹²⁵ This prompted his vain attempt to keep a certain modicum of privacy in the Oval Office. The President stated that, "[t]here are no curtains on the Oval Office, there are no curtains on my private office, there are no curtains or blinds that can close the windows in my private dining room There is a peephole in the office that George Stephanopoulos and then Rahm Emanuel occupied" ¹²⁶ The President was responding to Ms. Jones' attorney's suggestion that he conducted the affair with Monica Lewinsky in the kitchen behind the Oval Office. ¹²⁷ Arguably, this was the only private "sanctuary" for the President.

Mere curtains, as we have seen, would not have kept the President's behavior from the glare of public scrutiny. Any "opening" would have precluded such a claim. Even if sealed, the curtains would not have protected the President's privacy if Lewinsky had decided to cooperate with the Office of Independent Counsel. The President, a lawyer trained at one of the premier legal institutions in the United States, could scarcely be faulted for not divining that the United States Supreme Court would render curtains, in some circumstances, superfluous to a claim for pri-

¹²⁴ Quoted in JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 367 (1996).

¹²⁵ See JEFFREY TOOBIN, A VAST CONSPIRACY 222 (1999).

¹²⁶ *Id.*

¹²⁷ *Id.*

vacy. In short, the Supreme Court, in its august wisdom, has simply decided that some matters, no matter how "private," are not worthy of constitutional protection.

From a normative standpoint, *Carter* provides an answer to Professor Amsterdam's prescient query regarding "how tightly the Fourth Amendment permits people to be driven back into the recesses of their lives by the risk of surveillance."¹²⁸ Dissenting in *Riley*, Justice Brennan believed that that was the true issue in the case.¹²⁹ That case merely involved the curtilage rather than the dwelling.¹³⁰ Ultimately, *Carter* takes the analysis one step further by reaching the home. The answer to Professor Amsterdam's question is deceptively simple: the Fourth Amendment now requires that people tightly recede into the interior of their homes and carefully monitor whom they invite into that deep recess.

2. *Forget the Car and the Streets: Privacy is Not Part of the Equation*

Professor James J. Tomkovicz wrote an article in 1992 in which he foresaw that the Court's opinion in *California v. Acevedo*¹³¹ augured the demise of the warrant requirement.¹³² His prediction, as we have seen in *Carter*, has been fulfilled to a great degree. But another case decided in the same term as *Carter* complements *Acevedo*'s premise. In *Wyoming v. Houghton*,¹³³ Justice Scalia, writing for the majority, extended the scope of the vehicle exception to the warrant requirement. Reversing the Wyoming Supreme Court, the *Houghton* majority held that police officers with probable cause to search an automobile "may inspect passengers' belongings found in the car that are capable of concealing the object of the search."¹³⁴ In the process, the Court upheld a search of the purse belonging to a car passenger who was not suspected of criminal activity. That is, the *Houghton* majority sanctioned the search of a highly personal "repository"¹³⁵ belonging to a person whom they had no

¹²⁸ Amsterdam, *supra* note 94, at 402.

¹²⁹ 488 U.S. at 466.

¹³⁰ *Id.*

¹³¹ 500 U.S. 565 (1991).

¹³² James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103 (1992).

¹³³ 526 U.S. 295 (1999).

¹³⁴ *Id.* at 307.

¹³⁵ In a concurring opinion, Justice Breyer recognized that purses are "special containers" that harbor personal items in which the owner would have a reasonable expectation of privacy. He felt constrained, however, to side with the majority by the force of precedent. *Id.* at 308 (Breyer, J., concurring). Breyer's point of distinction was not the type of container but rather "the fact that it was separate from the person." *Id.*

probable cause or reasonable suspicion to believe was involved in criminal activity.

Distinguishing *United States v. Di Re*,¹³⁶ in which the Court held that probable cause to search a car did not extend to a body search of the passenger, Justice Scalia made the outlandish claim that “[s]uch traumatic consequences are not to be expected when the police examine an item of personal property found in a car.”¹³⁷ How divorced must Justice Scalia be from reality? Or must we ascribe this statement to outright disingenuousness? Would a passenger in a car not suffer trauma when the personal items of her purse are revealed to a perfect stranger, perhaps of the opposite sex? Would rummaging through such items as personal letters, prescription drugs, birth-control pills, or other “private” items not cause “traumatic consequences”? Or is the protection of the Fourth Amendment dependent upon the passenger taking the purse out of the car and keeping it attached to her person?

Notice the utter disconnect with reality that the *Houghton* majority displays. Would the police officer who is going to search the car permit the passenger to exit the car with her purse? More likely, to ensure his or her safety, the officer would prohibit the passenger from taking the purse outside the vehicle.¹³⁸ At that point, the purse, briefcase, or wallet would remain in the car subject to being searched if the object of the search could be located therein. From a practical standpoint, the Court would probably not prevent the police officer from removing the item to ensure his or her safety. That being the case, *Di Re*'s holding becomes a dead letter.

Even if the Court were to decide that police officers could not, consistent with a need to protect themselves, order passengers with personal items to leave the items inside the vehicle, defendants are unlikely to succeed in convincing trial courts that they unsuccessfully attempted to exit the car with their personal effects. Consider the case of *Idaho v. Newsom*.¹³⁹ Newsom was the passenger in a car stopped for a minor traffic violation. A search revealed outstanding felony warrants for the driver.¹⁴⁰ The arresting officer asked Newsom to get out of the vehicle. At the suppression hearing, the testimony was conflicted on whether she sought to exit the car with her purse. According to Newsom's testimony, she attempted to get out of the car with her purse, but the officer instructed her to leave the purse in the vehicle. The officer testified that

¹³⁶ 332 U.S. 581, 586–87 (1948).

¹³⁷ *Houghton*, 526 U.S. at 303.

¹³⁸ Indeed, this is precisely what occurred in *State v. Steele*, 2000 S.D. 78, available at 2000 S.D. LEXIS 81 (2000).

¹³⁹ 1997 Ida. App. LEXIS 116 (Idaho Ct. App. 1997), *rev'd* 1998 Ida. LEXIS 143 (1998), *cert. denied*, 526 U.S. 1158 (1999).

¹⁴⁰ *Id.* at 1–2.

Newsom left the car without the purse. A search of the purse revealed a small blue coin purse that contained methamphetamine.¹⁴¹ Who will win the swearing match between the police officer and the defendant? The answer is obvious: the police officer will win the match ninety-nine percent of the time.¹⁴²

A passenger in a car takes the risk, therefore, that whatever personal container she places inside the vehicle will be searched if the police develop probable cause to search the car. As the facts in *Houghton* demonstrate, a mere traffic violation could place a passenger's personal items at risk of being searched. In *Houghton*, the driver of the car was stopped for speeding and driving with a faulty brake light.¹⁴³ The police officer who effected the stop noticed a hypodermic syringe in the driver's pocket and asked him why he had it, which elicited the candid response, "to take drugs."¹⁴⁴ At that point, the officer had probable cause to search the car and Ms. Houghton's purse suddenly lost its character as a "private" repository.

Furthermore, the police need not have probable cause to search the vehicle in order to search the personal items belonging to the passengers. Rather, the search-incident-to-arrest exception to the warrant requirement obviates the need for probable cause to search the car's passenger compartment under *New York v. Belton*¹⁴⁵ and *United States v. Robinson*.¹⁴⁶ That brings us to the proposition that police may arrest the driver of the vehicle for a minor traffic offense and then proceed to thoroughly search the passenger compartment, including a passenger's private repositories, without any probable cause whatsoever to believe any items of criminality will be found inside the car or the purse. This authority is predicated upon the legal fiction the Court created in *Belton*: the passenger compart-

¹⁴¹ *Id.* at 2.

¹⁴² In connection with the *Miranda* warnings, Justice Souter has confirmed this truism. In *Davis v. United States*, he noted, "when an inculpatory statement has been obtained as a result of an unrecorded, incommunicado interrogation . . . officers rarely lose 'swearing matches' against criminal defendants at suppression hearings." 512 U.S. 454, 474 n.7 (1994) (Souter, J., concurring). Of course, the same holds true of an encounter in the street witnessed only by the police and the suspect. The trial judge must decide whom she will believe, and the natural inclination is to credit the officer's testimony rather than that of the defendant. In reversing the lower court opinion, however, the Idaho Supreme Court saw the facts of *Newsom* in a different vein. It credited the defendant's testimony that the second officer at the scene requested she leave the purse in the car and that the officer merely testified that the passenger left the vehicle without her purse. Therefore, her testimony to the effect that she involuntarily left the purse in the car was "undisputed." *Idaho v. Newsom*, 1998 Ida. LEXIS 143, at 6-7.

¹⁴³ *Houghton*, 526 U.S. at 297.

¹⁴⁴ *See id.* at 298.

¹⁴⁵ 453 U.S. 454 (1981) (holding that a search incident to a valid arrest extends to the interior passenger compartment of the car and to any open or closed containers, including the glove compartment, but does not extend to the trunk).

¹⁴⁶ 414 U.S. 218 (1973) (extending the search incident-to-arrest exception to misdemeanor non-evidentiary traffic offenses).

ment of the vehicle will be presumed to be within the immediate control of a recent occupant of the car.¹⁴⁷

Indeed, as an appellate court has aptly noted, “[n]othing in . . . *Belton* requires that the area and containers searched within the reach of the arrestee must be the personal property of the arrestee.”¹⁴⁸ Given the “bright-line” rule rationale undergirding *Belton*, it is consistent not to circumscribe the area of the search based on the ownership of the container.¹⁴⁹ *Houghton*’s reasoning amply supports this conclusion.

We are, however, confronted with a putative irony: the Rehnquist Court’s implied authorization of unwarranted searches of vehicles when police officers issue citations for minor traffic violations in lieu of an arrest. Refusing to broaden *Belton* and *Robinson*’s reach, the Court held in *Knowles v. Iowa*¹⁵⁰ that a police officer may not conduct a “full search” of the car if he decides to issue a citation instead of arresting the driver.¹⁵¹ But the Court left open an important question: whether the police may arrest a motorist for a minor traffic offense and thus conduct a full search of the vehicle under the search-incident-to-arrest exception to the warrant requirement. Herein lies the key to *Knowles*’s force and effect: either it constitutes a genuine safeguard or it is merely a paper tiger.

The *Knowles* Court provided a strong hint that the opinion was not meant to constrain a state’s discretion in selecting the range of arrestable offenses. The Iowa statute at issue in *Knowles* permits police officers to arrest a motorist upon probable cause to believe she has violated “any traffic or motor vehicle equipment law.”¹⁵² Justice Rehnquist made it clear that *Knowles* was not contesting whether the statute could be “lawfully applied,” thus skirting the issue whether a jurisdiction may, consistent with the Fourth Amendment, permit police officers to arrest motorists for minor traffic or motor vehicle equipment violations.¹⁵³ Given the emphatic tone with which Justice Rehnquist noted *Knowles*’s failure to assail the Iowa statute’s validity, it is safe to conclude that the *Knowles* decision is indeed a paper tiger.

The Court’s opinion in *Atwater v. Lago Vista* unmistakably confirms that *Knowles* is a paper tiger.¹⁵⁴ Writing for the majority, Justice

¹⁴⁷ This is the rationale adopted by the South Dakota Supreme Court in *State v. Steele*, 2000 S.D. 78, 2000 S.D. LEXIS 81.

¹⁴⁸ *Idaho v. Newsom*, 1997 Ida.App. LEXIS 116 at 7 (citations omitted).

¹⁴⁹ *See id.*

¹⁵⁰ 525 U.S. 113 (1998), *as amended* October 21, 1999.

¹⁵¹ *Id.* at 114.

¹⁵² *Id.* at 115 (citing IOWA CODE ANN. § 321.485(1)(a) (West 1997)).

¹⁵³ *Id.* at 116.

¹⁵⁴ *Atwater v. Lago Vista*, No. 99-1408, 2001 U.S. LEXIS 3366 (U.S. April 24, 2001), *to be published* at 532 U.S. 318.

Souter observed that "[i]f an officer has probable cause to believe that an individual has committed a *very minor* criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."¹⁵⁵ If the arresting officer in *Knowles* had opted to effect an arrest rather than issuing a citation to the offender, then the search incident to the custodial arrest would have been valid.

Coupled with *Whren's* directive that probable cause is an objective concept and that the subjective motivations of a police officer, however malevolent, are irrelevant to Fourth Amendment analyses,¹⁵⁶ *Knowles* bodes ill for a citizen who dares to accept a ride as a passenger in a car and bring a personal item with her. She must assume the risk that, upon the driver's commission of any traffic violation, her privacy interests in a personal item vanishes. Only in those jurisdictions not following Iowa's scheme is any motorist, whether driver or passenger, protected from a search and seizure of a private repository upon a violation of a minor traffic infraction. As the petitioners argued in *Whren*, "'the multitude of applicable traffic and equipment regulations' is so difficult to obey perfectly that virtually everyone is guilty of a violation, permitting the police to single out almost whomever they wish for a stop."¹⁵⁷ An expansive statute like Iowa's radically expands *Whren's* scope by allowing a search and seizure of the car and personal items within it, affording police officers unfettered discretion in determining whom they will arrest so that they can search the car. Racial profiling and invidious discrimination would be given full rein under this insidious scheme. But the Court's remedy for this ill is the Equal Protection Clause, not the Fourth Amendment.¹⁵⁸ Such a remedy is not adequate within the criminal justice context.

More revealing is Justice Scalia's language in *Whren* suggesting that the minor infractions for which the petitioners were stopped could potentially lead to an arrest. Citing *Robinson*, Justice Scalia noted that "a traffic-violation arrest (*of the sort here*) would not be rendered invalid by the fact that it was a 'mere pretext for a narcotics search.'"¹⁵⁹ What Justice Scalia implied was that a jurisdiction would be free to make such minor offenses as not giving a signal when turning, driving too fast for conditions, and not paying attention to the operation of the vehicle,¹⁶⁰

¹⁵⁵ *Id.* at *63 (emphasis added).

¹⁵⁶ *Whren*, 517 U.S. 806, 813 (1996) (asserting that the proper remedy for selective enforcement of traffic or criminal statutes based on individual racial factors is the Equal Protection Clause, not the Fourth Amendment).

¹⁵⁷ *Id.* at 818.

¹⁵⁸ *Id.* at 813.

¹⁵⁹ *Id.* at 812-13 (emphasis added).

