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HAVING IT BOTH WAYS: PROOF THAT THE U.S. SUPREME COURT IS "UNFAIRLY" PROSECUTION-ORIENTED

Christopher Slobogin[*]

INTRODUCTION

It is no secret that most of the United States Supreme Court's criminal procedure cases of the past two and a half decades have favored the government. Many legal academics, myself included, like to point this out, and to imply or state that the decisions are therefore wrong. The typical law review article in this vein describes a case from the Court and then shows how the holding is reprehensible in light of the Constitution, precedent, and logic. While the details vary, the overarching critique is that the Court is too willing to give the government a break, and too insensitive to the rights of defendants.

Viewed from beyond the halls of academia (that is to say, viewed from a layperson's perspective) this type of critique isn't very forceful. Even a staunch academic critic like myself often finds unsatisfying the formulaic cry: "There the Court goes again—sticking it to defendants!" Yes, the Constitution does enumerate a variety of rights for criminal suspects, but that document remains enshrouded in mystery because its wording is so vague. That "searches and seizures" must be "reasonable,"[1] counsel of "assistance,"[2] juries "impartial,"[3] and "process" all that is "due"[4] is all well and good, but amorphous phrases like these do not tell us very much. Moreover, when we become frustrated with trying to decipher the plain meaning of the Constitution and look to legislative history (i.e., original intent), we are usually led to a position that is *government*-oriented; colonial rules favored the state much more than

* Professor of Law and Alumni Research Scholar, University of Florida College of Law. The author would like to thank participants in the October 24, 1997 Florida College of Law Faculty Symposium, especially Jerold Israel, for their comments on this essay.

1. U.S. CONST. amend. IV.
2. U.S. CONST. amend. VI.
3. *Id.*
4. U.S. CONST. amend. XIV.

they helped defendants (for example, coercion during interrogation, counselless trials, and all white, male juries were routine during the eighteenth century).[5] Finally, even if we ignore constitutional language and legislative history and write on a blank slate, the perception, if not the reality, that crime is increasingly more out-of-control and random tends to favor an anti-defense view.

As a result of all this, academics who insist the Supreme Court has misconstrued the fundamental law of the land with servile concessions to the government lack credibility among the populace, law enforcement officials, and even many judges.[6] Decrying the fact that a particular Court decision is "wrong" because it is prosecution-oriented isn't a particularly persuasive advocacy position; an anti-defense view usually has some constitutional basis and thus is generally no less legitimate than a pro-defense view.

In the end, as any legal realist well knows, the debate isn't about the Constitution but about perspectives. If you are a Due Process Junkie you're generally a Warren Court fan, while if you are a Crime Control Crusader you tend to favor the Burquist Court's retrenchment.[7] What puts you in one camp or the other is not any message divined from the abstract language in the Constitution; instead, it depends on how you were raised, your training, and other environmental influences (including, perhaps, whether you were ever robbed or mugged on the one hand, or manhandled by the police on the other). These factors influence how a person feels about a number of variables: autonomy, privacy and fairness values; the appropriate tradeoff between accuracy and efficiency; and the extent to which actors in the system—police, prosecutors, judges and defense attorneys—can be trusted not to abuse their discretion. These feelings and beliefs, in turn, are what drive one's arguments supporting or lambasting the Court's decisions. Although I'm sure the sentiment could be dressed up in fancy talk using "isms" and maybe the word "epistemology," the bottom line is that being prosecution-oriented is not "biased" (in the sense of wrong-headed) despite what many academics would have you think. To really hit home, a stronger argument is needed.

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5. *See* CHRISTOPHER SLOBOGIN, REGULATION OF POLICE INVESTIGATION 326-27, 442-43 (1993).

6. It also doesn't help that we ivory tower types are perceived as knee-jerk liberals who were educated in elite, out-of-touch institutions and who, even worse, may have received that education during the fantasy-land times of the 1960s.

7. Herbert Packer came up with the Crime Control and Due Process models of criminal procedure to describe two disparate ways of looking at criminal procedure rules. HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 153 (1964). The modifications of these terms and the abbreviated reference to the Burger and Rehnquist regimes are my fault.

