Law Enforcement and Criminal Law Decisions

Erwin Chemerinsky

One of the extraordinary aspects of the Supreme Court’s 2000 Term was the success of criminal defendants. Criminal defendants prevailed last Term in two cases concerning sentencing,1 two of three cases concerning the Fourth Amendment,2 and both cases concerning the Fifth Amendment privilege against self-incrimination.3 Although I do not have comparative statistics, I expect that this is the best Term criminal defendants have had in a long time, perhaps even since the end of the Warren Court.4

One Term, of course, does not make a trend. I certainly do not mean to suggest that the Rehnquist Court is getting soft on crime or criminal defendants. But the success of criminal defendants is interesting, especially because in some of the cases—notably Apprendi concerning sentencing and Hubbell concerning the Fifth Amendment’s protection for documents—the two most conservative Justices, Scalia and Thomas, wanted to go even further than the Court in protecting rights. I have long thought that conservatives with their distrust of government and government power logically should be for greater protections for criminal defendants’ rights. That certainly has not been the case over the past few

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1. Castillo v. United States, 530 U.S. 120 (2000) (holding that use of the word “machinegun” in 18 U.S.C. §924(c)(1) signifies a separate, aggravated crime); Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding state hate crime penalty enhancement statute requires proof of racial motivation beyond a reasonable doubt; the Constitution requires that any fact that increases the penalty for a crime beyond the statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt).
2. Florida v. J.L., 529 U.S. 266 (2000) (holding an anonymous tip providing a description, but not the name, of a person accused of having a concealed weapon is not sufficient for probable cause); Bond v. United States, 529 U.S. 428 (2000) (holding manipulation of bus passenger’s luggage to find contraband is a search under the Fourth Amendment).
3. Dickerson v. United States, 530 U.S. 428 (2000) (holding that the federal statute that allows for the introduction of voluntary confessions without proper administration of Miranda warnings is unconstitutional; therefore, Miranda v. Arizona is based on the Fifth Amendment and is reaffirmed); United States v. Hubbell, 530 U.S. 27 (2000) (holding that documents produced under a grant of prosecutorial use immunity violate the privilege against self-incrimination under the Fifth Amendment).
4. One area where criminal defendants did not prevail was in cases concerning criminal appeals. Here, the government prevailed in all three cases. See Smith v. Robbins, 528 U.S. 259 (2000) (holding California’s no-merit brief procedure, which allows attorneys to write a brief summarizing the facts and procedural history, satisfies the requirements of Anders v. California, 366 U.S. 139 (1967)); see also Martinez v. Cal. Court of Appeal, 528 U.S. 152 (2000) (holding that a criminal defendant does not have constitutional right to elect self-representation on direct appeal from judgment of conviction); Roe v. Flores-Ortega, 528 U.S. 476 (2000) (holding the Constitution does not require that trial counsel file a notice of appeal or inquire of the defendant’s desire to file a notice of appeal in all cases).
decades. Nor was it true in all of the criminal procedure cases last Term; Scalia and Thomas were the dissenters in Dickerson's reaffirmation of Miranda v. Arizona. Yet, the Term's criminal procedure decisions offer the possibility that the Court's great deference to law enforcement may be waning.

Indeed, this is consistent with the central theme I saw in the amazing October Term 1999: This is a Court that defers to no one. The Court showed no deference to Congress and struck down important federal laws, such as the civil damages provision of the Violence Against Women Act. The Court did not defer to state courts and state laws, such as the New Jersey Supreme Court's holding that the Boy Scouts exclusion of a gay scout leader violated state law and was not protected by freedom of association. The Court did not defer to state legislative powers in repeatedly finding preemption by federal laws. The Court did not defer to federal agencies, as evidenced by the striking down of the Food and Drug Administration's regulation of tobacco products. The criminal procedure decisions likewise reflect a lack of deference to the government. Right now, it appears that this is a Court that defers to no one.

Eleven years ago, I had the wonderful opportunity of writing the forward to the Harvard Law Review. My central thesis was the Rehnquist Court's tremendous deference to government at all levels; the government prevailed in virtually every case that Term. The Court often expressed an explicit need for deference to majoritarian branches of government. No longer is this deference evident. Ironically, this is from a Court that by all accounts, is conservative; seven Justices were appointed by republican presidents and the most common division has five conservative Justices in the majority.

I will focus primarily on five cases: Apprendi v. New Jersey, which concerns sentencing; Illinois v. Wardlow, Florida v. J.L. and Bond v. United

5. See United States v. Morrison, 528 U.S. 598 (2000) (holding that the civil cause of action for gender motivated violence within the Violence Against Women Act is unconstitutional because it is not within the scope of Congress' commerce clause authority or its powers under section five of the Fourteenth Amendment).

6. See Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding it is an unconstitutional violation of freedom of association for a state anti-discrimination law to be applied to require the Boy Scouts to use gay men as scout masters).

7. See, e.g., Geier v. Am. Honda Motor Corp., 529 U.S. 861 (2000) (holding Federal law preempts a defective design lawsuit against the American Honda Motor Corporation for damages allegedly arising from the absence of an airbag, when the car was manufactured in accordance with federal safety standards which allowed alternatives to airbags); see also Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000) (holding Massachusetts law that refused to do business with companies doing business in Burma is preempted by federal law imposing sanctions on Burma).


which involve the Fourth Amendment; and United States v. Dickerson, which reaffirmed Miranda v. Arizona.

I. SENTENCING

I regard Apprendi v. New Jersey as the single most important decision of the Term. The decision, especially if extended, can dramatically change criminal sentencing in the United States. The holding in Apprendi can be simply stated: State hate crime penalty enhancement statutes require proof of racial motivation beyond a reasonable doubt; "the Constitution requires that any fact that increases the penalty for a crime beyond the prescribed statutory maximum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt." The facts are straightforward. In December 1991, Charles Apprendi fired several shots into the home of an African-American family that had recently moved into a previously all-white neighborhood. Apprendi was quickly arrested, and he then told the police that he did this "because they are black in color and he did not" want them in the neighborhood. Apprendi ultimately pled guilty to second-degree possession of a firearm for an unlawful purpose. Under New Jersey law, the penalty for this offense is a sentence of five to ten years in prison.

Additionally, under the terms of the plea agreement, the state reserved the right to ask the judge to impose a greater sentence under the New Jersey hate crime law. New Jersey, like many states, has a statute which provides for greater penalties when it is proven that a crime is hate motivated. New Jersey law provides for an "extended term" of imprisonment if the judge finds, by a preponderance of the evidence, that [t]he defendant in committing the crime acted with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity. Under the terms of the plea agreement, Apprendi reserved the right to challenge the hate

16. 120 S. Ct. 2348 (2000).
17. Id. at 2350.
18. Id. at 2351.
19. Id.
20. Id. at 2352.
21. Id.
22. Id.
23. Id. at 2351 (quoting N.J. Stat. Ann. § 2C-44-3(e) (West Supp. 2000)).
crime enhancement of his sentence as violating the United States Constitution.24

The trial judge sentenced Apprendi to the maximum sentence of 10 years in
prison for possession of a firearm for unlawful purposes.25 Although Apprendi
recanted his statement to the police about his reasons for the shooting and said
that it was not accurately described, the judge found that the evidence supported
a finding "that the crime was motivated by racial bias."26 The judge imposed an
additional two years of imprisonment based on the New Jersey hate crimes law.27