¹⁶⁰ These three traffic violations purportedly justified the stop of petitioners by plainclothes police officers in *Whren*. See *id.* at 810 (citations omitted).

arrestable offenses. If that is the case, then *Knowles* is a dead letter, a mere blip on the screen that permits the police to search vehicles and their contents at will.

Suspend your disbelief for a moment while we return to the affair that nearly brought down the President of the United States. Imagine that the President and Lewinsky sought a different venue for their sexual escapades. The President managed to shake off the Secret Service and get away from the White House with Lewinsky in a custom van (belonging to the Secret Service) with airtight privacy and a full-length bed located toward the back of the vehicle. They proceeded to a quiet, suburban, Washington, D.C. neighborhood in the early hours of the morning (around 1 to 2 a.m.), where they park the vehicle. Lewinsky is sloppy in parking the van, letting one of the tires protrude onto the sidewalk.

The "alien" van arouses the suspicion of a curious and concerned neighbor, who calls the police because she believes potential burglars may be ready to strike the neighborhood. Two police officers respond to the scene, spot the van, and notice that it is parked in violation of a city ordinance that prohibits any part of a vehicle from resting on the sidewalk. One of the officers taps the side door of the van to get the occupant's attention. Lewinsky nervously responds by opening the door and asking the officers how she can assist them. One officer asks Lewinsky what she is doing in the neighborhood and immediately notices there is a bed in the back of the van and a person, who looks like the President, in the back of the van. Lewinsky is so startled that she fails to respond to the officers' inquiry.

Concerned not only with the safety of the neighborhood, but also with the well-being of the President, and his safety as well as that of his partner, the officer requests identification from Lewinsky, shines his flashlight inside the van, and draws his service revolver. Lewinsky fumbles around the van looking for identification while the President tries to conceal his face from the officers. After Lewinsky fails to produce the identification, the officer requests that she and the President exit the van. Startled to see the President, the officer asks if he has been harmed. The President, embarrassed by the ordeal, assures the police officer he is perfectly fine. At this point, one officer enters the van without consent and finds Lewinsky's purse. Inside the purse, the officer looks for Lewinsky's identification and in the course of doing so inadvertently comes across love letters she has written to the President in which she discusses their "affair."

Is the officer's search legal? The facts I have just set forth, fictional though they may be in regard to the President and Lewinsky, are adapted

from a California case, *People v. Hart*.¹⁶¹ The California appellate court held that the police were justified in going into the van because the occupant had not found identification, though she had spent several minutes unsuccessfully looking for it, and the officers had a right to search the van for the identification and for weapons.¹⁶² Quoting from *Houghton*, the majority said the officer could look for the identification in the purse because "the critical element in a reasonable search is not that the owner of the property is suspected of crime but that there is reasonable cause to believe that the specific 'things' to be searched for and seized are located on the property to which entry is sought."¹⁶³

While the *Hart* court may have stretched *Houghton* to its outer limits, the result the majority reached is not implausible. In *Houghton*, the police had probable cause to believe they might find contraband inside the car. The police in *Hart*, though they had no initial probable cause, did think it suspicious that the defendant had no identification and could not offer a reasonable explanation for her presence in the neighborhood. They thus had a reasonable basis for searching those places where the identification might be located: that is, the purse. Of course, the majority's premise is founded on the notion that if a traffic violation occurred (parking on the sidewalk), the officer was justified in asking the presumed driver for identification. Indeed, the California Vehicle Code permits the police to detain and cite a person for violating the code.¹⁶⁴

Aside from *Houghton*, the police may have searched the van if the jurisdiction, like Iowa, had afforded officers the discretion to arrest the defendant for a minor traffic infraction. Then, the police could search not only the purse, but also any containers, open or closed, including the glove compartment, within the van. Since the entire van constitutes the "passenger compartment," *Belton* and *Robinson* would place no restrictions on the officer's ability to search the vehicle or its contents. Notice again how probable cause to search the van is irrelevant under the exception for searches incident to a valid arrest. A trivial violation of the traffic code gives police unfettered authority to search the intimate contents of "private repositories." Let the citizen beware lest such private effects suddenly metamorphose into public ones when placed inside a "not so private" vehicle.

The final blow to Fourth Amendment safeguards for the "people" comes to us in the *Wardlow*¹⁶⁵ opinion. It is fitting that the opinion was issued just twelve days after the arrival of the new millennium. Portend-

¹⁶¹ 86 Cal. Rptr. 2d 762 (App. Div. 1999).

¹⁶² *Id.* at 769.

¹⁶³ *Id.* at 768, quoting *Wyoming v. Houghton*, 526 U.S. 295.

¹⁶⁴ *Id.* at 766 (citations omitted).

¹⁶⁵ 528 U.S. 119 (2000).

ing a narrow perspective on Fourth Amendment protections, the decision brings to full life Professor Maclin's prophetic 1990 article, which was entitled *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*.¹⁶⁶ Professor Maclin emphasized the contradiction between the ascending value of privacy in the Court's interpretation of the Fourth Amendment and its devaluation of liberty "to walk the streets" and travel "free from arbitrary government intrusion."¹⁶⁷ Indeed, the freedom of "locomotion" and "personal integrity" are no longer simply jeopardized; they are on the verge of extinction in the wake of *Wardlow*.

The *Wardlow* majority sanctioned the detention of an individual who flees upon sight of the police in a "high crime area."¹⁶⁸ Rejecting the twin propositions that mere "unprovoked flight" at the sight of the police or presence in a high crime area by itself justified detention of an individual in the streets, the Court unanimously opted for a "totality of the circumstances" approach to the issue whether reasonable suspicion exists to detain a citizen in public.¹⁶⁹ In combination, however, these two factors add up to sufficient cause to interfere with the freedom of a citizen to run through the public streets or places. Unfortunately, this "fuzzy" standard, to borrow Justice Scalia's phrase in *Carter*, leaves many gaps for the police to find cause to detain.

Let us take one common example. The Supreme Court has identified airports in large metropolitan areas as major sites for drug trafficking.¹⁷⁰ Does *Wardlow* mean that if a citizen begins running through the concourse in order to purchase a ticket, check-in, or get to the departure gate, and simultaneously makes eye-contact with a uniformed police officer, the officer will have reasonable suspicion to detain that individual against her will? Presumably, the two determinative factors at issue in *Wardlow* are present here: unprovoked flight and a "high crime" area. Aside from a mere consensual encounter with a police officer that does not rise to the level of a "seizure" for Fourth Amendment purposes, now the police would have the right to forcibly detain the individual for questioning.

Imagine Lewinsky running through the Washington, D.C. or Los Angeles airport and being detained by a uniformed police officer who is working under the aegis of the Office of Independent Counsel. He be-

¹⁶⁶ Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258 (1990).

¹⁶⁷ *Id.* at 1259. Professor Maclin argued that the Court's misplaced emphasis on privacy ignored the otherwise discrete but important values of locomotion and personal integrity. *Id.* at 1327-33.

¹⁶⁸ *Wardlow*, 528 U.S. at 124.

¹⁶⁹ *Id.* at 136.

¹⁷⁰ See, e.g., *United States v. Sokolow*, 490 U.S. 1 (1989); *United States v. Mendenhall*, 446 U.S. 544 (1980).

gins questioning her about her actions. She nervously fumbles for identification in her purse. While attempting to retrieve her identification, a paperback copy of a book given to her by the President falls to the floor, showing the inside jacket signed by the President. What a find for Starr's investigation into the President's sexual activities with Lewinsky! Indeed, to the extent the officer would have reasonable suspicion to stop Lewinsky at the outset, rather than relying on the consensual nature of the encounter,¹⁷¹ he might also be able to articulate grounds to frisk her, as well as her belongings, for weapons pursuant to *Terry v. Ohio*.¹⁷²

Wardlow suggests that the police officer might be justified in searching through Lewinsky's purse for weapons. In *Wardlow*, during a patdown search for weapons, the officer who ultimately arrested Wardlow "squeezed the bag respondent was carrying and felt a heavy, hard object similar to the shape of a gun. The officer then opened the bag and discovered . . . a handgun."¹⁷³ Though the Supreme Court did not grant certiorari on the frisk issue in *Wardlow*,¹⁷⁴ had it done so it might have been inclined to support the officer's decision to frisk Wardlow's bag.

By combining flight from a police officer and presence in a "high crime area" as factors giving rise to reasonable suspicion to seize an individual, the *Wardlow* Court gave prominence to elements that are inherently ambiguous. As I have demonstrated in the context of the Clinton-Lewinsky affair, many Americans could be subjected to seizures if the mere fortuitous combination of these two elements provided justification to seize citizens in public places. A host of reasons, as Justice Stevens points out in his *Wardlow* dissent, may prompt an individual to run: "to catch up with a friend a block or two away, to seek shelter from an impending storm, to arrive at a bus stop before the bus leaves, to get home in time for dinner, to resume jogging after a pause for rest, to avoid contact with a bore or a bully, or simply to answer the call of nature . . ."¹⁷⁵ Of course, any of these reasons "may coincide with the arrival of an officer in the vicinity."¹⁷⁶

More importantly, *Wardlow* is bound to adversely affect minority persons' "right to locomotion." Negative encounters with the police, racial profiling, and residing in "high crime areas" for socioeconomic reasons render minorities especially vulnerable to *Wardlow*'s facile

¹⁷¹ The standard for a Fourth Amendment seizure was set forth in Justice Stewart's plurality opinion in *Mendenhall*. A consensual encounter between an individual and the police becomes a seizure when a show of official authority would lead a reasonable person to believe she was not free to leave. See *Mendenhall*, 446 U.S. at 554.

¹⁷² 392 U.S. 1 (1968).

¹⁷³ *Wardlow*, 528 U.S. at 122.

¹⁷⁴ *Id.* at 124 n.2.

¹⁷⁵ *Id.* at 128-29 (Stevens, J., dissenting).

¹⁷⁶ *Id.*

reach.¹⁷⁷ Either blithely or disingenuously ignorant of these implications, the *Wardlow* majority continues a trend established by *Whren*: the Fourth Amendment has no relevance in ferreting out potentially invidious discrimination in law enforcement. Rather, some other constitutional remedy, such as the Equal Protection Clause, is the appropriate avenue for redress.

D. "NO FETISH FOR PRIVACY": THE SUPREME COURT IN THE NEW MILLENNIUM

Thirty-four years after *Katz* and Alan Westin's pathbreaking book, *Privacy and Freedom*, we find a Supreme Court openly contemptuous of the notion of privacy embodied in these two tracts. Justice Scalia has expressed his disdain for *Katz*; other members of the Court profess adherence to its fundamental tenets while undermining the very principle *Katz* fostered. However the Court might wish to rationalize its drift, it cannot escape the reality that its definition of privacy would not have guarded the most private consensual sexual encounter, between the President of the United States and a White House intern, from the public glare.

Judge Starr does not, therefore, bear the sole responsibility for what Orlando Patterson classified as the "wanton" invasion of the President's privacy. It is, rather, the Rehnquist Court's evisceration of the value of privacy as an essential ingredient of the Fourth Amendment which stands as the metaphor for the Starr investigation and its revelation of the lurid sexual details of the President's sexual life. The pendulum of privacy had swung markedly in the course of the three decades between *Katz* and the Clinton-Lewinsky affair. Privacy is not a value the Supreme Court collectively holds in high esteem, *Katz's* continued validity to the contrary notwithstanding. Perhaps an analogy to the *Miranda* doctrine is apt for *Katz*: privacy as a Fourth Amendment value is either on life support, dead, or irrelevant.¹⁷⁸

There are those who would question whether privacy ought to be the Fourth Amendment's principal concern. Justice Scalia, for example, has unequivocally voiced disdain for the *Katz* approach and would perhaps return to the pre-*Katz* scheme in which the Amendment protects property rather than privacy. In a recent article, Professor William Stuntz has called for a rejection of privacy as the lodestar of Fourth Amendment jurisprudence because such a perspective unduly advantages the rich and adversely affects the poor and blacks.¹⁷⁹

¹⁷⁷ *Id.* at 132-33.

¹⁷⁸ See Garcia, *Is Miranda Dead*, *supra* note 87.

¹⁷⁹ William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265 (1999).

The crux of Professor Stuntz's argument is that "[t]he targets of police searches and seizures tend to be relatively poor."¹⁸⁰ Accordingly, "[p]rivacy is an interest whose importance grows with one's bank account, or one's square footage."¹⁸¹ Professor Stuntz ends the syllogism by arguing that since most searches and seizures occur "on the street, far from the world of bedroom closets and telephone conversations," the poor and minorities have little protection from the privacy safeguarded by the Fourth Amendment.¹⁸² It is difficult to disagree with such an obvious proposition. Where Professor Stuntz's analysis misses the mark is in its blind acceptance of the proposition that the "middle class" still enjoys wide protection from the privacy rationale underlying *Katz*.

Stuntz observes that "homes are almost the only place where the warrant requirement remains meaningful."¹⁸³ I have shown that post-*Carter*, the home is no longer subject to the protection of the warrant requirement if a "short-term, commercial" visitor happens to be invited by the host inside the premises. Presumably, this principle remains regardless of the "square footage" of the home. Indeed, the *Salemme* case demonstrates how an affluent "mob" house can be safely invaded without the benefit of a warrant if the police merely wish to collect evidence against "mobsters" who have, at most, a "fleeting" and obviously commercial tie to the home. The same principle would hold sway in a house obtained with illicit profits from the drug trade in an upper middle-class neighborhood. Police officers have an incentive after *Carter* to infringe upon the privacy of the home without a warrant in the hope of at least securing evidence against those involved in the trade who are "short-term" guests. The *Carter* rationale extends beyond the poor, two-bit dealer; it also covers the high-level operative or, potentially, the kingpin of a drug organization.

Another major flaw underlies Stuntz's argument. Contrary to his assertion, "middle class" bank accounts are not necessarily safe from government scrutiny. Under its "assumption of risk" analysis, the Court has determined that if we divulge information to a third party, such as a bank, even with the expectation that it would not be revealed to other parties, we have forsaken our privacy interest in that information.¹⁸⁴ Given the potential and vast range of modern technology, moreover,

¹⁸⁰ *Id.* at 1289.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 1269.

¹⁸⁴ See, e.g., *Smith v. Maryland*, 442 U.S. 735, 735-36 (1979) (no expectation of privacy in telephone numbers dialed because they are conveyed to a third-party, i.e., the telephone company); *United States v. Miller*, 425 U.S. 435 (1976) (no expectation of privacy in bank accounts even if the information is divulged with the assumption that the third party will not betray the confidence).

there is no telling how much the privacy of a home may be subject to invasion by the police regardless of its "square footage."