This essay tries to develop such an argument. It builds on the notion underlying that old saying that what's good for the goose is good for the gander.[8] Gender implications aside, the idea behind this maxim is that one's approach to problems should be consistent, that similar cases should be treated similarly. In this context, it means that if the Court adopts a certain rationale or approach in support of a prosecution-oriented rule, it ought to stick with that rationale or approach, even one which, in another case, ends up helping the defense. If the Court does not do so—if instead it changes the rules rather than allows the defense to win—then by my definition it has acted "unfairly." And if it does so time and time again, it can truly be said to be unfairly prosecution-oriented.

In this short piece, I describe six aspects of criminal procedure which I think demonstrate such unfairness. The argument proceeds by pairing two Court decisions or lines of decisions, all of which find for the prosecution, and then showing how a consistent line of reasoning should have made anti-defense rulings in both instances impossible; rather, to be fair, the defense should have prevailed in one instance or the other. Three of these pairings have to do with Court holdings focusing on adversarial components of our system; in all of these situations, the Court cuts prosecutors more slack than defense attorneys. The other comparisons have to do with Fourth Amendment law, for-cause challenges, and federal court review of state court decisions.

I'm sure there are more examples than those I give below. My purpose is simply to illustrate that on more than a trivial number of occasions the Court's "result-orientation" has led it not only to arrive at certain predictable prosecution-favoring outcomes but also to forsake—sometimes fairly blatantly and sometimes in a subtle way—its pretense of neutrality. It seems to me that this type of argument is more likely than the usual undifferentiated complaints about the Court's anti-defense attitudes to sway people toward serious questioning of the Court's decisions.

I. EXPECTATIONS OF PRIVACY

According to the Supreme Court, defendants have standing to make a claim that the Fourth Amendment was violated only when their own legitimate expectations of privacy are infringed. Thus, in *Rakas v. Illinois*,[9] the defendants had no standing to contest the search of a car

8. For each and every saying there is an equal and opposite saying: here, to wit, "foolish consistency is the hobgoblin of little minds." I don't think the pleas for consistency made in this paper are foolish; whether they're the product of a "little mind" I'm not quite as sure of.

9. 439 U.S. 128 (1978).

in which they were passengers because, "*qua* passengers,"[10] they had no authority to exclude people from the area beneath their seat or inside the glove compartment (where incriminating items used to convict them were found).[11] The typical academic reaction to this case has been to point out that this view of expectations of privacy unduly limits the scope of the Fourth Amendment (because most people would expect privacy in this situation) and encourages police to violate the amendment (because they will figure that any time a car contains more than one person they have a good chance of obtaining non-suppressible evidence even if they don't meet constitutional dictates).[12] In other words, the case is too government-oriented.

But why is it *too* government-oriented? Certainly a passenger, at least one who doesn't own or routinely use the car, doesn't expect as much privacy in glove compartments and under seats as the owner-driver. And while in theory police might knowingly violate the Fourth Amendment when they think the target will be unable to argue the constitutional question, we should not assume that will be so, at least with any frequency.[13] Finally, since granting standing to someone creates the possibility that probative evidence will be excluded, a broader definition of legitimate expectations of privacy would put a significant crimp in the efficient operation of the criminal justice system. In debating the standing issue one is ultimately left with a clash between crime control and due process perspectives that cannot be definitively resolved by reference to either Constitutional language or history.

Consider now the Court's third party consent cases, in which the question is whether a person other than the defendant can consent to a search of an area in which the defendant has an expectation of privacy. In *Illinois v. Rodriguez*,[14] twelve years after *Rakas*, the Court held such third party consent is valid any time the police reasonably believe that the third party has a privacy interest in the area, regardless of what is actually the case.[15] Using the *Rakas* facts as an example, as long as the

10. I like Latin as much as the next lawyer, but this is the Court's own phrase. *Id.* at 148.

11. *Id.* at 147-48.

12. For an example of such criticism, see Christopher Slobogin, *Capacity to Contest a Search and Seizure: The Passing of Old Rules and Some Suggestions for New Ones*, 18 AM. CRIM. L. REV. 387, 397, 417 n.238 (1981). I generally will not refer to academic pieces in this essay, but for some reason couldn't resist citing this one. I also will get several other self-plugs in before the essay is over. *See infra* notes 70, 71, 90, 101.

13. *Cf.* United States v. Payner, 447 U.S. 727, 730 (1980) (in which federal agents, knowing the defendant would not have standing to contest their actions, burglarized the apartment of a confederate to obtain documents later used against the defendant).

14. 497 U.S. 177 (1990).