The issue before the Supreme Court was whether the penalty enhancement
requires proof, to a jury, beyond a reasonable doubt.28 More precisely, the
question for the Court was whether such a penalty enhancement should be
regarded as a sentencing factor, which can be proven by a preponderance of the
evidence to the judge, or an element of the offense, which must be proven to a
jury beyond a reasonable doubt.29 In a five-to four decision, the Supreme Court
took the latter view.30 In an unusual division among the Justices, Justice Stevens
wrote the opinion for the Court, which was joined by Justices Scalia, Souter,
Thomas, and Ginsburg.31

The Court held that "[o]ther than the fact of a prior conviction, any fact that
increases the penalty for a crime beyond the prescribed statutory maximum must
be submitted to a jury, and proved beyond a reasonable doubt."32 The Court
stated, quoting a concurring opinion from Justice Stevens in a decision a year ago:
"[I]t is unconstitutional for a legislature to remove from the jury the assessment
of facts that increase the prescribed range of penalties to which a criminal
defendant is exposed. It is equally clear that such facts must be established by
proof beyond a reasonable doubt."33

The Court explained that the constitutional guarantee of due process of law,
together with the Sixth Amendment right to trial by jury, entitles a criminal
defendant to a jury determination that he is guilty, beyond a reasonable doubt, of
every element of the crime for which he is convicted and sentenced.34 Simply put,
the Court held that it violates due process and the Sixth Amendment to convict
a person of one crime, but punish him or her for another.35 Apprendi was
convicted of possession of a firearm for an unlawful purpose, but he was

24. Id. at 2352.
25. See id.
26. Id. (quoting App. to Pet. for Cert. 143a).
27. See id.
28. Id. at 2351.
29. Id.
30. Id. at 2355.
31. Id. at 2351.
32. Id.
33. Id. at 2363 (quoting Jones v. United States, 526 U.S. 227, 252-253 (1999) (Stevens, J.,
concurring)).
34. See id at 2362-63.
35. See id. at 2363.

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sentenced both for this crime and for the separate offense of acting with an impermissible hate-based motive. The Court ruled that this latter factor essentially was a separate crime and it, too, must be proven to a jury beyond a reasonable doubt.

There were two dissenting opinions by Justices O’Connor and Breyer. Justice O’Connor’s dissent, joined by Chief Justice Rehnquist and Justices Kennedy and Breyer, said that the Court’s decision would be “remembered as a watershed change in constitutional law.” Justice O’Connor argued that legislatures should have discretion in deciding what are elements of the offense and what are factors in sentencing. She lamented, “[i]n one bold stroke the Court today casts aside our traditional cautious approach and instead embraces a universal and seemingly bright-line rule limiting the power of Congress and state legislatures to define criminal offenses and the sentences that follow from convictions thereunder.”

Justice Breyer’s dissenting opinion, joined by Chief Justice Rehnquist, argued that “compromises” are essential in allocating functions between judges and juries. Justice Breyer argued that the majority’s holding was “impractical” and unsupported by the Constitution. Justice Breyer expressed great concern over what the Court’s holding would mean for the federal sentencing guidelines.

Apprendi promises to have enormous implications for trials and sentencing in federal and state courts. Dozens of lower courts have already interpreted Apprendi. Two of the most important unresolved questions concern whether Apprendi can be applied to sentences within the prescribed range and whether it applies retroactively.

Regarding the question of sentence range, if Apprendi is read literally, it applies only when the punishment is greater than the statutory maximum for the offense. In other words, it has no application when the sentence is within the

36. See id.
37. See id.
38. Id. at 2380-96 (O’Connor, J., dissenting); see also id. at 2396-2402 (Breyer, J., dissenting).
39. Id. at 2380 (O’Connor, J., dissenting).
40. Id. at 2380-81 (O’Connor, J., dissenting) (quoting McMillan v. Penn., 477 U.S. 79, 85 (1986)) (“[W]e have held that the ‘legislature’s definition of the elements of the defense is usually dispositive.’”).
41. Id. at 2381 (O’Connor, J., dissenting).
42. Id. at 2397 (Breyer, J., dissenting).
43. Id. (Breyer, J., dissenting).
44. Id. (Breyer, J., dissenting).
range prescribed by law. Yet, its central rationale—that it is wrong to convict a person of one crime and impose punishment for another—logically applies to factors used to enhance penalties within the statutory range. A simple example illustrates: An eleven count indictment is issued in federal court against a person; ten counts are for drug offenses and an eleventh count is for bankruptcy fraud. The defendant is acquitted of all ten drug counts, but convicted of bankruptcy fraud. The federal judge, in applying the sentencing guidelines, uses the drug offenses, for which there was an acquittal, as the basis for choosing a very high sentence for bankruptcy fraud, but one within the allowable statutory maximum for the offense. Does Apprendi apply to make this unconstitutional? If Apprendi concerns only punishments greater than the statutory maximum, it is inapplicable. But Apprendi precludes this, if it establishes the broader principle that it is wrong to punish a person for crimes that were not proven beyond a reasonable doubt.

Most lower courts to consider Apprendi thus far have chosen the narrow interpretation. For instance, the Seventh Circuit in United States v. Smith, held that Apprendi applies only to sentences greater than the statutory maximum. In Smith, the defendants were sentenced to mandatory life imprisonment rather than 30 years to life, because they were found at sentencing to be leaders of a street gang, a criminal enterprise. The Seventh Circuit rejected the argument that Apprendi applied, stating that it was inapplicable since the punishment was in the range provided for the offense.

Other courts, however, have applied Apprendi to the federal sentencing guidelines. As of this writing, two United States courts of appeals have ruled that Apprendi requires that the government prove the quantity of drugs—a key factor under the sentencing guidelines—beyond a reasonable doubt.

Also, two circuits have held that a sentence-enhancing factor must be charged in the indictment. The Eighth Circuit, in United States v. Aguayo-Delgado, said: "[I]f the government wishes to seek penalties in excess of those applicable by virtue of the elements of the offense alone, then the government must charge the facts giving rise to the increased sentence in the indictment. . . . "51 The Fifth Circuit came to the same conclusion in United States v. Meshack.52

There is also the question of whether Apprendi will be applied retroactively. Under Mackey v. United States, Supreme Court decisions concerning criminal procedure have retroactive effect if they place "certain kinds of primary, private individual conduct beyond the power of the criminal law" or if they are "

46. 223 F.3d 554 (7th Cir. 2000).
47. Id. at 565-66.
49. See id. at 533, 565-66.
50. United States v. Sheppard, 219 F.3d 766, 767-69 (8th Cir. 2000); see also United States v. Nordby, 225 F.3d 1053, 1057-59 (9th Cir. 2000).
51. 220 F.3d 926, 933 (8th Cir. 2000).
52. See 225 F.3d 556, 574-78 (5th Cir. 2000).
in the concept of ordered liberty” and "watershed rule[s] of criminal procedure." The Court's holding in Apprendi concerns when the criminal law may punish a person for a crime, going to the question of guilt. There is a strong argument that it is a "watershed" rule; indeed, Justice O'Connor used that very term to describe the decision. The result is that courts will be flooded with thousands of petitions from federal and state prisoners who claim they were sentenced in violation of Apprendi's holding.

Thus far, however, lower courts have rejected the retroactive application of Apprendi, especially as a basis for successive habeas corpus petitions. Under Mackey, Apprendi would warrant retroactive application; its holding goes to guilt and it is a watershed rule of criminal procedure. However, courts may be reluctant to open that door.