The telling aspect of Professor Stuntz's article, and the rejoinders by two prominent criminal justice scholars,¹⁸⁵ is the assumption that privacy is still protected despite the Court's eradication of *Katz*'s spirit and letter. As to its class bias, it is obvious that to the extent the Court treats privacy as a scarce commodity it also ignores the class implications of its decisions. When privacy as a Fourth Amendment value recedes almost to the point of obliteration, it becomes difficult to sustain the argument that it protects even the middle and upper classes. We must ask the most powerful, upper-middle class person in the United States, President William Jefferson Clinton, whether he could have expected privacy in the White House when he was having an affair with a young, upper-middle-class intern. Mr. President, I am afraid to tell you that Chief Justice Rehnquist and his Court just might answer that you may have expected privacy, but Lewinsky would not (at the very least for the first encounter); and there, vicariously, goes any right to privacy you might have if she decides to speak to law-enforcement agents. And Professor Stuntz, the Court does indeed evince a class-bias in its Fourth Amendment jurisprudence. I would not, however, be confident of your ability to convince either the distinguished sociologist Orlando Patterson or the President of the United States of your argument.

II. "TERROR IN ROOM 1012"

Another lesson we collectively learned as a nation during the impeachment saga is the degree to which any person may become the victim of law enforcement tactics designed to pressure a suspect to confess her crime. The experience also reminds us that the right to counsel embodied in the Sixth Amendment is a tenuous privilege.¹⁸⁶ Lewinsky tells of the horror she faced as she unwittingly confronted FBI agents and Ken Starr's deputies at the Ritz-Carlton Hotel in Arlington, Virginia.¹⁸⁷ Her biographer, Andrew Morton, describes that grueling twelve-hour session with Starr's deputies as the "Terror in Room 1012."¹⁸⁸

Two leading commentators diverge on the issue of whether Starr's subordinates violated constitutional tenets during the interrogation session. Judge Posner believes that had Lewinsky made incriminating state-

¹⁸⁵ Louis Michael Seidman, *Making the Best of Fourth Amendment Law: A Comment on The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1296 (1999); Carol S. Steiker, "How Much Justice Can You Afford?"—A Response to Stuntz, 67 GEO. WASH. L. REV. 1290 (1999).

¹⁸⁶ See Garcia, *supra* note 6.

¹⁸⁷ ANDREW MORTON, *MONICA'S STORY* at 219–41 (1999).

¹⁸⁸ *Id.* at 175.

ments during the episode at room 1012, they might have been excluded from evidence as "having been obtained by coercion."¹⁸⁹ But even if that had occurred, Posner believes the tactics of Starr's deputies constituted at most "harmless error."¹⁹⁰ On the other hand, Jeffrey Toobin contends that "Lewinsky's treatment in the hotel room was entirely appropriate for an important witness in an unfolding criminal investigation."¹⁹¹ Toobin is, I believe, just plain wrong. Judge Posner misses the point through his hypertechnical, myopic, and consequentialist philosophy characteristic of the Rehnquist Court. In the final analysis, however, these two distinguished legal analysts fail to acknowledge how "fair-process" is no longer part of the "criminal justice system." Rather, the Clinton-Lewinsky affair is redolent of an earlier time in the criminal process where the emphasis lay on getting results at any cost. Therefore, it is not surprising that a jurist and a former prosecutor ignore the deleterious impact of judicial decisions that invite law enforcement agents to evade legal constraints in ferreting out crime. Indeed, the Court has encouraged deception, lying, and implicitly, coercion, in the service of the finality of a criminal conviction. Perhaps the new apothegm for the system ought to be the "criminal system" without the "justice" appended to it.

Let us delve into the "horror in room 1012" with two questions: whether law enforcement agents did employ coercive tactics that would have violated Lewinsky's right against self-incrimination; and the related question whether the agents subverted either the Sixth Amendment right to counsel or ethical, self-imposed proscriptions against dealing with a suspect who has retained counsel to represent her on a legal matter.

A. WHAT HAPPENED IN ROOM 1012? DOES IT MATTER?

Most suspects do not enjoy the luxury of being represented by an attorney when confronted by law enforcement agents bent on extracting a confession from them or obtaining their cooperation as a means of securing evidence against a higher-level operative. When Lewinsky encountered two FBI agents in the Pentagon City Mall that fateful day of January 16, 1998, she immediately told them she wanted to speak with her lawyer, Frank Carter.¹⁹² Of course, the objective of the Office of the Independent Counsel was to get Lewinsky to "flip" against Vernon Jordan, Betty Currie, and the President, and even to wear a body wire while conversing with him.¹⁹³ To secure Lewinsky's cooperation, the lawyers

¹⁸⁹ POSNER, *supra* note 15, at 76.

¹⁹⁰ *Id.*

¹⁹¹ TOOBIN, *supra* note 125, at 204.

¹⁹² MORTON, *supra* note 187, at 221, 223.

¹⁹³ *Id.* See also TOOBIN, *supra* note 125, at 204.

for Judge Starr's Office threatened her with prison sentences for her alleged crimes totaling twenty-seven years.¹⁹⁴

Let us deal first with the question raised by Judge Posner: did the nearly ten to twelve-hour session that Lewinsky endured with law enforcement agents in room 1012 amount to coercion such that if she had made inculpatory statements before being granted immunity, they would have been inadmissible against her? This is a particularly timely question given the Supreme Court's recent decision to revisit the constitutional viability of the *Miranda* opinion. More important, the law enforcement tactics employed by Starr's deputies in that room provide an opportunity to probe the Court's cynical attitude toward what limits, if any, should be placed on the ability of the police to secure a confession from a criminal suspect. Furthermore, what transpired in "Room 1012" gives us pause to consider the disdain the Court holds for the functional and symbolic role played by criminal defense counsel in an adversary system of adjudication.

1. *Work on a Suspect, Lie to Her, Get a Confession; Even If the Confession Is Suppressed, It Might Not Matter, Anyway. By All Means, Keep Lawyers Out of the Process—Even If You Have to Lie!*

Imagine being in a room with as many as nine armed FBI agents¹⁹⁵ as well as three experienced federal prosecutors.¹⁹⁶ To sway your decision in their favor, they lie, telling you that you face twenty-seven years in prison if you do not cooperate with them in snaring the President of the United States and his friends. At best, you might face twenty-seven months in prison rather than twenty-seven years.¹⁹⁷ Perhaps an FBI agent, for effect, displays his jacket to show you his handcuffs when this somber lie is being conveyed to you.¹⁹⁸ When you attempt to call your lawyer, they rely on deception by claiming your lawyer specializes in civil law and has no familiarity with the criminal process.¹⁹⁹ In fact, your lawyer headed the Washington, D.C. public defender service for six years.²⁰⁰ Raising the stakes, they threaten to prosecute your mother as an added bonus.²⁰¹ To allay the inherent coercion of the encounter, they permit you to leave the room after a few hours and roam the shopping

¹⁹⁴ *Id.* at 220; POSNER, *supra* note 15, at 76.

¹⁹⁵ MORTON, *supra* note 187, at 225.

¹⁹⁶ *Id.* at 220–25; TOOBIN, *supra* note 125 at 204–06. The prosecutors who unsuccessfully attempted to "flip" Lewinsky were Mike Emmick, Bruce Udolf, and Jackie Bennett.

¹⁹⁷ POSNER, *supra* note 15, at 76.

¹⁹⁸ MORTON, *supra* note, 187 at 223–25.

¹⁹⁹ *Id.* at 223.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 225.

mall to which the hotel is attached.²⁰² And, of course, you can call mom, but not your attorney!²⁰³ Your attorney is contacted *after business hours* by the same FBI agent who had conveniently displayed his handcuffs when you were deceived into believing you had a twenty-seven year exposure to criminal liability.²⁰⁴

What is remarkable about Monica Lewinsky's ordeal is that she did not break down and opt to accept immunity in exchange for turning government agent against the President and his associates. Nevertheless, we should explore Judge Posner's query: had Lewinsky confessed to crimes without either the benefit of immunity or counsel, would the confession have withstood constitutional scrutiny?²⁰⁵ Even presuming the confession was coerced or the product of a violation of the right to counsel, would it nonetheless have been admissible in a criminal prosecution? More germane to our inquiry, what is the Supreme Court's view on deceiving the suspect as well as the role of counsel in improving the police's chances of securing a confession? These questions go to the heart of an adversarial system of criminal adjudication. As such, they reveal the Court's conception of that system and whether that philosophy squares with the goals of the process.

The Supreme Court has long grappled with the fundamental question of what constitutes a coerced, or involuntary, confession. Focusing on a multifactor analysis, the Court has concluded that either physical or psychological coercion, or the threat of such coercion, renders a confession involuntary or coerced, because it "overbears" a suspect's will.²⁰⁶ Although this approach might be deemed unsatisfactory because of its indeterminate nature, it does raise the ultimate issue of determining when the police cross the threshold from legitimate investigation to unsavory torture.

Neither the FBI nor Starr's deputies attempted to physically "overbear" Lewinsky's will to resist confessing and becoming a governmental agent. But from the deception about her potential criminal liability to the machinations designed to prevent her from contacting her lawyer, the FBI and Starr's deputies relied on mental pressure to achieve their ends. The Supreme Court has emphatically noted that "coercion can be mental as well as physical, and . . . the blood of the accused is not the only

²⁰² *Id.* at 223.

²⁰³ *Id.* at 226.

²⁰⁴ *Id.* at 228-30.

²⁰⁵ See POSNER, *supra* note 15, at 76.

²⁰⁶ See, e.g., *Arizona v. Fulminante*, 499 U.S. 279 (1991); *Columbe v. Connecticut*, 367 U.S. 568 (1961); *Rogers v. Richmond*, 365 U.S. 534 (1961); *Blackburn v. Alabama*, 361 U.S. 199 (1960); *Spano v. New York*, 360 U.S. 315 (1959); *Payne v. Arkansas*, 356 U.S. 560 (1958).

hallmark of an unconstitutional inquisition.”²⁰⁷ We know with the benefit of hindsight that Lewinsky did not succumb to the pressure, which testifies to her exceptional fortitude. It would have been natural to have caved in to the pressure and relented to the Office of Independent Counsel’s suasion. A related question is whether Lewinsky was in police “custody” and subject to interrogation or its functional equivalent²⁰⁸ such as to trigger the now famous *Miranda* warnings.

Would the actions by Starr’s deputies and FBI agents gathered in room 1012 with a captive victim have amounted to coercion? Three factors are critical to determining whether Lewinsky’s will would have been overborne had she confessed and agreed to cooperate with Starr’s investigation. First, the exaggeration, if not outright lie, concerning her potential prison sentence would have created significant psychological pressure for her to confess. Indeed, Judge Posner believes “[t]his was the most coercive aspect of the encounter.”²⁰⁹ Second, the Independent Counsel sought to extract Lewinsky’s cooperation by threatening to expose her mother to criminal punishment. Third, Starr’s deputies strove to circumvent Lewinsky’s attempt to contact her lawyer through chicanery and intimidation. Conceivably, these factors could in the aggregate have worn down her resistance and “overborne” her will.

Before discussing the cases that support this conclusion, it is instructive to examine the reasons why two distinguished legal commentators do not agree with my assessment. Let us begin with Judge Posner, since he raised the issue in his influential book. In his own words: “Had [Lewinsky] made a self-incriminating statement and later been prosecuted, it is possible but unlikely that the statement would have been excluded from evidence as having been obtained by coercion. No such thing happened, and these hardball tactics were at most what the law calls harmless error.”²¹⁰ Perhaps it is unfair to castigate Judge Posner for making a conclusory statement without foundation in legal precedent. After all, I presume Judge Posner was trying to reach a broader audience than the legal community. As a jurist and member of the academy, however, one wishes he would have provided a measure of legal support for

²⁰⁷ *Blackburn v. Alabama*, 361 U.S. at 206.

²⁰⁸ The warnings are mandated when the suspect is in custody or otherwise “deprived of his freedom of action in any significant way,” *Miranda*, 384 U.S. at 444. See also *Berkemer v. McCarty*, 468 U.S. 420 (1984) (defining custody from an objective standard); and when he is subject to interrogation or its functional equivalent as defined in *Rhode Island v. Innis*, 446 U.S. 291 (1980) (interrogation involves express questioning “or any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect”).

²⁰⁹ POSNER, *supra* note 15, at 76 n.28.

²¹⁰ *Id.* at 76.

his conclusion. I will attempt to fill in the gaps in Judge Posner's analysis or, more aptly, his lack of analysis.

I believe Judge Posner's assessment reflects the musings of an elitist jurist and academician whose instrumental and pragmatic perspective on the criminal justice system animates his rationale. Paradoxically, while he fails to justify his conclusion on why Lewinsky's confession would have not been coerced, Judge Posner stresses the distinction between "popular" and "legal" justice.²¹¹ He takes academics, lawyers, and the President's supporters in the impeachment drama to task for failing to make that distinction.²¹² Yet, he fails to explain why, if Lewinsky had made self-incriminating statements, the government's tactics would not have violated the Fifth Amendment. Judge Posner is, I suppose, the consummate elitist judge; the message he disseminates is consistent with a judicial philosophy that views transgressions by law enforcement agents as a mere stumbling block to the ultimate aim of apprehending criminals. As he observes, "[t]he purpose of a criminal trial . . . is to get at the truth rather than to decide whether the prosecutors have been unsporting."²¹³

Jeffrey Toobin, on the other hand, wrote a book intended for a "popular" mass audience. Therefore, it is hard to fault him for not providing legal support for his perspective that what transpired in "Room 1012" was "entirely appropriate" given the status of Judge Starr's investigation.²¹⁴ As a former prosecutor and associate counsel in the Iran-Contra Independent Counsel Investigation, however, Toobin naturally would see nothing legally amiss with what occurred in "Room 1012." It is difficult to imagine the other side of the coin when one's proclivity is to see the criminal process from the vantage point of the prosecutor rather than defense counsel.

Returning to the three variables that I stressed could have resulted in a coerced confession had Lewinsky given prosecutors a "self-incriminating" statement in room 1012, I will now explore them in depth. Unaware of what she would be confronting that day, thrust into a hotel room with her betrayer and a host of FBI agents and seasoned prosecutors, and falsely told she faced substantial criminal exposure, Lewinsky could have concluded that she had no choice but to incriminate herself and agree to cooperate.