15. *Id.* at 188-89.

police are reasonable in erroneously thinking the *Rakas* defendants have control over the glove compartment, consent obtained from one or both of those individuals would validate a search of the compartment, even over the owner-driver's objection. The *Rodriguez* holding was justified on the ground that the Fourth Amendment only requires searches to be reasonable.[16]

Independent of one another, either *Rakas* or *Rodriguez* can easily be justified: basing Fourth Amendment standing on privacy expectations makes some sense, and officers seeking consent can only be expected to act reasonably. But the fact that the prosecution won *both* cases is, in my opinion, "unfair." Either a person has control over a place or he doesn't. The absence of such control may mean he doesn't have standing to contest its search, but it should also mean he doesn't have the authority to allow its search. If the *Rakas* defendants are not allowed to argue that a search of the glove compartment was illegal, they shouldn't be able to consent to its search. Conversely, if a person's consent is valid any time it's reasonable to assume, despite reality, that control exists, that person should also have standing to contest the associated search.[17] Privacy should be defined either subjectively or objectively and should not depend on which version of that concept the government is currently favoring.[18] But as it stands, the government, thanks to the Court, gets to have its cake and eat it too.

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16. *See Rodriguez*, 497 U.S. at 186 ("Whether the basis for such authority [to consent] exists is the sort of recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably.").

17. Note the irony that, under current law, a consenting third party who has apparent but not actual authority to consent does not have standing to contest any subsequent illegality during the authorized search. Say, for instance, the police obtain consent to search an apartment for drugs from a person who only has apparent authority to consent and then unconstitutionally (because the action is outside the scope of the consent) move a stereo set in the apartment to see its serial numbers. *Cf.* Arizona v. Hicks, 480 U.S. 321, 324-25 (1987) (holding that moving a stereo to read the serial numbers constitutes a search under the Fourth Amendment). The consenter would not have standing to challenge the illegal search.

18. One response to this conclusion might be that the *Rodriguez* holding is justified, despite *Rakas*, because a reasonable officer can't be deterred; if an officer reasonably thinks he has consent then he will act accordingly, regardless of whether the party actually has control. *See Rodriguez*, 497 U.S. at 184-86 (stating that because law enforcement acts on probabilities, reasonable factual mistakes are permissible). But if deterrence is the key, standing should exist in those situations where a reasonable officer would believe control existed, regardless of reality; only in that way will bad faith violations of the Fourth Amendment (e.g., searching a car in the hopes that one or more of the passengers won't have standing) be deterred. *Cf. Payner*, 447 U.S. at 730-31 (holding that a search made to get evidence against a third party cannot be suppressed by that third party).

Despite the brevity of this analysis, it has sufficed to illustrate my methodology. The rest of this essay will be even more succinct in treating the remaining examples of unfair prosecution-orientation.

II. JUROR BIAS

Under the Sixth Amendment, jurors and juries must be impartial. In a number of cases, the Court has made it clear that to trigger the protection of the Impartiality Clause the defense must make a substantial showing of bias. In *Smith v. Phillips*,[19] the defendant proved that one of his jurors was actively seeking employment with the prosecutor's office both before and during trial.[20] But the Court held that this evidence, when counteracted by the juror's assertion that this extracurricular activity did not affect his deliberations, was insufficient to prove a Sixth Amendment violation;[21] to use the Court's words, an "imputation of bias" is not enough.[22] Along the same lines is *Patton v. Yount*,[23] involving a defendant who was retried and convicted for a gruesome murder after a successful appeal.[24] Yount showed from voir dire testimony that eight of the fourteen jurors (including two alternates) who sat at his second trial had formed an opinion of his guilt before they heard the evidence, and that three of these individuals had stated they would require evidence to overcome those beliefs.[25] Publicity before the trial also had revealed the defendant's prior conviction, his confession, and his prior plea of temporary insanity (none of which were admitted at trial).[26] Nonetheless, the Supreme Court did not consider the defendant's showing sufficient evidence of bias, noting that the previous trial had been four years earlier and that the recent publicity had not been "inflammatory."[27] In sum, the Court stated, the jurors in

19. 455 U.S. 209 (1982).

20. *Id.* at 212.

21. *See id.* at 217-18 (stating that because the state court held a hearing on the issue, the mere allegations alone were not enough to convincingly show bias).

22. *Id.* at 218.

23. 467 U.S. 1025 (1984).

24. *Id.* at 1027.

25. *Id.* at 1029-30.

26. *Id.* at 1029.