Extended to its logical conclusion, Apprendi challenges the entire manner in which sentencing is carried out in the United States. Ultimately, it says that a jury should find the basis for the sentence. Apprendi focuses on other crimes that lead to a sentence greater than the maximum. But logically, it would seem to be a basis for saying that any factor that enhances a sentence should be found by the jury. I doubt the Court will take Apprendi that far, but it will be difficult for the Court to draw lines that do not seem arbitrary in limiting the reach of this decision.

II. FOURTH AMENDMENT

Three Fourth Amendment cases were decided last Term, and four the year before that. The Supreme Court already has five cases on its docket for the new Term concerning the Fourth Amendment. In an era in which the Supreme

56. See id. at 2394-95 (O'Connor, J., dissenting).
57. See, e.g., Sustache-Rivera v. United States, 221 F.3d 8, 14-15 (1st Cir. 2000); In re Joshua, 224 F.3d 1281, 1283 (11th Cir. 2000).
58. See Apprendi at 1205 S. Ct. 2380 (O'Connor, J., dissenting), 2402 (Breyer, J., dissenting).
59. Id. at 2391-92 (O'Connor, J., dissenting) (discussing capital punishment and implications of Apprendi).
60. Id. at 2393-94 (O'Connor, J., dissenting).
Court’s docket is dramatically shrinking, the number of Fourth Amendment cases is, if anything, increasing. Moreover, it is not simply a matter of quantity; qualitatively, these cases pose issues that affect large numbers of people. For example, the cases pending this Term involve important issues such as: Can the government set up roadblocks to check for drugs? Can a public hospital subject pregnant women suspected of cocaine use to drug tests? Can the police arrest a person for not wearing a seatbelt? Can the police exclude a person from his or her home while obtaining a search warrant? Is it a search for the police to use a thermal imaging device to detect a concentration of heat consistent with an indoor marijuana growing operation?

Why so many significant Fourth Amendment cases? Over the past two decades, the Supreme Court has emphasized that "reasonableness" is the central inquiry in Fourth Amendment analysis. The Court stresses that "reasonableness" is determined based on "the totality of the circumstances." This inquiry is inherently fact-based and therefore invites Supreme Court review of a large number of rulings. Also, the Court has fashioned over a half dozen exceptions to the warrant requirement for searches and seizures. Some of these, such as "exigent circumstances" and "special needs" are quite vague. This inevitably requires Supreme Court interpretation and clarification.

A. Last Term’s Decisions

All three Fourth Amendment cases decided last Term were significant. In Illinois v. Wardlow, the Court held that a person’s sudden and unprovoked flight from a clearly identifiable police officer who is patrolling a high crime area is a factor that can justify temporary investigatory stops pursuant to Terry v. Ohio.

Sam Wardlow was walking down a sidewalk in Chicago carrying a black opaque bag. He saw four cars driving in what he described as caravan fashion. He thought they were police cars, although the record is silent as to whether they were marked or unmarked cars. Wardlow began running in the other direction.

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68. 120 S.Ct. 673 (2000).
69. See id. at 675-77; see also Terry v. Ohio, 392 U.S. 1 (1968).
70. See Wardlow, 120 S. Ct. at 674-75.
71. Id. at 674.
72. Id. at 683 (Stevens, J., concurring in part and dissenting in part).
73. Id. at 675.
One of the police cars pulled over and an officer chased Wardlow down. The police officer did a frisk and found Wardlow had a weapon. He subsequently was convicted of unlawful possession of the weapon. The Illinois Supreme Court unanimously ruled that the stop and frisk lacked reasonable suspicion.

The issue in Wardlow was whether flight from the police officers in these circumstances was sufficient to create reasonable suspicion to justify the stop. The Court, in a footnote, said that it did not consider whether there was reasonable suspicion for the frisk. In a five-to-four decision, with Chief Justice Rehnquist writing for a majority that included Justices O'Connor, Scalia, Kennedy, and Thomas, the Court held that there was reasonable suspicion to justify the stop under Terry v. Ohio. The Court reaffirmed that reasonableness is to be determined from the totality of the circumstances. The Court refused to adopt a bright-line rule that flight always is sufficient for reasonable suspicion or that it never is sufficient.

Instead, the Court said that flight is a factor to be considered in evaluating, as part of the totality of the circumstances, whether there is reasonable suspicion. The Court said that here there was reasonable suspicion, based on the fact that the flight occurred in a high crime area. Those factors together, the Court said, were enough to justify the stop.

Wardlow leaves open many important questions. First, does it really matter whether flight occurs in a high crime area? If so, does that lead to an opportunity for greater racism in policing because of the correlation between race and poverty in major cities? If not, then isn't flight sufficient by itself? Imagine the next case where the flight occurs in a wealthy, white, suburban area. In many ways, flight in those circumstances is even more suspicious than in inner cities where there is often great distrust of police officers. If the stop in the wealthy, white suburb is treated differently, then race-based policing is approved by the Court. If the result would be no different in the suburb, and I don't think it should be any

74. Id.
75. Id.
76. Id.
77. Id.
78. Id.
79. Id. at 676.
80. Id. at 674, 677.
81. Id. at 676-77, 677-82 (Stevens, J., concurring in part and dissenting in part).
82. Id. at 676-77.
83. Id.
84. Id. at 676.
85. Id. at 676-77.
86. Id. at 680-81.
different, then *Wardlow* means that flight by itself is sufficient; a position that Chief Justice Rehnquist's majority opinion rejects.

Also, the question of what behavior is sufficient to constitute flight still persists? Courts will have to decide whether walking to the opposite side of the street or walking quickly away from the officers will be enough to create reasonable suspicion.87

A second major Fourth Amendment decision is *Florida v. J.L.*, which held that an anonymous tip providing a description, but not the name of a person accused of having a concealed weapon, is not sufficient for probable cause.88 In *J.L.*, the Miami-Dade police received an anonymous call that a young black male was standing at a specific bus stop and carrying a gun.89 The tip said only that the man was wearing a plaid shirt.90 The police knew nothing about the informant but nonetheless sent two officers to respond to the call.91 When the police went to the bus stop they saw three black males there, one of whom was wearing a plaid shirt.92 Based entirely on the anonymous tip, one of the officers approached the male dressed in the plaid shirt and frisked him.93 A gun was found in the man's pocket.94 Another officer frisked the other two men, but neither had a gun or any other contraband.95

The male with the gun was a 15 year-old boy, referred to as J.L. in all of the court proceedings.96 J.L. was charged with illegal possession of a concealed weapon.97 J.L. successfully moved to suppress the gun in the trial court as the result of an illegal search.98 The Florida Court of Appeals reversed, only to have its decision overturned by the Florida Supreme Court, which agreed with the trial court that the police did not have the requisite reasonable suspicion to justify the stop and frisk.99

Before the Court, the issue was whether the anonymous tip was sufficient to create reasonable suspicion to justify the stop and frisk.100 Justice Ginsburg wrote for a unanimous Court, holding that there was not reasonable suspicion.101 The Court said that there was not sufficient corroboration of reliability to justify police

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87. *Id.* at 678-79 (discussing how people may flee for a variety of innocent reasons and that courts must make case by case determinations of when there is reasonable suspicion).
88. 529 U.S. 266 (2000).
89. See *id.* at 268.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 269.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 268.
101. *Id.*
reliance on the anonymous tip as the basis for the stop and frisk.\(^{102}\) The Court stated, "The anonymous call concerning J.L. provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility."\(^{103}\)