Compare this scenario with the facts in *Spano v. New York*.²¹⁵ In that case, a number of detectives and a skillful prosecutor interrogated a

²¹¹ *Id.* at 92. Judge Posner defines "popular" justice as the "ideas of justice that are held by the average person untrained in the law." By contrast, he stresses that "legal" justice is the "justice meted out by judges and other authorized officials." *Id.*

²¹² *See id.*

²¹³ *Id.* at 83.

²¹⁴ TOOBIN, *supra* note 125, at 204.

²¹⁵ *Spano v. New York*, 360 U.S. 315 (1959).

twenty-five year old man suspected of murder for nearly eight continuous hours.²¹⁶ Like Lewinsky, he had no criminal record, although he had a grade-school education²¹⁷ and a history of emotional instability.²¹⁸ Spano repeatedly but unsuccessfully requested an attorney during the interrogation session.²¹⁹ Finally, the police used a childhood friend, who was a “fledgling” policeman, to elicit the defendant’s sympathy and thereby obtain a confession.²²⁰

Notice the parallels between *Spano*, albeit with some differences, and Lewinsky’s dilemma in “Room 1012.” She was twenty-three years old when she had to deal with the FBI and Starr’s deputies in room 1012. True, she was not in a police station; but, after all, she had been unexpectedly confronted with her accuser, Linda Tripp, in that room as well as numerous accusers. It is also true that she had a college education; Spano had only a half-year in high school. But she was in the room with the agents for almost the same amount of time.²²¹ She faced not just one “skillful” prosecutor but three.²²² Surely, through the tapes and the debriefing of Linda Tripp, the Office of Independent Counsel should have been aware of Lewinsky’s fragile emotional state. Further, her biographer amply documents Lewinsky’s emotional problems, culminating in therapy and admission into an eating disorder clinic when she was thirteen.²²³ Of course, those problems were exacerbated by her relationship with the President.

Spano had also been betrayed by his friend’s false importunings. It is intriguing to note that the Supreme Court cited John Gay’s famous couplet in its opinion: “An open foe may prove a curse, But a pretended friend is worse.”²²⁴ Lewinsky was betrayed by her best friend. It is true that Spano knew he was being questioned about a murder. Lewinsky’s suspected crime may have been less ominous, but she was being confronted with a potential imprisonment of twenty-seven years or incriminating herself and ensnaring the President of the United States in a criminal web. It is astonishing, once more, that her will was not overcome despite the unrelenting stress and pressure she endured in room 1012. Like Spano, moreover, Lewinsky was denied the opportunity to

²¹⁶ See *id.* at 317–19.

²¹⁷ See *id.* at 321–22.

²¹⁸ See *id.* at 322.

²¹⁹ See *id.* at 318–19, 322.

²²⁰ *Id.* at 318–19.

²²¹ See MORTON, *supra* note 187, at 225. Morton observes that, “[f]or ten hours Monica was alone with as many as nine armed FBI agents and Starr’s deputies, hard-boiled characters who normally hunt or prosecute those responsible for the most serious and brutal federal offenses.” *Id.*

²²² See *id.*

²²³ See *id.* at 34–35.

²²⁴ Spano, 360 U.S. at 323.

call her attorney, Frank Carter, to deal with the awesome power representing the government in room 1012.

Despite these similarities, one could stress differences which would distinguish *Spano* and point toward the voluntariness of Lewinsky's self-incriminating statements, had she decided to make inculpatory statements to Starr's deputies. First, Spano had a limited education. Second, he suffered a cerebral concussion and was found unsuitable for military service because of a "psychiatric" disorder. Spano, moreover, had been indicted for a serious crime (murder) and instructed by his attorney not to answer any questions by the police. Perhaps more telling would be the fact that Lewinsky was allowed to leave the confines of room 1012, and Spano was in the custody of the police for the entire interrogation session. Whether these differences would have mattered in rendering a confession voluntary are debatable, but other factors at play in the Lewinsky saga buttress the finding of coercion in her case as well.

Indeed, a salient factor contributing to a finding of coercion was the threat to send Lewinsky's mother to prison if Lewinsky failed to cooperate.²²⁵ When Starr deputy Jackie Bennett relied on this stratagem in room 1012, we are reminded of a similar tactic the Court frowned upon in *Rogers v. Richmond*.²²⁶ In that case, the police managed to obtain a confession from the suspect only after threatening to arrest his wife, who suffered from arthritis.²²⁷ Further, the police denied the suspect's request at the beginning of the interrogation to consult with a lawyer.²²⁸ Elucidating the principle that a confession is not voluntary merely because it is truthful, the Court instead stressed the notion that the method by which the confession was obtained is central to the adversarial process of adjudication.²²⁹ In effect, subtle psychological ploys designed to break down a suspect's resistance offend the quintessential tenet "that ours is an accusatorial and not an inquisitorial system."²³⁰

Are the two situations comparable, or are they sufficiently dissimilar to arouse skepticism? Is threatening a suspect with criminal sanctions for either a spouse or a mother qualitatively different? I don't think so. What the law enforcement agents were attempting to accomplish in both instances is indistinguishable: to exploit the deepest core of the suspect's emotional vulnerability in order to obtain a confession. This is indeed

²²⁵ See MORTON, *supra* note 187, at 226. Prosecutor Jackie Bennett reputedly told Lewinsky: "You should know that we are going to prosecute your mother too, because of the things you have said she has done. We have it all on tape." *Id.* See also POSNER, *supra* note 15, at 76.

²²⁶ *Rogers v. Richmond*, 365 U.S. 534 (1961).

²²⁷ See *id.* at 535-36.

²²⁸ See *id.* at 536-37.

²²⁹ See *id.* at 540-41.

²³⁰ *Id.* at 541.

the “staple” of modern confession techniques. The police no longer rely on physical punishment to break the suspect’s will; rather they employ “psychological persuasion and manipulation.”²³¹ After all, if the goal was to investigate potential criminal liability at the highest level of government, no investigative stone should have been left unturned. From an instrumental perspective, whatever psychological harm may have been inflicted on Lewinsky paled in comparison to the possibility of uncovering crimes in the White House.

Had Lewinsky made incriminating statements that were the product of coercion, those statements may nevertheless have been admissible. Judge Posner is indeed correct in stating that coerced or involuntary confessions are subject to “harmless error” analysis. In *Arizona v. Fulminante*, a majority of the Court held that the admission of an involuntary confession is a “classic trial error”—distinguishable from a “structural error,” which vitiates the fairness of a trial—and that the former type of error may be “harmless.”²³² Therefore, if the prosecution proved that the introduction of such a confession at trial was “harmless” beyond a reasonable doubt, the admission of the confession would not require reversal of the conviction.²³³ Given the confession’s powerful weight, however, it is difficult to predict whether the harmless error standard would have been satisfied if Lewinsky had been prosecuted.

It is counterintuitive to contend that a confession secured through police misconduct is merely a “trial error” subject to harmless error analysis. In effect, Chief Justice Rehnquist, who wrote that portion of the opinion in *Fulminante*, condones illegitimate law enforcement conduct for the sake of efficiency. The most revealing aspect of his opinion is the rationale furnished for this perplexing doctrine. The Chief Justice explains that since governmental violations of the Fourth and Sixth Amendments are subject to harmless error analysis, and may be “as reprehensible as conduct that results in an involuntary confession,” it follows that involuntary confessions should receive the same treatment.²³⁴ Chief Justice Rehnquist further observes that Fourth and Sixth Amendment transgressions “can involve conduct as egregious as police conduct used to elicit statements in violation of the Fourteenth Amendment.”²³⁵ The final part of his syllogism concludes that “[i]t is thus impossible to

²³¹ Jerome H. Skolnick & Richard A. Leo, *The Ethics of Deceptive Interrogation*, 11 CRIM. JUST. ETHICS 3 (1964); Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979).

²³² *Arizona v. Fulminante*, 499 U.S. 279, 309–10 (1991).

²³³ In *Chapman v. California*, 368 U.S. 18 (1967), the Court held that constitutional error does not necessarily require the reversal of a conviction. Rather, the prosecution has the burden of establishing that the error was “harmless” beyond a reasonable doubt.

²³⁴ *Arizona v. Fulminante*, 499 U.S. at 311–12.

²³⁵ *Id.* at 311.

create a meaningful distinction between confessions elicited in violation of the Sixth Amendment and those in violation of the Fourteenth Amendment."²³⁶

The message the Chief Justice conveys through this syllogism is unmistakable: egregious police conduct should not obstruct the central meaning of the criminal process—to get at the truth regardless of the “egregious” methods employed by law enforcement in search of that elusive and contextual goal. Juxtaposing this tenet with the *Rogers v. Richmond* principle that the conduct of the police, rather than the “truth” value of a confession, is the critical question in determining the voluntariness of a confession, produces an intriguing paradox.²³⁷ How does the Rehnquist Court reconcile the notion that coerced confessions are abhorrent to a democratic system of government and an adversarial criminal justice system with the potential admission of such confessions in a criminal trial? More germane to our theme, doesn’t the harmless error doctrine as applied to involuntary confessions provide a potential incentive for police to extract coerced confessions from suspects in the hope that the harmless error doctrine will possibly permit the confession to be heard by the jury? At bottom, what the Rehnquist Court implicitly condones is “egregious” police conduct that violates essential adversarial safeguards embedded in the Fifth Amendment.

2. *Would Miranda Have Helped Lewinsky?*

A second legal avenue that Lewinsky could have invoked had she confessed to Starr’s deputies in room 1012 is the controversial *Miranda*²³⁸ doctrine. In order to prevail on a motion to suppress the confession, Lewinsky would have had to establish the twin predicates on which *Miranda* rests: custody and interrogation.²³⁹ Although the interrogation prong might have been satisfied, it is questionable whether Lewinsky could have convinced a trial court that she was in custody when she faced the dilemma in room 1012. Had she surmounted that hurdle, she would have succeeded where the vast majority of *Miranda* claimants fail: she uttered the magic incantation that furnishes the only genuine protection under the doctrine, “I want an attorney.”²⁴⁰ Lurking behind these

²³⁶ *Id.* at 311–12.

²³⁷ See *supra* notes 226–30 and accompanying text.

²³⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966).

²³⁹ *Miranda* is premised on the inherent coercion surrounding custodial interrogation. The Court defined custodial interrogation as “questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.” *Id.* at 444.

²⁴⁰ In *Edwards v. Arizona*, 451 U.S. 477 (1981), the Court held that once the subject of custodial interrogation expresses the desire not to be questioned without the presence of a lawyer, he “is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges,

issues are more fundamental questions concerning the behavior by law enforcement that the Rehnquist Court has sanctioned in the process of fundamentally altering the meaning and spirit of *Miranda*.

The key question is whether Lewinsky was in custody and interrogated in room 1012. The pillar supporting *Miranda* is the need to dispel the police-dominated atmosphere of custodial interrogation. Therefore, at the threshold, a suspect must establish that she was in custody at the time law enforcement officers questioned her about a crime. A police station, by definition, constitutes a forum in which the police exert control over a citizen. Nevertheless, such a venue does not automatically convert a police-citizen encounter into custody for *Miranda* purposes. Indeed, the Court has held that an individual who "voluntarily" went to a police station to be questioned about a burglary was not in custody and thus fell outside *Miranda*'s protective umbrella.²⁴¹ But the fact that the suspect who "voluntarily" went to the station in that case was on parole casts doubt on the conclusion the majority reached.²⁴²

Conversely, one would intuitively assume that a suspect who is questioned in her home is not in a police-controlled venue.²⁴³ Of course, this inquiry is necessarily fact-specific, for if a police officer points a gun at a suspect while questioning her at her home, the reasonable person under the circumstances would feel she was in custody.²⁴⁴ Straddling these two extremes is the situation Lewinsky confronted: she faced her accusers neither in the imposing confines of the police station nor in the more familiar surroundings of her Watergate apartment. Was the atmosphere in room 1012 one in which a reasonable person under the circumstances would have felt her freedom of action was curtailed to a degree associated with "custody?" It is apparent that Starr's deputies sought to evade the strictures posed by *Miranda* in choosing a neutral site at which they could seek Lewinsky's confession in exchange for the promise of immunity. This stratagem was probably triggered by their knowledge that Lewinsky had legal representation and would, as she ultimately did, probably seek the services of her attorney before dealing with a cadre of

or conversations with the police." *Id.* at 484–85. This is the part of the opinion that "has withstood dilution." See Garcia, *Is Miranda Dead*, *supra* note 87, at 491.

²⁴¹ *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977).

²⁴² *Id.* at 500 (Stevens, J., dissenting).

²⁴³ *Beckwith v. United States*, 425 U.S. 341 (1976). However, in *Orozco v. Texas*, 394 U.S. 324 (1969), the Court held the defendant was in custody when four police officers entered his bedroom at 4 a.m. and questioned him without administering the *Miranda* warnings.

²⁴⁴ In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the Court adopted an objective approach to the question of custody. The relevant inquiry is whether a reasonable person would believe he was in custody. *Id.* at 442. Thus, a police officer's unarticulated beliefs "are relevant only to the extent they would affect how a reasonable person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action.'" *Stansbury v. California*, 511 U.S. 318, 325.

experienced FBI agents and prosecutors. To bolster the case against *Miranda* warnings, the investigators made sure they could contend that she was free to leave the hotel room at any time during the process.

In fact, it was after two hours had elapsed with her pursuers in room 1012 that Lewinsky succeeded in leaving, as prosecutor Emmick "reluctantly allowed Monica to leave the room" and make a call from a pay phone to her mother.²⁴⁵ From the standpoint of the contending parties, it is easy to argue that either Lewinsky was in custody or she was free to leave at any time during her unexpected encounter with law enforcement agents and Starr's deputies. The relevant inquiry, however, is whether a reasonable person in the suspect's position would have believed she was in custody.²⁴⁶ Further, the law enforcement agent's "unarticulated plan" bears no relation to the question of custody.²⁴⁷ Would a trial court employing this objective standard have found that Lewinsky was in custody for those two hours before she ultimately left room 1012 in order to contact her mother? Let us examine the issue with the benefit of hindsight.