27. *See id.* at 1032-33 ("the record of publicity in the months preceding, and at the time of, the second trial does not reveal the 'barrage of inflammatory publicity immediately prior to trial amounting to a huge . . . wave of public passion' that the Court found in [Irvin v. Dowd, 360 U.S. 310 (1959)]. The *voir dire* testimony revealed that [the four-year] lapse in time had a profound effect on the community and, more important, on the jury, in softening or effacing opinion." (citations omitted)).

Yount did not appear to have "such fixed opinions that they could not judge impartially the guilt of the defendant."[28]

The casual assertions about juror psychology found in *Smith* and *Yount* might drive a Due Process Junkie wild. However, they reflect a plausible view that jurors can be open-minded despite prior knowledge of the defendant or occupational aspirations, and they also may be colored by the pragmatic concern that accurately discerning bias is a futile endeavor. The real unfairness occurs when the Court conveniently forgets these assumptions about jurors and assessing prejudice in cases involving *government* claims of bias.

Four years after *Smith* and merely a year after *Yount*, the Court decided that the prosecution may exclude from a capital case any juror who, although willing to swear she will base her verdict on the evidence, says the prospect of the death penalty would "interfere" with the judgment of guilt or innocence.[29] One year later the Court decided that the prosecution also may exclude from a capital trial a person who would view imposition of the death penalty to be against his or her "principles."[30] Neither type of juror has a "fixed opinion" about guilt or innocence. Indeed, in the latter instance the juror presumably has *no* opinion about guilt or innocence and is merely indicating an aversion to capital punishment. Perhaps such a person should be removed from the sentencing phase if conviction results, but sanctioning that person's removal from the *trial* jury is allowing a challenge when there is no evidence even of implied bias.[31] More important for the thesis of this

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28. *Id.* at 1035.

29. Wainwright v. Witt, 469 U.S. 412, 432-35 (1985).

30. Darden v. Wainwright, 477 U.S. 168, 178 (1986).

31. The only rationale one might give for the latter result is the expense of seating a new juror at the sentencing phase. However, as Justice Marshall pointed out in his dissent in *Buchanan v. Kentucky*, that expense is close to non-existent given the fact that alternates are selected and sit through the trial in any event. 483 U.S. 402, 430 (1987) (Marshall, J., dissenting).

It also must be pointed out that some symmetry on this issue does exist in *capital* cases: the defense is permitted to exclude from the trial jury as well as from the sentencing jury those who would automatically vote for the death penalty, even though these people are not necessarily biased in favor of conviction in a given case. Morgan v. Illinois, 505 U.S. 719, 733-34 & n.7 (1992). However, the number of people who fit in the automatic death penalty camp is so small compared to those who have problems with the death penalty that this apparent symmetry is in fact ephemeral. *Compare* Joseph B. Kadane, *After* Hovey: *A Note on Taking Account of the Automatic Death Penalty Jurors*, 8 LAW & HUM. BEHAV. 115, 116 (1984) (indicating that people who believe those who commit murder should automatically be executed comprise 1% of the population) *with* Robert Fitzgerald & Phoebe C. Ellsworth, *Due Process vs. Crime Control: Death Qualification and Jury Attitudes*, 8 LAW & HUM. BEHAV. 31, 41-42 (1984) (finding that a random sample from which those who would acquit because of antipathy toward the death penalty are excluded still includes 17% who could be challenged for cause under the

article, it also stands in contrast to the explicit "fixed" bias *Yount* requires the defense to demonstrate before it can remove a juror for cause.

III. PLEA BARGAINING

In *Ricketts v. Adamson*,[32] the defendant entered into an plea bargain with the prosecution which stipulated that his charge would be reduced from first-degree to second-degree murder if he testified against his two codefendants.[33] The agreement also stated that if the defendant refused to testify, "this entire agreement is null and void and the original charge will be automatically reinstated."[34] Finally, the agreement provided that if the defendant did testify, he would be sentenced under its terms "at the conclusion of his testimony" against the codefendants.[35] Adamson testified and the codefendants were convicted.[36] However, their convictions were overturned on appeal, and they were retried.[37] When approached by the prosecution to testify at the retrial, Adamson refused to do so without further concessions from the prosecution, pointing out, among other things, that the agreement stated his sentencing for second degree murder would occur after his "testimony."[38] The state courts subsequently found, however, that Adamson's refusal to testify a second time constituted a breach of the agreement and allowed his prosecution on a first degree murder charge, despite his subsequent willingness to testify against his codefendants.[39] The Supreme Court affirmed this disposition of the case against a double jeopardy challenge, relying on the agreement's language that a refusal to testify would void the bargain.[40]

There is nothing wrong with *Adamson*'s holding that double jeopardy protection can be waived through a plea agreement. Nor, viewed on its own, does the decision's underlying assumption that Adamson breached his agreement seem unreasonable. Although a literal reading of the agreement supports Adamson's view of it, a more contextual interpretation supports the government's position.