The Court said that it was irrelevant that the allegation that J.L. had a gun was proven true.\(^{104}\) The Court pointed out:

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\text{[T]he reasonableness of official suspicion must be measured by what the officers knew before they conducted their search. All the police had to go on in this case was the bare report of an unknown, unaccountable informant who neither explained how he knew about the gun nor supplied any basis for believing he had inside information about J.L.}\(^{105}\)
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The Court stressed—and this seems to be the most important aspect of its ruling—that an accurate description of a person and his or her clothing by an anonymous tip generally is not sufficient to provide reasonable suspicion to justify a stop and frisk.\(^{106}\) The Court explained that the accurate description of the person "will help the police correctly identify the person whom the tipster means to accuse... [but] [s]uch a tip... does not show that the tipster has knowledge of concealed criminal activity."\(^{107}\) The crucial question is whether there are indicia of reliability of the accusations of illegal activity, and a physical description is insufficient in this regard.\(^{108}\)

The Court expressed concern about the dangers of false tips. It is very easy for a person to call the police and describe someone’s physical appearance and then make up an accusation.\(^{109}\) Allowing this to be enough for a stop and frisk would open the door to people easily subjecting others to the intrusion of police stops and frisks.\(^{110}\) Also, though not discussed by the Court, there is concern that the police could justify stopping and frisking virtually anyone at any time, simply by inventing a false tip.\(^{111}\) The Court noted that there was no audio recording of the tip about J.L.\(^{112}\)

\(^{102}\) \textit{Id.} at 271.

\(^{103}\) \textit{Id.}

\(^{104}\) \textit{Id.}

\(^{105}\) \textit{Id.}

\(^{106}\) \textit{Id.} at 271-72.

\(^{107}\) \textit{Id.} at 272.

\(^{108}\) \textit{Id.}

\(^{109}\) \textit{Id.}

\(^{110}\) \textit{Id.}

\(^{111}\) \textit{Id.}

\(^{112}\) \textit{Id.} at 268.
The Court also rejected the government’s contention that there should be a per se exception allowing a stop and frisk when there is an allegation of illegal possession of a firearm. Justice Ginsburg, writing for the Court, reasoned:

But an automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target’s unlawful carriage of a gun. Nor could one securely confine such an exception to allegations involving firearms.

*Florida v. J.L.* is an important limit on the ability of police to rely on anonymous tips to justify stops and frisks. Prior to the Supreme Court’s decision, most courts had found that such tips were sufficient for reasonable suspicion to justify a stop and frisk under *Terry v. Ohio*. It should be noted that the Court left several crucial questions unanswered. First, the Court did not address what else, besides a physical description, is necessary to create enough for reasonable suspicion when there is an anonymous tip. The Court stated that a physical description is not sufficient, but did not address what other factors would be adequate to permit a stop and frisk based on an anonymous informant.

Second, the Court did not elaborate as to the situations in which a physical description might be sufficient to permit a stop and frisk based on an anonymous tip. Justice Ginsburg acknowledged that such circumstances might exist. She wrote: "We do not say, for example, that a report of a person carrying a bomb need bear the indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk." Also, she said that there are places—such as airports and schools—where there are lower expectations of privacy, and that anonymous tips, supported only by accurate physical descriptions, might be enough for reasonable suspicion in those places.

A third important Fourth Amendment decision was *Bond v. United States*. The Court held that the manipulation of a bus passenger’s luggage to find contraband is a search under the Fourth Amendment.

In *Bond*, a Border patrol agent got on a bus in Texas that was traveling from

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113. *Id.* at 272.
114. *Id.*
117. *See id.* at 272-73.
118. *Id.*
119. *Id.* at 279.
120. 529 U.S. 334.
121. *See id.* at 337-38.
California to Arkansas. The agent checked to make sure that all passengers were lawfully in the United States. The agent testified that he also reached into the luggage compartment and felt suitcases and other bags that were soft-sided. He said that he customarily did this to probe for weapons or contraband.

The agent testified that in feeling one suitcase he detected a "brick-like" object that he thought was drugs. He asked for and received consent to open the suitcase in which he found a brick of methamphetamines.

The issue was whether the probing of the suitcase by the border patrol agent constituted a search within the Fourth Amendment. In a seven to two decision, with the majority opinion written by Chief Justice Rehnquist and Justices Scalia and Breyer in dissent, the Court held that this was a search. The Court focused on the reasonable expectation of privacy of passengers. The Court explained that all passengers have a reasonable expectation that their luggage will be touched and handled by others, but also there is also an expectation that luggage will not be probed by the police.

Under the Court’s ruling, the police may touch luggage, and if to their "plain feel" they detect weapons or contraband, they may proceed with a search. But the police may not manipulate or probe soft-sided bags and luggage. In other words, the permissibility of the police action depends entirely on the testimony of the officer. There is no search and no violation of the Fourth Amendment if the officer says, "I touched the suitcase and immediately detected the contraband or weapon." But there is a search if the officer testifies that he or she squeezed the suitcase.

Justice Breyer, joined by Justice Scalia, dissented. Justice Breyer emphasized the lack of expectation of privacy when traveling and the expectation that one’s bags will be handled. Justice Breyer lamented that this will lead to a "jursiprudence of squeeze[ing]." Justice Breyer is certainly correct in that the result of a suppression motion will turn on the precise acts of the officer and, more specifically, what the officer testifies to having done.

Yet, this is not new under the Fourth Amendment. For example, a few years

122. Id. at 335.
123. Id.
124. Id.
125. Id. at 336.
126. Id.
127. Id. at 335.
128. Id.
129. Id. at 337.
130. Id. at 338-39.
131. Id. at 339 (Breyer, J., dissenting).
132. Id. at 342 (Breyer, J., dissenting).
ago in *Minnesota v. Dickerson*, the Court ruled that police doing a frisk may seize what is in their "plain feel," but that officers may not manipulate the lining of someone's clothes. If the officer testifies that the weapon or contraband was immediately detected to the touch, there is no Fourth Amendment violation. But the officer acted improperly if the officer did more than this, such as manipulating the lining of the person's clothing.

**B. Pending Fourth Amendment Cases in October Term 2000**

There are five Fourth Amendment cases on the docket for this Term, and they promise to be even more important. In *Indianapolis v. Edmond*, the Court will consider the constitutionality of police roadblocks that seek to catch drug offenders by having the police look for indications of drug use or possession. Police in Indianapolis created checkpoints where they stopped cars and inspected the autos, using drug-sniffing dogs to uncover any evidence of drug violations.

In *Michigan Department of State Police v. Sitz*, the Court upheld sobriety checkpoints to identify those driving under the influence of alcohol. The Seventh Circuit, in an opinion by Judge Richard Posner, distinguished sobriety checkpoints as serving an important safety need not present with the drug roadblocks. Judge Posner found that the drug checkpoints constituted an impermissible search without probable cause. But Judge Frank Easterbrook dissented arguing that the intrusion on privacy was minimal while the benefits to law enforcement were great. The Supreme Court must choose between these conceptions and decide the circumstances under which police roadblocks for law enforcement purposes are permissible.