A reasonable person unwittingly confronted with a host of law enforcement agents bent upon securing her cooperation against powerful individuals, including the President of the United States, would find it difficult to imagine she could merely walk away, even from a hotel room. This feeling was probably accentuated by the threat of substantial prison time leveled at Lewinsky not by police officers, but rather by experienced prosecutors. She was, moreover, "escorted" to room 1012 by two FBI agents,²⁴⁸ hardly a comforting factor leading the reasonable person to conclude she was free to leave the room at any time. Couple those factors with the attempt by prosecutors to dissuade her from contacting her lawyer, and you have a situation in which the reasonable suspect would feel her freedom of action was severely circumscribed. Perhaps Lewinsky's perception was not objectively far-fetched: "I still have nightmares about it . . . the sense of being trapped and drowning."²⁴⁹

For practical purposes, though the encounter may have occurred in the antiseptic confines of a hotel room, it was nevertheless permeated with the aura of a police-dominated atmosphere. I seriously doubt that most people, other than professional hit men, when faced with such an awesome display of governmental power, would immediately tell the inquisitors to take a hike.²⁵⁰ The options available to Lewinsky in the ho-

²⁴⁵ MORTON, *supra* note 187, at 226-27; TOOBIN, *supra* note 125, at 205.

²⁴⁶ *Berkemer v. McCarty*, 468 U.S. at 442.

²⁴⁷ *Id.*

²⁴⁸ MORTON, *supra* note 187, at 219; TOOBIN, *supra* note 125, at 203.

²⁴⁹ MORTON, *supra* note 187, at 225.

²⁵⁰ I use this example to illustrate how difficult it is for any individual to resist a law enforcement dominated situation. David Simon has documented the Baltimore Homicide Department's inability to secure a confession only in the instances of two professional hit men

tel room were stark: turn against Jordan, Currie, and the President; contact her attorney for legal advice; or attempt somehow to escape the investigators by convincing them that she would not cave in to their demands without some preliminary concessions—at the very least, being allowed to call her mother. The last option is what she chose to do, only after two grueling hours of exchanges with the prosecutors and federal law enforcement agents. Lewinsky, moreover, was effectively precluded from exercising the second alternative: calling her lawyer for assistance. Obviously, that option would have foiled the government's objective to flip Lewinsky against the "bigger fish."

The most compelling evidence, however, that Lewinsky was "in custody" for *Miranda* purposes, seems to lie in the prosecutors' exaggerated and deceitful contention that she faced considerable prison time for her deeds. Would a reasonable person who was unexpectedly escorted to a hotel room filled with law enforcement agents, confronted with potential exposure to twenty-seven years in prison, and given the option to avoid the onerous penalties by providing evidence against the President, feel her freedom of action was not significantly abridged? Did she somehow feel, after her betrayer Linda Tripp was in the room with her, that Ken Starr's deputies, together with the two FBI agents who escorted her to the room, would let her escape without any adverse consequences? A layperson with even a modicum of common sense would believe that law enforcement agents with sufficient evidence to charge a suspect with serious crimes are not going to let her slip gently into the night.

Two cases potentially militate against the finding that Lewinsky was in custody when she faced her accusers in room 1012. In *Oregon v. Mathiason*,²⁵¹ the Court held that a burglary suspect who voluntarily went to a police station and was interviewed regarding the crime was not "in custody."²⁵² The suspect not only went to the station of his own volition but also was immediately informed he was not under arrest and was allowed to depart the station a half-hour after the interview began.²⁵³ Indeed, the majority stressed these three factors in determining that Mathiason was not in custody.²⁵⁴

Similarly, the Court held that a suspect was not in custody even though he was questioned at a police station in *California v. Beheler*.²⁵⁵ Again, the majority emphasized Beheler's voluntary trip to the sta-

who immediately invoked their right not to be interrogated without an attorney when brought into police headquarters for questioning. DAVID SIMON, *HOMICIDE: A YEAR ON THE KILLING STREETS* 210 (1991).

²⁵¹ 429 U.S. 492 (1977).

²⁵² *Id.* at 495.

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ 463 U.S. 1121 (1983).

tionhouse, the police disclosure that he was not under arrest, and the short duration of the interview (less than thirty minutes).²⁵⁶ At bottom, what these two cases reflect is a policy judgment that stationhouse questioning is not necessarily custodial. Rejecting the lower court's conclusion that Mathiason was questioned in a "coercive environment," the majority concluded that warnings are not mandated at the stationhouse because "[a]ny interview of one suspected of a crime by a police officer will have coercive aspects to it."²⁵⁷ Rather, the critical inquiry in assessing whether the *Miranda* warnings must be administered is whether the suspect's freedom has been curtailed so "as to render him 'in custody.'"²⁵⁸

More importantly, deception designed to induce the suspect to confess is irrelevant to the issue of custody. In *Mathiason*, the law enforcement agent falsely informed the suspect that investigators had discovered his fingerprints at the scene of the burglary.²⁵⁹ The Court emphatically observed that this fact had "nothing to do with whether [the suspect] was in custody for purposes of the *Miranda* rule."²⁶⁰ Of course, it is disingenuous to maintain that a suspect who is falsely told by the police that they possess incontrovertible proof of her commission of a crime will feel she is perfectly free to leave the stationhouse without adverse legal effects.

Finally, Justice Marshall's prescient doubt has come to fruition. In his *Mathiason* dissent, he wondered whether the decision would "suggest that police officers can circumvent *Miranda* by deliberately postponing the official 'arrest' and the giving of *Miranda* warnings until the necessary incriminating statements have been obtained."²⁶¹ Indeed, the practice has become institutionalized among the police, as reflected in the term "to Beheler" a suspect.²⁶² Coupled with the notion that deception plays no role in determining whether a suspect is in custody, the precept that stationhouse questioning does not necessarily translate into custody underscores the legal charade that the Court has fostered in construing the scope of *Miranda*.

Do *Mathiason* and *Beheler* conclusively demonstrate that Lewinsky was not "in custody" when she was whisked to room 1012 by FBI agents and implored by Starr's deputies to turn government agent? The Court has noted that such an inquiry is fact-specific, to be determined by as-

²⁵⁶ *Id.* at 1122.

²⁵⁷ *Oregon v. Mathiason*, 429 U.S. at 495.

²⁵⁸ *Id.*

²⁵⁹ *See id.* at 493.

²⁶⁰ *Id.* at 496.

²⁶¹ *Id.* at 499 n.5 (Marshall, J., dissenting).

²⁶² *See, e.g.*, Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 881 (1996).

sessing the “totality of the circumstances.”²⁶³ It is incumbent upon us to weigh the facts in the Lewinsky saga to determine whether my conclusion that she was in custody is viable.

The first variable we must consider is the place where the encounter took place. In this respect, Lewinsky’s venue was less “coercive” than Mathiason’s or Beheler’s. Lewinsky was interviewed in a hotel room rather than in the traditionally “police dominated” atmosphere of the stationhouse. Whether she voluntarily accompanied the two FBI agents who “escorted” her to room 1012 is debatable. Mathiason went to the station without a police escort.²⁶⁴ Although Beheler presumably did go with police to the station, he was told before accompanying the police that he was not under arrest.²⁶⁵ I suppose one could argue that Lewinsky was in a public place and could have politely declined the invitation to accompany the agents. But at any rate, since Lewinsky came close to being ambushed and had no inkling she was about to be confronted by FBI agents, it is possible to distinguish her situation from Mathiason’s and Beheler’s, both of whom knew exactly what the police were up to when they decided to go to the stationhouse.

Furthermore, Lewinsky was presumably never told she was not under arrest during the two hours she dealt with Starr’s deputies in Room 1012. Nor, for that matter, was the interview “short,” lasting thirty minutes or less. Rather, the prosecutors labored intensely for two hours to convince Lewinsky that she faced grave criminal punishment, and that her only viable alternative was to cooperate with them. If we believe her account, moreover, that one of the FBI agents actually asked her whether his gun made her feel uncomfortable, it strains credulity to conclude that a reasonable person in her circumstances would have felt free to leave the room. Finally, the number and experience of her interrogators rendered Lewinsky more vulnerable than Mathiason, who only faced one detective, not a team of prosecutors and FBI agents.

My assessment that the false statement about her potential criminal exposure justifies the conclusion that Lewinsky was in custody is belied by *Mathiason*’s holding. Because deception is irrelevant to the issue of custody, the false statement by Starr’s deputies has no bearing on whether Lewinsky was in custody for *Miranda* purposes. Notice the paradox behind this legal fiction. Had she confessed, Lewinsky would have been on more solid legal ground in arguing that the false statements about her criminal exposure contributed to a coerced confession. But if she was not in custody, and the false statements by police are irrelevant, Lewinsky would not have been able to establish a *Miranda* violation. As

²⁶³ *California v. Beheler*, 463 U.S. at 1125 (1983).

²⁶⁴ *Oregon v. Mathiason*, 429 U.S. at 493.

²⁶⁵ 463 U.S. at 1122.

I have argued, this paradox shows that *Miranda*, which was supposed to provide more protections to suspects than the old "voluntariness" standard, actually furnishes fewer safeguards.²⁶⁶

Let us assume, however, that Lewinsky was in custody at the time Starr's deputies sought to obtain her assistance against the President and his friend and subordinates. Further, let us assume that she did not utter the magic *Miranda* incantation: I want my lawyer's assistance to deal with your experienced prosecutors and federal law enforcement agents. Finally, let us presume that she was interrogated under *Miranda*'s criteria for coerced confessions: that is, law enforcement agents expressly questioned her or used words or actions they should have known would have elicited incriminating responses.²⁶⁷ It is obvious, parenthetically, that Lewinsky was interrogated for *Miranda* purposes in room 1012. The prosecutors sought to elicit her concession that she had violated the law and would be willing to turn government agent in exchange for immunity. Had Lewinsky confessed, she would have had to overcome the custody hurdle, rather than the interrogation obstacle, in staking out a successful *Miranda* claim.

Under the foregoing assumptions, the question emerges whether deception by Starr's associates would have been legally relevant. For example, suspend disbelief once more and pretend that Frank Carter, Lewinsky's counsel, had received a tip that the prosecutors were attempting to debrief her at the Arlington, Virginia Ritz-Carlton Hotel. He promptly called Starr's office but was assured that such was not the case. Rather simply, Starr's Office lied to Carter about their attempt to obtain Lewinsky's incriminating admission and to "flip" her against Vernon Jordan, Betty Currie, and the President. Would this flagrant lie have had legal ramifications had Lewinsky acceded to the Independent Counsel's wishes? The stark, yet simple, answer to this query according to the *Miranda* doctrine is: no.

In *Moran v. Burbine*,²⁶⁸ a majority of the Court held that police deception of an attorney and the failure of the police to inform a suspect of his attorney's effort to reach him did not adversely affect his waiver of the *Miranda* rights.²⁶⁹ Upholding Burbine's waiver of his *Miranda* protections, the majority concluded that as long as the suspect's decision is "uncoerced" and he knows he may remain silent and that any statements could be used to his detriment, "the analysis is complete and the waiver

²⁶⁶ See Garcia, *Is Miranda Dead*, *supra* note 87.

²⁶⁷ This is the standard to determine whether the police have interrogated a suspect set forth by the Court in *Rhode Island v. Innis*, 446 U.S. 291 (1980).

²⁶⁸ 475 U.S. 412 (1986).

²⁶⁹ *Id.* at 422-23.

is valid as a matter of law.”²⁷⁰ This tenet is consistent with the Court’s judgment that police deception of the suspect is not germane to the question whether the suspect is in “custody.”²⁷¹

It would be strange for the Court to deny that such information might be useful to a suspect. After all, any suspect who was about to be interrogated would likely reevaluate the decision to confess if told that her attorney had attempted to reach her. The *Burbine* majority acknowledged the obvious when it recognized that such information “would be useful” to a suspect and might even “affect” her decision to confess.²⁷² Nevertheless, the majority ignored this truism by stressing that the Court has “never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.”²⁷³

The ethos perpetuated by the Court’s facile sleight-of-hand is one “that exalts incommunicado communication, sanctions police deception, and demeans the right to consult with an attorney.”²⁷⁴ Indeed, the prosecutors or law enforcement agents who are familiar with the Court’s *Miranda* jurisprudence have embraced this “ethic.” In effect, Starr’s deputies knew that they could “Beheler” Lewinsky in the hope that she would “flip” against the President. She would not be in “custody” and they would dissuade her from asking for an attorney if she attempted to invoke that remedy. They were well aware that neither deception about her criminal exposure nor prevarication regarding what assistance her attorney could lend her would be legally relevant. Why blame Starr’s deputies for relying on tactics the United States Supreme Court has explicitly condoned? The message of the Court is clear: lying to criminal suspects in order to get them to confess and thereby arrive at the “truth” is a worthy objective in an adversarial criminal justice system.

What an exquisite irony lies behind the Court’s instrumental philosophy. Forgotten in this noble experiment are the values conveyed by Court opinions to those in the field. Starr’s associates and the FBI agents who participated in the Lewinsky gambit in room 1012 took their cue from the highest Court in the land. To the extent that members of the American public may have disagreed with Ken Starr’s tactics, they should not have directed their dismay at his office; the blame instead lies squarely with a Court blithely ignorant of the consequences of its intellectually elegant opinions. “War is hell,” and because the war against

²⁷⁰ *Id.*

²⁷¹ See *infra* notes 245–46 and accompanying text.

²⁷² *Moran v. Burbine*, 475 U.S. at 422.

²⁷³ *Id.* (citations omitted).

²⁷⁴ *Id.* at 441 (Stevens, J., dissenting).

criminals must be won, it is imperative to give the police the "upper hand," even if the criminals do not seem ominous, like Lewinsky.

3. *Forget About the "Right to Counsel" Because It Had Not "Attached"*

Beyond the self-incrimination implications of the encounter in room 1012 lies the broader, yet more fundamental, right of a criminal defendant to counsel under the Sixth Amendment. Lewinsky had retained able counsel to represent her in the civil case brought against the President by Paula Jones. Naturally, her first instinct when she was confronted by her accusers in room 1012 was to invoke the aid of her retained counsel. However wary the American public may be toward constitutional rights protecting criminal defendants, they certainly view the right to counsel as a necessity rather than a luxury. This commonsense notion has been embodied in Supreme Court opinions such as *Gideon v. Wainwright*²⁷⁵ and *Argersinger v. Hamlin*,²⁷⁶ both of which acknowledge the essential role of lawyers in preserving the fundamental rights accorded criminal defendants in the Constitution.

But however fundamental the right to counsel may be, it does not operate until the government has committed itself to formal prosecution of the defendant.²⁷⁷ Formal prosecution begins when the government files a formal charge, information, or indictment against the defendant; or, alternatively, when the defendant is arraigned or faces a preliminary hearing on the charges.²⁷⁸ None of these triggering events had come even close to fruition when Lewinsky confronted representatives from the OIC and FBI agents in room 1012. From the perspective of the Sixth Amendment right to counsel, which safeguards defendants once adversary proceedings have begun, Lewinsky in effect was entitled to none of the benefits her counsel, Frank Carter, could have provided at that critical time. For the attorney-client relationship does not, by itself, "trigger" the Sixth Amendment right to counsel.²⁷⁹

Given the powerful role confessions play in an adversary system, one could argue that they serve "to seal a suspect's fate,"²⁸⁰ in effect rendering the proceedings meaningless. In this context, the attorney-cl-

²⁷⁵ 372 U.S. 335 (1963).