In *Ferguson v. City of Charleston*, the Court will consider the constitutionality of a state hospital's policy of testing pregnant women who show signs of drug addiction for cocaine use and turning positive results over to law enforcement for prosecution. The United States Court of Appeals for the Fourth

134. *Id.* at 378.
137. *Id.*
139. *Id.* at 455.
140. See *Edmond*, 183 F.3d at 661.
141. *Id.*
142. *Id.* at 666-71.
143. 186 F.3d 469 (4th Cir. 1999), *cert. granted*, 120 S.Ct. 1239 (2000). Since the Pepperdine symposium, the Supreme Court decided *Ferguson v. City of Charleston*, 121 S.Ct. 1281 (2001), and held that the drug testing of pregnant women without probable cause violates the Fourth Amendment.
Circuit rejected the Fourth Amendment challenge, concluding that the government had a substantial interest in reducing the use of cocaine by pregnant women and that drug testing was the only effective means of accomplishing this goal. The Court of Appeals found that the drug testing was a permissible search within the "special needs" exception of the Fourth Amendment.

Previously, the Supreme Court upheld random drug testing for student athletes and for customs workers and invalidated a law requiring drug testing for political candidates in Georgia. Ferguson will require the Court to consider drug testing in a very different context. Underlying this case is the obviously difficult issue of how the law should regard a fetus and the extent to which the state has an interest in protecting a fetus from its mother's actions.

In People v. McArthur, the Court will consider whether probable cause to search a residence justifies removing a person from his home and preventing reentry until a search warrant is obtained. The defendant had been in his house and then came outside to the front porch. The police told him that he could not reenter unless accompanied by an officer until the warrant was approved. The Illinois Court of Appeals affirmed the trial court's exclusion of evidence based on a Fourth Amendment violation. The Supreme Court must decide whether the police committed an impermissible seizure by keeping McArthur from his home during the time before the warrant was obtained.

In Atwater v. Lago Vista, the issue is whether a custodial arrest for a misdemeanor violates the Fourth Amendment. A woman in Texas was arrested for driving without a seatbelt and failing to have her child in a seatbelt. The police officer arrested her and took her in custody. The Fifth Circuit, in an en
banc decision found no violation of the Constitution. The Fifth Circuit emphasized that the Fourth Amendment requires only probable cause for an arrest, and that was present in the case. The Supreme Court for the first time, must decide whether a custodial arrest for misdemeanor conduct violates the Fourth Amendment.

Finally, the Court granted review in United States v. Kyllo. The issue in Kyllo is whether the use of a thermal imaging device to detect heat in a residence is a search within the meaning of the Fourth Amendment. Based on a tip from a police informant and Kyllo's utility records, police suspected Kyllo of operating an indoor marijuana growing operation. The police used a thermal imaging device that showed a substantial concentration of heat, which is consistent with growing marijuana indoors. The United States Court of Appeals for the Ninth Circuit rejected Kyllo's claim that this was an impermissible search within the meaning of the Fourth Amendment. The Supreme Court will once more have to decide how an Amendment adopted 209 years ago should be applied to the technology of the 21st century.

Individually and collectively, these five Fourth Amendment cases promise to be some of the most interesting and important of the Term. Ultimately, the Fourth Amendment is about the proper balance between government power and individual privacy and freedom. Each of these cases, in quite different contexts, poses exactly this issue.

III. FIFTH AMENDMENT—SELF-INCRIMINATION

Few cases received more media attention than Dickerson v. United States, in which the Supreme Court reaffirmed Miranda v. Arizona. The Court declared unconstitutional a federal statute, 18 U.S.C. § 3501, which allows for the introduction of voluntary confessions, even without proper administration of Miranda warnings.

Charles Thomas Dickerson was arrested and indicted for bank robbery. Dickerson made incriminating statements to federal agents, but the United States District Court suppressed the confession on the grounds that Miranda warnings

153. See id. at 246.
154. See id.
155. 190 F.3d 1041 (9th Cir. 1999) (en banc), cert. granted, 121 S. Ct. 29 (2000).
156. Id. at 1043.
157. Id.
158. Id. at 1044.
159. Id. at 1047.
160. 120 S. Ct. 2326 (2000).
162. Dickerson, 120 S. Ct. at 2329-30.
163. Id. at 2330.

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were not properly administered. The United States government appealed solely on the issue of whether there had been a violation of Miranda. In its brief to the Fourth Circuit, the United States government declared: "[W]e are not making an argument based on § 3501 in this appeal."

However, the Washington Legal Foundation, a conservative public interest group, filed an amicus curiae brief in the Fourth Circuit urging the court to raise § 3501 sua sponte. Section 3501 was adopted by Congress in 1968 as part of the Omnibus Crime Control Act. The Justice Department rarely has invoked this law and, in fact, Attorney General Janet Reno sent a message to Congress, as required by federal law, informing it that the Justice Department believed that the law was unconstitutional and was not going to enforce it.

The Fourth Circuit, though, followed the urging of the Washington Legal Foundation and ruled on the constitutionality of the law. The court explained:

Dickerson voluntarily confessed to participating in a series of armed bank robberies. Without his confession it is possible, if not probable, that he will be acquitted. Despite that fact, the Department of Justice, elevating politics over law, prohibited the U.S. Attorney's office from arguing that Dickerson's confession is admissible under the mandate of § 3501. Fortunately, we are a court of law and not politics. Thus, the Department of Justice cannot prevent us from deciding this case under the governing law simply by refusing to argue it.

The Fourth Circuit then upheld the constitutionality of § 3501.

The Supreme Court simply assumed that the issue was properly raised. The Court appointed Professor Paul Cassell and the Washington Legal Foundation to defend the constitutionality of the statute. In a footnote, the Court stated: 

"[b]ecause no party to the underlying litigation argued in favor of § 3501's constitutionality in this Court, we invited professor Paul Cassell to assist our deliberations by arguing in support of the judgment below."

The Supreme Court confronted two issues. First, is § 3501 constitutional? Adopted in 1968, as part of the Omnibus Crime Control Act, the Act provided

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164. Id.
165. See www.abanet.org/cpr/wlfmdp.html.
166. United States v. Dickerson, 166 F.3d 667, 671 (4th Cir. 1999).
167. See id. at 672.
168. Id.
169. Id.
171. Id.
that confessions shall be admissible in federal court so long as they are voluntary. The statute declares: "In any criminal prosecution brought by the United States or the District of Columbia, a confession . . . shall be admissible . . . if it is voluntarily given."172 The Court held that *Miranda v. Arizona* is "constitutionally based" and states a "constitutional rule."173 Therefore, the Court held § 3501 unconstitutional because, of course, "Congress may not legislatively superecede our decisions interpreting and applying the Constitution."174 If the Court had ruled otherwise, Congress and the states would have had the authority to eliminate the requirement for *Miranda* warnings.

Second, the Court reaffirmed *Miranda v. Arizona*. Chief Justice Rehnquist wrote: "We do not think that there is such justification for overruling *Miranda*. *Miranda* has become embedded in routine police practice to the point where warnings have become part of our national culture."175 The reality is that *Miranda* is easy for police to follow and creates a presumption of admissibility so long as officers comply with it. The alternative, a case-by-case determination of voluntariness, would provide much less guidance to the police and be much less predictable in practice.

Perhaps the greatest long term significance of the decision is the rejection of Congress' authority to modify Supreme Court decisions interpreting the Constitution. If the Court had decided that *Miranda* was just "constitutional common law,"176 then that might have opened the door for Congress to eliminate other judicially created remedies in constitutional cases. If Congress could overrule the Court's command that confessions be excluded from evidence if they were obtained without proper administration of *Miranda* warnings, then perhaps it could also overturn judicial orders in other cases, such as for busing in school desegregation litigation or for damages in suits against federal officers.