²⁷⁶ 407 U.S. 25 (1972).

²⁷⁷ The Court has held that the right to counsel attaches at the initiation of "adversary judicial criminal proceedings," "by way of formal charge, preliminary hearing, indictment, information or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); *see also* *United States v. Gouveia*, 467 U.S. 180, 187 (1984); *Brewer v. Williams*, 430 U.S. 387, 400-01 (1977).

²⁷⁸ *See Kirby*, 406 U.S. at 689.

²⁷⁹ *Moran v. Burbine*, 475 U.S. at 431, *citing* *Maine v. Moulton*, 474 U.S. 159, 180 and n.16 (1985).

²⁸⁰ This unsuccessful argument was raised by the respondent in *Moran*, 475 U.S. at 431.

ent relationship reaches its “zenith” and becomes vital to the suspect. Nevertheless, while recognizing such an obvious principle, and acknowledging that a confession will make the case at trial more difficult for the defense attorney, the Court rejects the notion that a suspect should be entitled to the assistance of counsel absent adversary proceedings.²⁸¹ No doubt, the seasoned prosecutors representing the OIC were aware of this crucial doctrine when they snared Lewinsky into the confines of room 1012.

Consistent with *Miranda*'s anemic punch, the Sixth Amendment right to counsel furnishes scant aid to criminal suspects facing Lewinsky's predicament. And, as *Burbine* teaches prosecutors in the shoes of Starr's subordinates, it is perfectly legal to dissuade a suspect from contacting a lawyer when the suspect is neither in “custody” nor entitled to the Sixth Amendment right to counsel. Had Lewinsky confessed to her interrogators, she would have not been able to suppress those incriminating statements on either *Miranda* or Sixth Amendment grounds; the lies, deceptions or intimidation of the law enforcement agents were legally irrelevant, thanks to the Rehnquist Court's ethically bankrupt, instrumental jurisprudence.

Even if a violation of the right to counsel occurs, the Rehnquist Court has held that statements taken in such a context may be admissible for impeachment purposes.²⁸² Relying on language used to circumscribe *Miranda*'s scope, the Rehnquist Court has conflated the Sixth Amendment right to counsel with *Miranda*, bestowing upon both of these the pejorative sobriquet, “prophylactic rules.”²⁸³ Rather than treating the Sixth Amendment right to counsel as a fundamental right, the Rehnquist Court has instead opted to render it a mere “revocable privilege.”²⁸⁴ Why, then, we may rhetorically ask, should Starr's deputies have treated Lewinsky's plaintive cries for her attorney with anything other than contempt? An adversary who is given a potent weapon with which to vanquish his opponent should not be faulted for relying on it, especially when the stakes are high. The remarkable facet to the Lewinsky saga was that she managed to “win” the skirmish despite her opponents' natural and strategic advantages.

²⁸¹ See *id.* at 431–32.

²⁸² *Michigan v. Harvey*, 494 U.S. 344 (1990).

²⁸³ *Id.* at 353 (Stevens, J., dissenting). See also Meredith B. Halama, *Loss of a Fundamental Right: The Sixth Amendment as a Mere 'Prophylactic Rule'*, 1998 U. ILL. L. REV. 1207 (1999).

²⁸⁴ Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 39 (1991).

III. THE GRAND JURY: WHOSE JURY IS IT?

Lewinsky might have won the skirmish but she lost the war when she secured immunity from the Office of the Independent Counsel. At that point, Ken Starr had at his disposal the most potent weapon afforded a federal prosecutor: a grand jury to do his bidding. No institution is more submissive to the will of a prosecutor literally pulling its strings. It is not surprising, therefore, that the grand jury "became the focal point of the heavily criticized investigation of the President's conduct."²⁸⁵ Neither Ken Starr nor his subordinates are to blame for the abhorrent tactics employed, however unjustified they may have been in the eyes of a good portion of the American public. Rather, the untrammelled discretion and control, virtually without any judicial oversight, given to prosecutors by the Rehnquist Court gave Starr wide latitude to manipulate the grand jury process. In the final analysis, as one commentator has observed, "[t]he grand jury investigation led by the Independent Counsel did not violate the constitutional rights of any witnesses, even if the tactics appeared high-handed and the reason for the inquiry politically motivated."²⁸⁶

Rather than emphasizing Starr's tactics, historians ought instead to examine how the Supreme Court has transformed the traditional role and function of the grand jury. Further, those with a more discerning view should recognize that the Independent Counsel's use of the grand jury as his personal fiefdom reflects the erosion of the institution's independence. Whether we explore the manner in which grand jury witnesses were handled or mishandled, or the leaks from grand jury proceedings emanating from Starr's Office, we should juxtapose those actions with Supreme Court precedents that allow prosecutors not only to violate grand jury rules with impunity²⁸⁷ but also to withhold exculpatory evidence from it.²⁸⁸ In the war waged by the Independent Counsel against the most powerful figure in the United States, the nuclear arsenal calculated to neutralize the President's power rested in the grand jury. No wonder Ken Starr employed this mechanism with a vengeance. The grueling interrogation session the President endured in front of a camera, broadcast throughout the world, symbolized the extent to which the grand jury became the primal instrument designed to secure the President's impeachment.

²⁸⁵ Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1, 2 (1999).

²⁸⁶ *Id.*

²⁸⁷ See, e.g., *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988) (holding that errors in grand jury proceedings do not warrant dismissal of an indictment unless the defendant can establish prejudice); *United States v. Mechanik*, 475 U.S. 66 (1984) (holding that grand jury violations of Fed. R. Crim. P. 6(d) are moot if a petit jury returns a guilty verdict).

²⁸⁸ *United States v. Williams*, 504 U.S. 36 (1992).

A. THE GRAND JURY: FRIEND OR FOE?

Just as Lewinsky was helpless in room 1012 when confronting the Independent Counsel, she was literally subservient to the government once she struck the deal for immunity in exchange for her testimony. That is my point in noting that she may have won the skirmish but lost the war. Subject to the dictates of Starr's grand jury, Lewinsky would eventually have to endure the indignity of her mother being subjected to relentless questioning in front of a body of citizens that comprised Starr's grand jury. More than any other facet of the investigation, the image of Marcia Lewis, Lewinsky's mother, being reduced to tears inside the grand jury room, precipitated a public outcry against Ken Starr's investigation.²⁸⁹ Criticizing the Independent Counsel's foray, one legal observer decried the "aggressive and disproportionate tactics" which "left the public with the justifiable perception that Mr. Starr is conducting a crusade rather than an investigation."²⁹⁰

Nothing confirms this opinion in a more sardonic fashion than the incident that triggered Marcia Lewis's breakdown in front of the grand jury. The inanity of the questions that led to this pathos is redolent of the potential for abuse of a witness by prosecutors controlling the process. The line of questions revolved around the nickname Lewinsky had purportedly given Hillary Clinton in her conversations with Linda Tripp. An exchange occurred in which two of Starr's prosecutors quizzed Lewis on the etymology of the word "Babba," Mrs. Clinton's alleged nickname.²⁹¹ It is difficult to fathom how this issue was in any conceivable way relevant to Starr's investigation.²⁹² The grand jurors, using their common sense, must have been wondering how this information fit into the investigation's puzzle. Rather simply, it did not. But when overzealous prosecutors have the rapt attention of citizens who depend on agents of the government to present information, the "grand" jurors must endure trivia with aplomb and patience.

How could the Independent Counsel treat witnesses with cavalier disregard of their basic dignity and humanity without the threat of sanctions? I am sure that is a question the American people have pondered.

²⁸⁹ See, e.g., Editorial, *Calling Mother to Testify an Invasion of Privacy*, PORTLAND OREGONIAN, Feb. 25, 1998, at E11; Editorial, *Pushing the Envelope: Starr's Zeal May Undercut His Public Support*, NEWSDAY, Feb. 15, 1998, at B1; Myriam Marquez, Editorial, *How Would You Feel If Your Daughter Got Stuck in Starr's Web?*, ORLANDO SENTINEL, Feb. 23, 1998, at A10.

²⁹⁰ Richard Ben-Veniste, *Comparisons Can be Odious, Mr. Starr*, NAT'L L.J., Dec. 21, 1998, at 21.

²⁹¹ TOOBIN, *supra* note 125, at 282-83.

²⁹² The Federal Rules of Evidence are not applicable to a grand jury proceeding. FED. R. EVID. 1101(d)(2). Therefore, the irrelevance of this line of questioning to the proceeding does not constrain the prosecutor.

But when one delves into whether any significant legal checks and balances exist for a prosecutor who controls the evidence presented to a grand jury, the answer is stark and negative. In fact, the rough treatment accorded Lewis by the Independent Counsel pales in comparison with the behavior the Rehnquist Court has glossed over. It is instructive, therefore, to examine this precedent to determine whether a "runaway" federal prosecutor with a grand jury at his disposal may either be stopped, or, at least, "slowed down."

B. PROSECUTORS AND THE GRAND JURY: THEORY AND PRACTICE

Hailed as a bulwark against oppression²⁹³ and firmly entrenched in our historical and constitutional landscape, the grand jury has become the prosecutor's dream. As one astute scholar has observed, "[a]lthough the purpose of the grand jury is to protect those accused of crimes, few defendants take comfort from its presence; indeed, the staunchest defenders of the institution are prosecutors."²⁹⁴ This reality contradicts the primary function of the grand jury to "[protect] citizens against arbitrary and oppressive governmental action."²⁹⁵ It is ironic that the Court clings to the legal fiction that the federal grand jury still fulfills its original mission.

Inquiring into the possible motivations of the Independent Counsel's use or misuse of the grand jury is a speculative enterprise. Instead of dwelling on this futile exercise, it is more fruitful to determine whether any significant legal restraints exist which might deter prosecutorial misconduct within the grand jury. The answer to this question reveals the naked power wielded by the federal prosecutor. This legal riddle, in turn, explains the bold actions taken by the Office of Independent Counsel in the Clinton-Lewinsky affair. To a great extent, the lack of legal constraints upon prosecutorial misconduct underscores the futility of President Clinton's attempt to have the Office of Independent Counsel held in contempt for leaking grand jury matters to *The New York Times*.²⁹⁶

Imagine the following scenario: federal prosecutors committed several violations of the Federal Rules of Criminal Procedure governing the presentation of evidence to a grand jury. Specifically, the prosecutors "manipulated the grand jury investigation to gather evidence for use in civil audits; violated the secrecy provisions of [Federal Rule of Criminal Procedure] 6(e) by publicly identifying the targets and the subject matter

²⁹³ See *Wood v. Georgia*, 370 U.S. 375, 390 (1962).

²⁹⁴ Andrew D. Leipold, *Why Grand Juries Do Not (And Cannot) Protect the Accused*, 80 CORNELL L. REV. 260, 261 (1995).

²⁹⁵ *United States v. Calandra*, 414 U.S. 338, 343 (1974).

²⁹⁶ See *In re: Sealed Case No. 99-3091*, 192 F.3d 995 (D.C. Cir. 1999) (dismissing Rule 6(e) contempt proceedings against the Office of Independent Counsel and dismissing President Clinton's alternative request for a stay).

of the grand jury investigation; and imposed secrecy obligations in violation of Rule 6(e) upon grand jury witnesses.”²⁹⁷ In addition, the prosecutors administered unauthorized “oaths” to Internal Revenue Service agents; deliberately had those agents misrepresent evidence to the grand jury; and “deliberately berated and mistreated an expert for the defense in the presence of some grand jurors.”²⁹⁸ Indeed, the government “conceded” that it was abusive to the witness both during a recess as well as in front of the grand jury.²⁹⁹

To an untrained, detached observer, this behavior by the prosecutors would seem to reek of unfairness and would call for sanctions. Not so, according to the Rehnquist Court. Relying on the notion that the supervisory power of a federal district court is limited, the *Bank of Nova Scotia* Court held that a district court may only dismiss an indictment based upon such errors if they prejudiced the defendants.³⁰⁰ In effect, a conviction remedies any prosecutorial misconduct, however flagrant, rendering such conduct “harmless.” The only remedy left for a knowing violation of the Federal Rule of Criminal Procedure relating to the grand jury function is a possible contempt proceeding against the prosecutor.³⁰¹ As Professor Henning has noted, “[t]he Court’s approach to the prosecutor’s actions in grand jury investigations has effectively made that conduct unreviewable by lower courts.”³⁰²

A more extreme version of such a hands-off approach to prosecutorial control over the grand jury is exemplified in *United States v. Williams*.³⁰³ In that case, Justice Scalia, writing for the Court, held that the prosecutor has no “binding obligation” to present substantial exculpatory evidence to a grand jury; and correspondingly, that the lower federal courts have “no authority to prescribe such a duty” pursuant to their inherent supervisory power.³⁰⁴ Grounded in a separation of powers rationale, Justice Scalia’s opinion for the majority justifies its conclusion

²⁹⁷ *Bank of Nova Scotia v. United States*, 487 U.S. 250, 259 (1988).

²⁹⁸ *Id.* at 260–61.

²⁹⁹ *Id.* at 261.

³⁰⁰ *See id.* at 254. The Court relied heavily on *United States v. Hasting*, 461 U.S. 499, 505–06 (1983) (holding that supervisory power ought not to be exercised to reverse a conviction if the error is harmless); and *United States v. Mechanik*, 475 U.S. 66 (1986). The *Nova Scotia* court adopted the standard set forth in Justice O’Connor’s concurring opinion in *Mechanik* that dismissal of the indictment is not warranted unless the violation “substantially influenced the grand jury’s decision to indict” or created “grave doubt” that the decision to indict was not tainted by such violations. 487 U.S. at 256 (citing *United States v. Mechanik*, 475 U.S. at 78 (O’Connor, J., concurring)).

³⁰¹ *See id.* at 263.

³⁰² Henning, *supra* note 285, at 8.

³⁰³ 504 U.S. 36 (1992).