Thus, *Dickerson* will be remembered for its practical significance in requiring that the police and courts continue to follow *Miranda*, and for its broader theoretical significance in limiting the ability of Congress to overturn such judicially created devices for protecting constitutional rights.177

173. See, e.g., *Dickerson*, 120 S.Ct. at 2333, 2334.
174. *Id.* at 2332.
175. *Id.* at 2336.
177. In a forthcoming article, I argue that neither the Fourth Circuit nor the Supreme Court should have ruled on the constitutionality of § 3501 because of the Justice Department's decision not to invoke that statute. Erwin Chemerinsky, "The Court Should Have Remained Silent: Why the Court Erred in Deciding *United States v. Dickerson*," (forthcoming University of Pennsylvania Law Review (2000)).

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IV. CONCLUSION

The criminal procedure and law enforcement decisions of the Term certainly fit the theme of this conference: they were important rulings likely to have practical effects and to be the subject of academic discussions for years to come. Although it is difficult to find a unifying theme among cases dealing with such disparate issues, overall, they do reflect a willingness of the Court to say "no" to the police and to rule in favor of criminal defendants. If this is more than a one-year aberration and becomes a trend, it would be a major change from the Rehnquist Court's traditional great deference to law enforcement.
PROFESSOR LAURENCE TRIBE’S RESPONSE

PROFESSOR KMIEC: Laurence Tribe of the Harvard Law School will respond to Professor Chermersinsky.

PROFESSOR TRIBE: I certainly agree that Apprendi,1 in terms of impact on society and the way our criminal justice system is conducted, is hard to top for significance—although I’ll argue in a few minutes that Dickerson,2 though it doesn’t change anything, is by far the most revealing and important jurisprudential decision of the term.

As far as Apprendi is concerned, I think its significance may be even greater than what Professor Chermersinsky suggested, even greater because I think ultimately it’s very hard to reconcile the whole idea of sentencing with Apprendi. Oh, yes, one can have rules that assign a specific mandatory sentence to the precise crime of which an individual was indicted and convicted. But the moment you go beyond that, the moment you have any authority determining how better to fit the punishment to the crime or to the criminal than either is described in the indictment, there is a problem. Whether you end up with a sentence inside or outside the range, whether you invoke the guidelines or some fuzzier factors, in the end you are potentially increasing the severity of someone’s criminal punishment based on factors that have not been separately charged and proven beyond a reasonable doubt—and I would add, as the Court also stressed, proven to a jury. So the Court is on a course that I think is in ultimate collision logically with the whole idea of any pliability at all in the sentencing process, and I think that really is a profound challenge to the nature of our criminal justice system.

With respect to the rather peculiar lineup of justices in Apprendi, I certainly can’t find another instance of exactly the same lineup, but there was a fascinating criminal law decision outside Erwin’s frame of reference this term which had almost the same lineup. It was Carmell v. Texas,3 producing a very rare, and I think quite important, five-to-four reversal of a criminal conviction under the Ex Post Facto Clause. The only difference in lineup of the Justices was that Breyer and Ginsburg traded places. Breyer, who dissented in Apprendi, fearing for his cherished guidelines, joined Justice Stevens’ majority opinion in Carmell. And Justice Ginsburg, who joined Justice Stevens’ opinion in Apprendi, wrote the dissent in Carmell. You notice that Justice Stevens wrote for the majority in both of these cases.

In Carmell, Justice Stevens was joined, as he was in Apprendi, by Justices Scalia, Souter, and Thomas. The SST contingent rarely find themselves a trio. And dissenting in both cases were the Chief Justice and Justices O’Connor and Kennedy, increasingly the three centrist. Like Apprendi, Carmell involved the prosecution’s burden of proof. Except this time the case involved a Texas law that previously branded sexual assault victims over the

3. 120 S.Ct. 1620 (2000).
age of fourteen as essentially untrustworthy and said that courts could not base convictions for sexual assault on the uncorroborated testimony of an assault victim over fourteen when there was no outcry. Outcry is the ancient term for relatively contemporaneous report. Here the stepdaughter, who had been molested over a period of four years by her stepfather, talked to her mother, but a little too late.

In 1993, Texas reformed the law, and dropped its own rule that one couldn't convict on the basis of uncorroborated testimony of such a victim unless she or he cried out to someone soon enough. The issue in Carmell was whether that undoubtedly humane and progressive change could be applied retroactively to the defendant's pre-1993 sexual assaults on his stepdaughter. There were also some post-1993 assaults, but it would make quite a difference if you could apply the new law retroactively. The State of Texas tried to do so, and Justice Stevens for the majority said, "No, you cannot, because the change tilted the burden of proof in the government's favor and tinkered with the presumption of innocence." Justice Ginsburg, in her dissent, said, "You're completely wrong, the change did not affect the burden of proof. In fact, all along in Texas you could convict without any testimony from the victim, based on evidence from third parties or circumstantial evidence. The change just enlarged in a neutral way the class of witnesses deemed fully competent to give evidence. And we've known for decades, if not centuries, that eliminating witness disqualifications is a knife that can cut both ways; that kind of change can be applied retroactively."

The majority said, "You don't understand the way the criminal justice system works. For all practical purposes, this tilts the playing field. That's what it was intended to do. That's what it did. It's not a neutral change, because in the large majority of cases, it's really only going to work to the benefit of the prosecution, which will use it to get a better plea bargain from the accused." Carmell is a rather well argued and closely reasoned case that makes one feel proud of the Court. That is, every now and then it looks like these people are not simply there to act on the basis of their impulses in determining whether it's better to get tough on criminals or better to vindicate some abstract ideal of liberty or of fairness.

It's not, however, always a performance that makes one proud, and I want to turn to one that didn't make me proud at all, and that was Dickerson. I think it's a very important case, and there are four fascinating facets of Dickerson as a matter of constitutional jurisprudence that I want to turn to. The first is one that Erwin only barely touched on, but in the outline that he's handed out, he's indicated he has a forthcoming article making the argument that it was a violation of the separation of powers for the Court to decide the validity of section 3501 where the executive was unwilling to invoke or defend it. If, as I hope, the article is not yet put to bed, I would want to persuade Erwin that's wrong, that it was not a violation of the separation of
powers.

In the Fourth Circuit, Judge Michael, dissenting in part and concurring in part, said, “Forcing the use of 3501 upon the U.S. Attorney gets uncomfortably close to encroaching on the prosecutor’s routine discretion.” I think that’s essentially the separation of powers argument, and there are two fundamental points to be made about it. First, even if this were a case of forcing the executive to play by the rules and introduce evidence against a criminal defendant, there would still be venerable precedent for doing that—namely, United States v. Nixon.4

With a different scenario and with a different set of rules in the Justice Department, the executive branch didn’t want to introduce the Nixon tapes as evidence. The special prosecutor pressured their introduction, the district judge issued a subpoena demanding it, and the Supreme Court of the United States agreed. The President resigned after the smoking gun was revealed. This case, I suppose, is to be distinguished, but there’s a more decisive point to be made about Dickerson. Namely, the courts were not forcing the executive’s hand. The U.S. Attorney and the Department of Justice were fighting to get Dickerson’s confession in. They claimed that Miranda5 warnings were given. Section 3501 did not address the executive branch at all. That’s what made it wrong for the Fourth Circuit to castigate the executive branch. Section 3501 says that a confession shall be admissible in evidence if it is voluntarily given. It speaks to the judiciary. Now I submit that it would be wrong, perhaps a violation of the separation of powers, for the judiciary, whatever the parties are arguing, to disregard an act of Congress that specifically directs how it is to proceed by altering the rules of admissibility. I happen to agree that section 3501 was rightly struck down, but I do not think that it was wrong for the courts to heed what that section said, notwithstanding the decision of the Department of Justice not to invoke it.