³⁰⁴ *Id.* at 53–55.

on the functional independence of the grand jury from the judicial branch.³⁰⁵

The flaw underlying Justice Scalia's rationale is the assumption that "the Fifth Amendment's constitutional guarantee *presupposes* an investigative body 'acting independently of either prosecuting attorney *or judge*.'"³⁰⁶ It is amusing that Justice Scalia chooses to emphasize the word "presupposes." One wonders whether he did this with sarcasm. If he had read any literature on the true workings of the modern federal grand jury, he could not have been serious. As the facts of *Nova Scotia* demonstrate, the prosecutor enjoys unfettered control over the grand jury, free from the scrutiny of a legal adversary, a judge or, for that matter, the public.³⁰⁷ The notion that the modern grand jury is truly independent from prosecutorial control or manipulation defies context as well as reality.

Given the Rehnquist Court's doctrine barring meaningful judicial review of prosecutorial misconduct before the grand jury, it followed that the President's attempt to have the Office of Independent Counsel declared in contempt for leaks of grand jury material to the press would fail.³⁰⁸ In the ultimate political duel, the prosecutors had a trump card in the game of spin control for the hearts and minds of the American public: virtual immunity from judicial oversight of their actions relative to the grand jury investigating the President's conduct. The appellate opinion rejecting the President's stratagem is both ironic and illuminating. It is ironic because the Counselor to the Independent Counsel lied about what he disclosed to the press; it is illuminating to the extent it demonstrates both the power and impunity bestowed upon federal prosecutors through the Rehnquist Court's "Alice-in-Wonderland" perception of how grand juries truly operate. Let us examine the proposition that the Office of Independent Counsel violated neither the rules of criminal procedure governing grand jury proceedings nor the rights of any witnesses.

During the course of President Clinton's impeachment trial in the Senate, *The New York Times* published an article stating that prosecutors within the Office of Independent Counsel were considering seeking a grand jury indictment against the President upon the conclusion of the Senate trial.³⁰⁹ Among the charges the prosecutors were pondering, according to the article, were perjury in Clinton's Paula Jones deposition as well as in his grand jury testimony.³¹⁰ Immediately after publication of

³⁰⁵ See *id.* at 47–50.

³⁰⁶ *Id.* at 49 (citing *United States v. Dionisio*, 410 U.S. 1, 16 (1973)) (emphases in original).

³⁰⁷ See *id.* at 62–63 (Stevens, J., dissenting).

³⁰⁸ See *In re: Sealed Case No. 99-3091*, 192 F.3d 995 (D.C. Cir. 1999).

³⁰⁹ *Id.* at 997 (quoting relevant parts of the *Times* article).

³¹⁰ *Id.*

the article, Clinton and the Office of the President filed a motion to show cause why the OIC should not be held in contempt for violation of Federal Rule of Criminal Procedure 6(e),³¹¹ which prohibits federal prosecutors from divulging “matters occurring before the grand jury.”³¹²

In response to this motion, the OIC submitted a statement by Starr’s Counselor, Charles G. Bakaly, III, asserting that he told *The New York Times* reporter who wrote the article that he refused to confirm what either Starr or the OIC “was thinking or doing.”³¹³ Eventually, the OIC “abandoned the argument” that it was not the source of the information for *The New York Times* article, “took administrative action” against Bakaly, and requested that the Department of Justice conduct a criminal investigation of the issue.³¹⁴ Ultimately, the district court concluded that the disclosure of the potential indictment of Clinton upon the conclusion of the impeachment trial “revealed grand jury material and constituted a prima facie violation of Rule 6(e).”³¹⁵

Reversing the district court’s finding, the United States Court of Appeals for the District of Columbia Circuit held that the disclosures made by Bakaly to *The New York Times* did not constitute a prima facie violation of Rule 6(e).³¹⁶ The court based its ruling on two fundamental components: (1) the revelations by Bakaly did not involve “matters occurring before the grand jury”; and (2) the disclosure that Clinton was a witness before the grand jury technically violated Rule 6(e), but the error was harmless since the whole nation knew Clinton had testified before the grand jury and he had told the American public about it in a nationally televised address.³¹⁷

The appellate court had solid reasons for its holding. The disclosures by Bakaly were not “matters” that were before the grand jury. Rather, they represented possible future actions the OIC might undertake upon the conclusion of the impeachment trial. Although the court had acknowledged in previous holdings that Rule 6(e) encompassed “matters likely to occur” before the grand jury, it concluded that “[w]here the reported deliberations do not reveal that an indictment *has been* sought or *will be* sought,” they do not fall within the strict parameters of the rule.³¹⁸ Of course, one had to be on the moon not to know at the time the

³¹¹ *Id.*

³¹² In pertinent part, the rule states: “An attorney for the government . . . shall not disclose matters occurring before the grand jury, except as otherwise provided in these rules” FED. R. CRIM. P. 6(e).

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *Id.* at 997–98.

³¹⁶ *Id.* at 1001.

³¹⁷ *Id.* at 1001–05.

³¹⁸ *Id.* at 1003–04 (emphases in original).

article was written that "a grand jury was investigating alleged perjury and obstruction of justice by the President."³¹⁹ Left with no effective remedy, the court noted the "troubling" nature of such disclosures, especially since they could potentially damage an innocent suspect's reputation.³²⁰

Therein lies the conundrum generated by the Court's approach to judicial review of a federal prosecutor's misconduct before the grand jury. As Justice Marshall presciently observed in his *Bank of Nova Scotia* dissent, the Court's path has relegated Rule 6 "to little more than a code of honor that prosecutors can violate with virtual impunity."³²¹ Let us assume that the revelation of the possible indictment of the President or the disclosure that he was a witness would have constituted a "prima facie" violation of Rule 6(e). Let us further presume that Starr's successor would have sought and obtained an indictment against Clinton, after he leaves the Office of the Presidency, for perjury and obstruction of justice. Finally, let us assume that Clinton would have been convicted of either one or both counts. What would be the legal ramifications of the violations of Rule 6(e) by the Office of the Independent Counsel?

As we have seen, both the *Bank of Nova Scotia* and *Mechanik* opinions would render such error "harmless." Justice Marshall, therefore, was correct in surmising that these opinions rendered Federal Rule of Criminal Procedure 6, the only mechanism for regulating a federal prosecutor's conduct in front of a grand jury, "toothless." A result-oriented jurisprudence that justifies the prosecution's misconduct as long as the end of the game is a conviction goes a long way toward fostering an attitude of invincibility. This leitmotif gives us a glimpse into Bakaly's arrogance in misleading the court as to what he divulged to the press. And, while Bakaly's deception did not occur "under oath," it certainly besmirched the Office he represented by displaying the same behavior it was seeking to deter by recommending the President's impeachment and possible indictment.

As for Lewis's degrading treatment before the grand jury, the American public was not aware that the Supreme Court had in effect condoned such conduct in one of its decisions. In the *Bank of Nova Scotia* opinion, the prosecutors admitted to "berating" and "mistreating" an expert witness both in front of the grand jury as well as during a recess from the deliberations.³²² But as long as such behavior does not "substantially influence" the grand jury's decision to indict the defen-

³¹⁹ *Id.* at 1005.

³²⁰ *Id.* at 1003-04. The OIC had also regretted the disclosures, stating that they revealed "sensitive and confidential internal OIC information." *Id.* at 997.

³²¹ *Bank of Nova Scotia*, 487 U.S. at 265 (Marshall, J., dissenting).

³²² *Id.* at 260-61.

dant, it is legally irrelevant.³²³ How could such inane and irrelevant questions put to Lewis by Starr's subordinates have "substantially influenced" its decision to indict? The reader may readily glean the answer to my rhetorical question. One could hardly fault the American public, moreover, for being ignorant of Supreme Court precedent allowing such distasteful actions. In the political arena in which the investigation was being waged, the OIC's mistreatment of Marcia Lewis backfired against Starr. Had it not been a "high profile" political case, however, the prosecutor's misconduct would have been, most likely, legally irrelevant and ignored.

In effect, the grand jury investigation by the OIC vividly illustrates what the Rehnquist Court has wrought: the elimination of judicial review of prosecutorial misconduct during grand jury investigations.³²⁴ It is true that the Rehnquist Court has merely ratified a course the Supreme Court has consistently and slavishly adhered to. A major rationale proffered for such a rigid stance is that "seeking judicial review of the grand jury investigation can devolve into a tactic to delay the prosecution of valid criminal charges."³²⁵ Rather than regulating the prosecutor's conduct during the grand jury's investigation, the alternative seems to lie in two statutes designed to provide the aggrieved parties redress and to sanction the prosecutors after the fact through application of ethical rules governing an attorney's conduct. These two statutes are the Hyde Amendment³²⁶ and the McDade Act.³²⁷

Both laws emerged from Congressional ire over the prosecution of one of their own members, Robert McDade, who was acquitted of federal criminal charges involving campaign contributions.³²⁸ The Hyde Amendment allows a criminal defendant to recover attorney's fees in the event she is acquitted, as long as she establishes that the government's position was "vexatious, frivolous, or in bad faith."³²⁹ Seeking to render federal prosecutors accountable to ethical guidelines, the McDade Act subjects them "to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that

³²³ *Id.*

³²⁴ See Henning, *supra* note 285.

³²⁵ *Id.* at 47, citing *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-65 (1988); *United States v. Washington*, 431 U.S. 181, 185-88 (1976); *United States v. Dionisio*, 410 U.S. 1, 1-18 (1972).

³²⁶ Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (to be codified at 18 U.S.C. § 3006 A).

³²⁷ Pub. L. No. 105-277, § 801(a), 112 Stat. 2681 (1998) (to be codified at 28 U.S.C. § 530 B).

³²⁸ See 143 CONG. REC. H7791 (statement of Rep. Hyde).

³²⁹ Pub. L. No. 105-119, § 617, 111 Stat. 2440, 2519 (1997) (to be codified at 18 U.S.C. § 3006 A).

attorney's duties, to the same extent and in the same manner as other attorneys in that State."³³⁰

Unlike scholars who see these laws as promising starts in efforts to curb or deter misconduct by federal prosecutors in grand jury investigations,³³¹ I do not harbor such sanguine expectations. Instead, I view this approach as leaving the fortunes of those defendants and witnesses who bear the brunt of the prosecutors' misconduct subject to the political whims of the legislative branch. I wonder whether Congress would have even considered the Hyde or McDade proposals if one of their members had not, in their view, been the target of "overzealous and lawbreaking officials in the United States Department of Justice."³³² Furthermore, these laws impose daunting challenges to those defendants who may attempt to invoke them. The Hyde Amendment is the obverse side of the Court's grand jury investigation jurisprudence; it requires the defendant to prevail and to prove that the prosecution was vexatious or frivolous. The McDade Act requires a suspect being investigated by a grand jury to run the risk of a more vengeful prosecutor who will no doubt be angered by having to contend with an ethical complaint.

Let us return to Bakaly's leak to *The New York Times* in which he divulged to the press the possibility that the OIC might seek an indictment of Clinton. What sanctions were leveled at Bakaly? He "abruptly resigned" from the OIC on March 11, 1999.³³³ Ultimately, Bakaly was charged with criminal contempt and ordered to stand trial, presumably for lying to the district court regarding his leaks to *The New York Times* relating to the possible indictment of President Clinton.³³⁴

This outcome contrasts with the fate of the IRS agents who flagrantly violated the criminal laws in the infamous "briefcase caper" case, *United States v. Payner*.³³⁵ In that case, IRS agents deliberately induced an illegal break-in of an apartment by violating the rights of a third party, comfortable in the knowledge that their target would not be able to estab-

³³⁰ Pub. L. No. 105-277, § 801(a), 112 Stat. 2681 (1998) (to be codified at 28 U.S.C. § 530 B).

³³¹ See HENNING, *supra* note 285, at 48-61. Although Professor Henning detects numerous flaws in both the Hyde and McDade Acts, he concludes that legislative redress is the best means of addressing prosecutorial misconduct in grand jury investigations. For a thorough critique of the McDade Act, see Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207 (2000).

³³² Bill Moushey, *Murtha Seeking Prosecutor Limits*, PITTS. POST-GAZETTE, Feb. 3, 1999, at A1 (cited in HENNING, *supra* note 285, at 48 n.208). This was the statement attributed to Representative Murtha in wake of Representative McDade's acquittal on bribery and RICO charges.

³³³ John Broder, *Starr's Ex-Spokesman Charged With Contempt in Case on Leaks*, N.Y. TIMES, July 7, 2000, at A1.

³³⁴ *Id.*

³³⁵ 447 U.S. 727 (1980).

lish standing for Fourth Amendment purposes.³³⁶ Just as in the grand jury arena, the Supreme Court refused to invoke the supervisory powers of the federal courts to sanction egregious behavior by government agents.³³⁷

Both the majority and the dissent in *Payner* concurred that the government had probably engaged in criminal behavior by breaking into the apartment in order to gather evidence against its target.³³⁸ Did the government agents responsible for committing these serious violations of the law receive any meaningful sanctions? There is nothing in the record indicating so. Indeed, the *Payner* majority sheepishly acknowledged in a footnote that the IRS, in responding to these abuses, took measures “less positive than one might expect from an agency charged with upholding the law.”³³⁹ Similarly, Justice Marshall’s dissent not only took the government to task for its failure to discipline the agents involved but also alluded to the district court’s finding that the government agents knew they were violating the Constitution at the time they undertook their abominable gambit.³⁴⁰

We should be surprised, therefore, that Bakaly’s contumacy was punished. If the highest court in the land is willing to overlook serious government violations because it does not wish to tread upon executive prerogative, then it should shock us that Bakaly’s leak to *The New York Times*, and his deceptive answers to the district court, prompted such a vehement response. Given the high stakes in the public drama regarding the President’s impeachment, the government would have seemed hypocritical in pursuing defendants for such acts but not members of its own tribe, i.e., its own prosecutors and agents. Payner was an obscure citizen familiar only to lawyers or scholars interested in the Court’s criminal justice opinions. But the President of the United States was a different kind of defendant, with support from much of the American public and an array of formidable counsel. One can then discern why the government agents in *Payner* escaped unscathed.

Oblivious or cynical to the message it has conveyed through the abdication of its responsibility to uphold the values embedded in the Constitution, the Supreme Court paved the way for the prosecutorial excesses that the American public recoiled at when Starr zealously pursued

³³⁶ *Id.* at 729–30.

³³⁷ *See id.* at 735.

³³⁸ *Id.* at 733 (describing the “possibly criminal behavior of those who planned and executed this ‘briefcase caper’”). *See also* Justice Marshall’s dissent, citing the District Court’s conclusion that “the actions of the IRS appeared to constitute a prima facie case of criminal larceny under Florida law, and possibly violated other criminal laws of that State as well.” *Id.* at 746–47 n.12 (Marshall, J., dissenting).