Second, and I think more important by far for what it says about the Court and its current view, is the structure of the Chief Justice’s opinion, because the way Professor Chemerinsky described it, it seems fairly routine. He said, “This is a constitutional matter. We decide the Constitution’s meaning. Congress can’t change it. Next case.” But if you actually unpack it a bit, what’s happening is this: The Court goes through an elaborate analysis designed to prove not that Miranda was right, but that the prior Court viewed Miranda as a constitutional ruling. Seven or eight pieces of evidence, quotes from earlier opinions, were introduced to that effect. “See,

look there. We used the word Constitution. We applied it to the states, so we must have thought it was a constitutional ruling.” “We applied it in habeas cases, and, because we clearly thought it was a constitutional ruling,” to borrow a phrase from a forthcoming piece by Akhil Amar, “it’s as though Oz has spoken. We have spoken. Nobody can disagree.” And the Court, in case after case—City of Boerne v. Flores6 and Kimel,7 for instance—talks that way—as though the question of whether a prior decision was actually correct doesn’t so much matter. First, they struck down an act of Congress for defying the views of the Court. Then, the Court moved to whether they should overrule Miranda. In effect, they were saying, “even if Miranda was wrong, if we don’t get around to overruling Miranda for four or five years, this law is unconstitutional.” I think that imperialism is a striking manifestation of the Court’s recent approach.

Now the third important point relates to stare decisis and the way the Court views it. In Casey,8 the Court treated a landmark earlier opinion, namely Roe,9 as a kind of mountain, and said, “We climbed it once and, without extraordinary justification, we ain’t going up there again.” In Dickerson, Miranda is treated as a molehill. The Court says it was once a big deal: “Many of us disagreed with it, but it is now ground down and filtered. It’s assimilated, as Erwin said, into the national culture. No big deal anymore. We’ve whittled it down ourselves with a whole bunch of exceptions. Why not freeze the exceptions now into the law and say stare decisis?” These are two very different uses of stare decisis.

The fourth point, probably the most important because it affects every area of the law, is that Dickerson exposed a dramatic dichotomy between two different visions of how constitutional rules work. The Scalia vision, in his dissent, was fairly straightforward. He said, “First, we all agree the Constitution allows the admission of voluntary confessions. Second, we all agree that sometimes Miranda excludes confessions that are truly voluntary. Therefore, third, Miranda can’t be a constitutional ruling. It must represent an extra-constitutional excrescence that you are imposing on the world.”

Now the other vision, articulated only briefly by Chief Justice Rehnquist, was, “No, the Constitution also has structures and rules that are prophylactic and may even be provisional; in Miranda as in other areas, we put such rules in place. They might be rules about prior restraints or chilling effect, but you can’t just look at the situation in its application. You look facially, because the risk of a forced confession may be unacceptably high, but you won’t always be able to detect it.” This is what Rehnquist says. “We required the

safeguards of a Miranda warning unless and until you come up with something better. And the fact that the individual confession might be fine doesn’t prove that it exceeds our constitutional authority to apply a broader framework in judging the matter. If you didn’t give the warnings, you can’t use the confession.” You see how different those visions are? In one area after another, debate ensues between those who believe that it’s appropriate to use facial analysis quite often and those who say that you should invalidate a law on its face only if you can never imagine any case to which it would be constitutionally applied.

So that large issue is the one in which the Court joined, and it is interesting that it is a seven-to-two decision. In this respect I rather liked Dickerson. It came down in favor of what I think is the correct view. There is nevertheless an internal contradiction that I can’t resist talking about. And that is, on the one hand, that the Court says, “We are Oz, we have spoken, sit down and be quiet, Congress.” On the other hand, it says, “Constitutional rules can sometimes be properly provisional. The fact that fallibility is recognized in the substance of a rule the way it was in Miranda supports the view that these rules are not necessarily the end all and be all. Maybe something better can be provided. If it is, we will recede. The fact that it might be provisional doesn’t mean it’s not part of the Constitution.” So that degree of humility, at least, is built into the system.

PROFESSOR KMIEC: We now have questions directed to our presenter and respondent by David Pike of the Los Angeles and San Francisco Daily Journals.

MR. PIKE: This is a question for both professors. The Court again this term looks like it’s going to have a large proportion of criminal cases, and it could be argued that these cases keep coming back in various forms because this Court is adverse to issuing bright-line rules. Miranda was a bright-line rule that everybody learned to live with, but in the fleeing suspects case, for example, or the anonymous tip case, there are all these questions left that leave the police and the courts in confusion. And so there are going to be more cases filed. Do you have any theory on why it is this Court is reluctant, unlike, let’s say, the Warren Court, to issue any bright-line criminal rules?

PROFESSOR TRIBE: I think the best person to answer the question may be Dean Sullivan rather than Professor Chemerinsky or me, because she’s written very insightfully on bright-line rules. But I just want to say one word about it. To have a bright-line rule, you have to agree on the line. As Justice Brennan always used to tell his law clerks, “First thing I want you kids to learn is how to count to five.” If you don’t have five people to decide where to draw the line, you end up with a multi-factor test or something like it. So part of the
reason may be nothing more sophisticated than the degree of divergence of views within the Court, but there may be other reasons as well.

PROFESSOR CHEMERINSKY: I agree with that. I also agree to defer to Dean Sullivan on this. I would just offer two quick thoughts. One is to challenge the assumption that bright-line rules would necessarily mean a need for less follow-up cases. Here I use Apprendi, which seems to state a very clear bright-line rule. Any factor, other than a prior conviction, that leads to a sentence greater than the maximum must be proven beyond a reasonable doubt. That's as close to a bright-line rule as you'll find in constitutional law. And yet Apprendi opens the door to dozens, if not hundreds, of questions, many of which are going to have to come to the Supreme Court very quickly. Some undoubtedly next term.

Second, I do think balancing factors are inherent to any reasonableness and totality of the circumstances test that doesn't lend itself to bright-line rules, but it has to be fact specific. And since, as I mentioned, the Supreme Court in the Fourth Amendment area has emphasized reasonableness and totality of the circumstances, that belies there being a bright-line rule. Inevitably, these cases will be decided case by case.

DEAN SULLIVAN: I don't know that I have any great insight on who likes bright-line rules and who likes totality of the circumstances tests, other than Catholics tend to like bright-line rules. This explains my own affinity for the approach taken, at different times, by Justices Brennan, Scalia, and Thomas. But I agree with Larry that when you can't find the first best bright-line rule, you often go to a second best totality of the circumstances test, because it's the only one you're going to be able to live with. Obviously, that leads to a lot of possibilities for discretionary departures from your original vision down the line.