³³⁹ *Id.* at 733 n.5.

³⁴⁰ *Id.* at 750–51 n.16.

the impeachment of the President of the United States. Only legal technicians steeped in the Court's criminal justice doctrine could discern the skepticism and contempt for the law the highest court in the nation has bred. This cynicism is not limited to Independent Counsels. It extends to prosecutors and law enforcement agents as well. Thus, elimination of the Independent Counsel statute is not the panacea to a deep-seated and pervasive disdain for the law born of Supreme Court opinions rooted in theory rather than practice.

CONCLUSION, PRESCRIPTIONS, AND POSTSCRIPT

At the outset of this endeavor, I sought to give a broader explanation for the constitutional crisis that embroiled the nation as a result of an illicit affair between the President and a young, impressionable intern, and the President's attempt to deny it. Although Ken Starr was Clinton's foil in this surreal drama, I believe his role served to underscore an instrumental philosophy by a Court headed by a Chief Justice who has sent a clear signal to law enforcement agents and prosecutors that securing a conviction, even while circumventing the values and opinions supposedly undergirding the Constitution, is unseemly but palatable. I wish to elaborate upon this assessment, and to briefly scrutinize recent Court opinions which, taken at face value, may seem to undermine my conclusions. Finally, I wish to offer reasons for the Court's drift, which is based not on doctrine or ideological fault lines but on lack of experience in the "real world" of criminal law.

Let us first explore the erosion of privacy fostered by the Rehnquist Court's narrow interpretation of the Fourth Amendment. Recently, Professor Jeffrey Rosen has exposed the manner in which the advent and popularity of the Internet both at work and at home leaves Americans without protection from their innermost thoughts, feelings, and communications.³⁴¹ My brief excursion into the Clinton-Lewinsky affair has shown that the government can pry into our most private sanctuary, the home, even without the benefit of the Internet or a search warrant. A simple invitation of a "short-term, commercial" guest renders our homes vulnerable to the government's "unwanted gaze." This holds true regardless of whether we live in an expensive home or an "ill-appointed" apartment. "Big Brother" is here; ask President Clinton, and he will painfully tell you. Most Americans are unaware that Starr was not the culprit in our loss of privacy. Rather, Chief Justice Rehnquist—wearing his majestic robe while supposedly presiding over President Clinton's impeachment trial—and his Court bore the blame.

³⁴¹ JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* (Random House ed., 2000).

Critics might point to two opinions last term which seem to stem the tide of government intrusion into our spheres of privacy. In *Bond v. United States*,³⁴² the Court held that an officer's "physical manipulation" of a passenger's baggage constituted a search that violated the Fourth Amendment.³⁴³ Similarly, the Court held in *Florida v. J.L.*³⁴⁴ that police officers lacked reasonable suspicion to conduct a "stop and frisk" of an individual based solely on an anonymous tip that the suspect was wearing a plaid shirt and carrying a gun.³⁴⁵ I believe these two decisions are consistent with the Rehnquist Court's motif to the extent that they can be explained as attempts to protect property interests, the "old" talisman of Fourth Amendment jurisprudence before *Katz*; and to preserve a modicum of consistency in requiring at least a bare bones, yet partially corroborated, allegation before permitting a search and seizure in the streets.

Why is a "squeeze" of a passenger's soft luggage a search under the Fourth Amendment while peering into the curtilage of a home from an airplane³⁴⁶ or a helicopter³⁴⁷ is not? I believe the answer rests only in part on the majority's analysis of whether the law enforcement action in *Bond* was more "physically invasive" than mere "visual inspection."³⁴⁸ Relying on the "search" rationale, the *Bond* majority obscures the more obvious truth: what the law enforcement officer did by squeezing and manipulating the luggage was to "seize" the property without reasonable suspicion or probable cause. By squeezing the luggage, the officer interfered with the owner's *property* interest by creating the risk that he might damage property located inside the bag.³⁴⁹

In fact, this conclusion is buttressed by Justice Breyer's dissenting opinion in *Bond*, in which he was joined by Justice Scalia.³⁵⁰ Denying the distinction the majority relied upon, Justice Breyer instead emphasized the law enforcement agent's testimony that though his practice was to "squeeze" the luggage "hard," it was not "hard enough to break something inside."³⁵¹ This is apparently where the two sides parted ways. The majority believed the "squeeze" of the luggage by the police officer carried the intolerable risk of interfering with the owner's property rights; the dissent felt that the officer's testimony allayed that risk. Prop-

³⁴² 120 S.Ct. 1462 (2000).

³⁴³ *Id.* at 1465.

³⁴⁴ 120 S.Ct. 1375 (2000).

³⁴⁵ *Id.* at 1380.

³⁴⁶ See *California v. Ciraolo*, 476 U.S. 207 (1986).

³⁴⁷ See *Florida v. Riley*, 488 U.S. 445 (1989).

³⁴⁸ *Bond*, 120 S.Ct. at 1464.

³⁴⁹ *Id.* at 1465. The opinion reminds me of Justice Scalia's majority opinion in *Arizona v. Hicks*, in which the Court held that turning over a piece of stereo equipment in an apartment constituted a seizure under the Fourth Amendment. 480 U.S. 321 (1987).

³⁵⁰ *Bond*, 120 S.Ct. at 1465 (Breyer, J., dissenting).

³⁵¹ *Id.*

erty, not privacy, was the theme underlying the *Bond* opinion. After all, would the Justices countenance an officer squeezing their luggage at the risk of damaging a fine porcelain artifact? Though they travel by airplanes and not in buses, it may be that the possibility crossed the Justices' minds, even if subconsciously.

Turning to *Florida v. J.L.*, I believe the Justices might have realized that allowing the police to stop and frisk an individual in the streets on the basis of an anonymous tip without any other indicia of criminal activity would effectively overrule whatever is left of *Terry v. Ohio*.³⁵² The only information available to the police was a description of the suspect and the clothes he was wearing. When the police arrived at the site, they saw no signs indicating criminal activity was "afoot."³⁵³ Unlike Mr. Wardlow, J.L. had the fortune of not running at the sight of the police when they encountered him on the street. By sheer luck, then, J.L.—a juvenile—escaped the fate an adult endured because he was either too naive or too cocky to run from the police. Had J.L. scattered when the police arrived at the scene, *Wardlow* might have portended a different outcome for him.

More to the point, the Court left open the possibility that such a thin veil might justify a search in different circumstances. For example, Justice Ginsburg hinted that the Court might be more sympathetic to the government's position if the tip involved a person carrying a bomb; or was present in settings where "reasonable" expectations of privacy are "diminished," such as schools or airports.³⁵⁴ Chief Justice Rehnquist, in a concurring opinion joined by Justice Kennedy, suggested that an anonymous tip, without other corroborating indicia of criminality, might satisfy the *Terry* standard if it can be traced to a specific telephone number or a person who related the information to an officer "face-to-face."³⁵⁵

In sum, neither *Bond* nor *J.L.* reflect the Rehnquist Court's reversal of its decimation of *Katz*, the privacy "lodestar." *Carter*, *Wardlow*, and *Houghton* are emblematic and more representative: they constitute a pattern designed to leave Warren Court precedents in place while undermining their doctrinal bases. In the process, such a philosophy fosters an ethos among law enforcement agencies and prosecutors that Supreme Court opinions are meant to be observed and, at the same time, circumvented.

³⁵² *Terry v. Ohio*, 392 U.S. 1 (1968) (allowing a stop and frisk of an individual upon reasonable suspicion that he is involved in imminent criminal activity and is armed and dangerous).

³⁵³ *Florida v. J.L.*, 120 S.Ct. at 1377. The majority noted that when the officers encountered J.L. they "did not see a firearm, and J.L. made no threatening or otherwise unusual movements." *Id.*

³⁵⁴ *Id.* at 1380 (citations omitted).

³⁵⁵ *Id.* at 1381 (Rehnquist, C.J., concurring).

How does one explain the most recent opinion, authored by none other than Justice Scalia, in *Kyllo v. United States*?³⁵⁶ In *Kyllo*, the Court held that use by the police of a thermal imaging device positioned in public streets to detect relative amounts of heat emanating from a home constitutes a search for Fourth Amendment purposes.³⁵⁷ The decision is strange for two reasons: first, Justice Scalia relies on *Katz*, a decision he detests and has criticized; and second, Justice Stevens, joined by the Chief Justice and Justices Kennedy and O'Connor, writes the dissent. Justice Scalia's rationale is rooted in the dangers to the *Katz* "expectation of privacy" safeguards inherent in information retrievable through "sense-enhancing technology."³⁵⁸ He qualifies the breadth of the holding, however, by limiting it to technology that "is not in general public use."³⁵⁹

Strange as *Kyllo* may appear, it does not affect my analysis of the collateral consequences flowing from *Carter*. Law enforcement agents are free to employ sense-enhancing technology and to introduce the fruits of such "searches" against short-term commercial guests of a house, who will lack standing to contest the search or its fruits. It is ironic that after his attack upon *Katz* in *Carter*, Justice Scalia finds, with respect to homes, that *Katz* has "roots deep in the common law."³⁶⁰ In the space of a term, *Katz* is transformed from a "fuzzy" opinion to one that, at least with respect to homes, has historical and constitutional validity. A stranger to our jurisprudence would find Justice Scalia's sudden about-face puzzling. *Kyllo* reflects the Court's institutional schizophrenia in the criminal justice arena, a schizophrenia that undermines the legitimacy of its handiwork.

That brings us to the most noted opinion by the Court this past term, *Dickerson v. United States*.³⁶¹ Confounding the pundits, Chief Justice Rehnquist wrote the majority opinion upholding the constitutionality of the *Miranda* doctrine. Is Chief Justice Rehnquist reversing course? Quite the contrary, he probably learned the obvious: as I have argued,³⁶² the Chief Justice might have realized that the constricted version of *Miranda* is, on balance, a boon rather than a burden to the police. Only those who live in a "fairyland" of imagined lost confessions, rather than in real police precincts, would believe a lot of confessions in important cases are lost because the *Miranda* warnings were not administered. I find it amusing that forgotten in the *Dickerson* controversy is the fact that

³⁵⁶ *Kyllo v. United States*, 121 S.Ct. 2038 (2001).

³⁵⁷ *Id.* at 2046.

³⁵⁸ *Id.* at 2043.

³⁵⁹ *Id.*

³⁶⁰ *Id.*

³⁶¹ *Dickerson v. United States*, 120 S.Ct. 2326 (2000).

³⁶² See Garcia, *Is Miranda Dead*, *supra* note 87.

the motion to suppress the most damning evidence against him on Fourth Amendment grounds was denied.³⁶³ On the other hand, the suppression of Dickerson's confession will not impede his prosecution or prevent his conviction.

We have seen that the impeachment and concomitant violation of the President and Lewinsky's privacy, the coercive tactics employed by the OIC to persuade Lewinsky to confess and turn government agent, and the potential transgression of grand jury rules, were all rendered legal principally through Rehnquist Court precedents. Starr and his subordinates did what the law permitted them to get away with, however repugnant it may have looked to a significant portion of the American people. This is a function of an ethically bankrupt criminal justice jurisprudence in which the Rehnquist Court, while seemingly upholding (though chipping away at) the center of Warren Court doctrine, simultaneously invites law enforcement to flout the spirit and heart of these precedents. Indeed, the Court would stand on higher ground if it discarded this charade and returned to the pre-Warren era. Maybe at that point the players below would respect the law of the land rather than view it as a superable obstacle or, as one commentator has aptly observed, as useful stationhouse furniture.³⁶⁴

Is this direction the Court has taken attributable to ideology? I believe it is attributable to something more fundamental: naivete about what happens in the "real world" of criminal law. None of the members of the current court have any experience in the field; there are no former prosecutors or defense attorneys in the Court. I find it perplexing that Judge Posner castigates the current Court's apparent *faux pas* in allowing a sitting President to be sued and ascribes the error to its political naivete.³⁶⁵ He describes the Rehnquist Court as "notable for its high professional sheen—and lack of political experience."³⁶⁶ By that measure, Judge Posner is equally unfit to judge criminal cases. He has no experience in the field of criminal law, much like the current members of the Court and even Starr, for that matter. The ultimate pragmatist should not criticize when he himself lacks the experience to make decisions in criminal law grounded in reality rather than in ethereal casuistry.

Gradually eviscerating Warren Court doctrine, the Rehnquist Court has wrought the ultimate quagmire it confronted in the *Dickerson* case: upholding precedent it has decimated. Perhaps if the Court had consisted

³⁶³ *United States v. Dickerson*, 166 F.3d 667, 693–95 (4th Cir. 1999), *rev'd Dickerson v. United States*, 120 S.Ct. 2326 (2000).

³⁶⁴ See SIMON, *supra* note 250, at 211. Simon refers to the *Miranda* doctrine. I believe, however, that his point is applicable to the Court's Fourth and Sixth Amendment jurisprudence as well.

³⁶⁵ POSNER, *supra* note 15, at 229.

³⁶⁶ *Id.*

of some criminal law practitioners, it would have evaded the tortured path *Miranda*, and the rest of its criminal justice doctrine, has followed. In the process, the Court would have recognized the real world implications of an area that touches the deepest recesses of our society at its most real level: crime in the streets, in the corporate world, and, yes, however bizarrely, in the Office of the President of the United States.

Our next President ought to consider the broad implications of the Clinton impeachment saga. In selecting Supreme Court justices, he should consider the individual's insight into the real world of criminal law. As *The New York Times* noted in a past editorial, the most glaring shortcoming of the Rehnquist Court "is its myopia about real situations in the real world. This Court too often deals in abstract ideology with no appreciation of how people will actually behave under the force of its rulings."³⁶⁷ This prescription rings true in the criminal arena more than in any other field of constitutional jurisprudence. It is even more resonant today than it was in 1993, when the editorial was written. The Court must come down from its pedestal and broaden its horizon with members who will understand the consequences their opinions will wreak in the streets, corporate offices and, for that matter, the Internet. The Clinton constitutional crisis emerged not from a "politically naive" Supreme Court; it was born of ignorance of the ramifications of criminal constitutional jurisprudence in the most "real" of worlds. Take heed Mr. President: it is not ideology that counts stupid; it is experience in the real world of criminal law that matters. Follow this advice from a quixotic law professor who practiced criminal law on the streets of Miami, Florida during the 1980s at the risk of your political peril.

³⁶⁷ Editorial, *A Court For Real People*, N.Y. TIMES, April 9, 1993, at A1.