MR. PIKE: In addition to the four cases that Professor Chemerinsky talked about last term in which the criminal defendants came out to top, there were several that were pro-defendant in the term before, including Knowles v. Iowa and the anti-gang ordinance in Morales. Are we seeing a change in the Court in terms of deference to police and local governments? It seemed to hold true in the '90s, or were these just particular cases, maybe aberrations? At the same time, if I could tuck on one thing. It did strike me that Justice Thomas last term in Apprendi, Carmell, also Hubbell, voted for the defendant. Is he changing in some way, or were these particular constitutional issues in which his particular conservative view just happened to bring him out on that side?

PROFESSOR TRIBE: First of all, I think that, from the beginning of his time on the Court, Justice Thomas has quite often happened to agree with the

defendant. I don’t think there is an automatic anti-defendant tilt in his jurisprudence. I think it’s also the case that these snapshots that are one year or two or even three years in size have an arbitrariness that gives one a false impression of a trend, when you may just be seeing a particular sort of random, chaotic intersection of a shifting scene.

MR. PIKE: Journalists love trends. We thrive on them.

PROFESSOR CHEMERINSKY: I certainly want to agree with that and just offer two thoughts. One is that it’s the nature of these specific rulings that it’s very hard to generalize about them. Now by virtue of having limited time, I chose what I thought were the five most important cases. There were also some notable cases where criminal defendants lost last term. There were three cases involving criminal appeals. In all of them the criminal defendants lost, and so I would want to be very cautious about generalizing.

The other comment that I make, now I am going to generalize, is if that I were to name a single characterization of the Rehnquist Court, it is that this is a Court that defers to no one. This is a Court that doesn’t defer to Congress; it doesn’t defer to executive agencies; it doesn’t defer to state legislature; it doesn’t defer to state courts; and it doesn’t defer to the police. And I’d even encourage you as you listen to the discussion of the cases throughout the day to look at the lack of deference by this Court to all of those different institutions. And I think what you’re seeing in the criminal procedure cases is one manifestation of that, the lack of deference to the police.

PROFESSOR JAMES: Professor Chemerinsky, an audience questioner asks whether Bond v. United States13 properly draws a line about the role of vigilance by law enforcement officials. I’ll try to summarize the question by asking, “Should law enforcement personnel be trained to push the envelope in pursuing their task, to continue questioning, probing, perhaps even squeezing the defendant?”

PROFESSOR CHEMERINSKY: As some of you may know, I’ve spent the last six months doing a fairly intensive review of the Rampart police scandal. And one conclusion is that the police in Los Angeles are very much trained to push the envelope. From the time they are in the academy, they’re taught that street policing is much more important than what’s in the manuals. There’s in fact a Ninth Circuit ruling that found that the police here in Southern California are specifically trained on how to do questioning outside of Miranda. The court found that training to be a violation of the Fifth

Amendment.

I draw on what I recently learned about the scandal to say that I don't think we should be training our police to push the envelope. That leads to what I believe exists in Los Angeles—a culture of lawlessness within the police department. I think that the police are there to uphold all the law, and that includes the law of the Fourth Amendment and the Fifth Amendment and all of the protections of the Constitution.

PROFESSOR JAMES: To both Professor Tribe and Professor Chemerinsky: "Airports and borders are subject to a special-needs exception. Why not even more so schools, in light of the need to reduce crime and keep children safe?"

PROFESSOR CHEMERINSKY: Well, schools are already treated differently under the Fourth Amendment. In fact, more than any other institution, schools are treated differently under all the Constitution. As I mentioned, the Supreme Court in New Jersey v. T.L.O. 14 said that reasonable suspicion is the appropriate standard for searches in schools. My question is how to reconcile Florida v. J.L., 15 which says that an anonymous tip is not enough reasonable suspicion, with Justice Ginsburg's statement that this rule would apply differently in schools, where reasonable suspicion is the standard.

PROFESSOR TRIBE: I just wanted to make a methodological point: If you have to choose, suppose you accept as the bottom line that the Court is going to allow searches based on anonymous tips claiming that there is a bomb in the school. And if the two ways of doing it are, one, to say, "Well, in the school context, that's reasonable suspicion" or two, to say, "For various reasons in the school context, you don't even need reasonable suspicion," I would vastly prefer the second to the first. The first alternative has more dangerous potential for leaking over into other areas, because if in the school this is reasonable suspicion, then why not in the library? If in the library, why not in the local movie theater? If in the movie theater, why not somewhere else?

Jurisprudence can be contained better if you identify particular places and recognize that when you have identified them in a certain way, almost all bets are off there. You are simply saying that in this zone, because of the vulnerability of the people there, you have a completely different set of criteria, not just a variance of the more general criteria. That can leak over too, but the risk is less.

PROFESSOR KMIEC: Larry, would that carry over to Charleston v. Ferguson, 16 the medical clinic case, where the vulnerable one is the fetal life endangered by the mother's drug use?

15. 529 U.S. 266 (2000).
16. Ferguson v. City of Charleston, 186 F.3d 469 (4th Cir. 1999), rev'd, No. 99-936 2001 W.L. 273220 (Mar. 21, 2001). At the time of the Symposium, this case was undecided, but since that time, the Court reversed the Fourth Circuit, holding that drug testing pregnant woman violated the Fourth Amendment.
PROFESSOR TRIBE: It might, Doug, if you put the question, "Shall we treat the uterus or the hospital as a zone within which the government doesn't need the usual criteria for searching." In general, I would like to frame the issue that way. Should hospitals or some other area, defined in one way or another, be subject to a completely different regime of rules, or shall we adjust the scale up or down a little more, given how special the circumstances are? I don't know where I come out on the bottom line, but I would approach it that way.

PROFESSOR JAMES: And finally, several questions on Apprendi v. New Jersey. "Does Apprendi encourage the risk that juries in hate crime cases may translate their passions and prejudices into higher sentences?"

PROFESSOR CHEMERINSKY: I think Apprendi says that if it's going to be a punishment greater than the statutory maximum because it's found to be hate motivated, it's the role of the jury to find that the hate motivation is present. And I think what that's saying is that because the person has been convicted of one crime but is being punished for another, hate motivation, it's the role of the jury to find it. There's always the danger that juries can be guided by passions and prejudices. I don't think there are any more risks here than in any other area. I think the Court was just saying, "You can't convict for one crime and punish for another without having the jury involved in that determination."

PROFESSOR TRIBE: It's a misnomer to think of this as a sentence enhancement based on the racism of the actor or the act. In a way, that makes it seem profoundly ideological--almost like a thought crime. That would enhance the risk that the jury would lash out at the bigotry of the accused rather than make a determination of what actually happened. The only reason the Court upholds the constitutionality of enhancing punishment based on the racial or gender motive of an offense is that the trigger for the enhanced sentence is simply the question: "Was the race or the gender of the victim a 'but for' cause of the defendant's selection of that victim to be the subject of the attack?"

When the Court in R.A.V.17 made clear that, although fighting words are unprotected, a viewpoint-based determination of which fighting words to punish nonetheless violates the First Amendment, a lot of people predicted a similar result in Wisconsin v. Mitchell,18 a case involving a higher sentence given to a mugger motivated by race. I was a dissenting voice to that prediction because the statute involved asked simply whether the defendant picked the victim because the victim was of a given race. In Mitchell, the

defendant, who was black, picked the victim because the victim was white, and that was proven. I thought that would be upheld. It was nine-to-nothing, although the opinion by the Chief Justice was a little sloppy and made it sound as though somehow the defendant was being punished for his bigotry.