Court's caselaw). The more apt comparison, in terms of numbers, is between cases like *Smith* and *Yount*, on the one hand, and *Witt* and *Darden*, on the other.

32. 483 U.S. 1 (1987).
33. *Id.* at 3.
34. *Id.* at 4.
35. *Id.* at 5 n.3.
36. *Id.* at 4.
37. *Id.*
38. *Id.*
39. *Id.* at 5-7.
40. *Id.* at 11-12.

However, when the Court's decision in *United States v. Benchimol*[41] is taken into account, *Adamson* begins to look "unfair." In *Benchimol*, decided two years before *Adamson*, the plea agreement included a promise by the government to recommend probation with restitution.[42] But the presentence report the prosecutor submitted to the court was silent as to recommendation and, when the defense attorney asked in court for an explanation of its absence, the prosecutor merely stated that such an agreement had existed.[43] The Supreme Court found nothing wrong with this behavior, holding that unless the government specifically agrees to support a particular recommendation "enthusiastically" or to give its reasons for a lenient recommendation, it need not do so.[44] In short, while *Adamson* stands for the proposition that the *defendant* must abide by the spirit of the plea agreement as well as its letter, *Benchimol* says the *prosecutor* need barely comply with its literal dictates, much less honor its underlying purpose.

IV. CONFLICTS OF INTEREST

When a defense attorney represents two or more codefendants, there is a significant potential for conflicts of interest to develop. For instance, the attorney might seek a plea bargain for one client to the detriment of another (an egregious example, suggested by *Adamson*, would be a plea bargain to have one testify against the other). Or direct examination of one might elicit information that helps or hurts the other. Accordingly, the Supreme Court has held that if defense counsel indicates prior to trial that conflict is likely, failure to assign separate counsel will provide a strong basis for a subsequent ineffective assistance of counsel claim.[45] However, in *Cuyler v. Sullivan*,[46] the Supreme Court also made clear that when the defendant raises the conflict issue *after* trial, an appellate court may overturn a conviction only if there was an "actual" conflict of interest that "adversely" affected the defendant's case; the mere "possibility" or potential for conflict is an insufficient basis for reversal where the conflict issue is not raised prior to trial.[47]

The *Sullivan* holding is based on the plausible idea that defendants and their attorneys know more about the potential for conflict than the trial court, and that if they fail to raise the issue before trial they should

41. 471 U.S. 453 (1985) (per curiam).
42. *Id.* at 453-54.
43. *See id.* at 454-55 (reviewing the determinations of the facts by the court of appeals).
44. *Id.* at 455.
45. Holloway v. Arkansas, 435 U.S. 475, 484 (1978).
46. 446 U.S. 335 (1980).
47. *Id.* at 350.

not get the benefit of the doubt afterward. But that idea was turned on its head in *Wheat v. United States*.[48] There the co-defendants, three of them, did provide a pretrial indication of their views on conflict: they explicitly decided that they all *wanted* the same lawyer, both because of his highly touted skills and to avoid any divide-and-conquer ploys by the prosecution.[49] In such a situation, one would think that unless an actual conflict existed this "waiver" of conflict-free counsel should stand. But the Supreme Court held that a trial court's rejection of such a decision should be given "substantial latitude" by appellate courts, even if based only on the "potential" for conflict.[50]

The Court's rationale for the rule in *Wheat* was that to rule otherwise would allow the legal system to be "whipsawed" by co-represented defendants who would later argue that their convictions were tainted by conflict.[51] Yet it is unlikely defendants would be allowed to renege on a voluntary and intelligent waiver of conflict-free counsel, especially in light of the Court's unwillingness in *Sullivan* to allow defendants to disclaim even less explicit waivers.[52] In any event, after *Wheat*, the standard for appellate review in cases claiming conflict when the defense has made a pretrial assertion (explicit or implicit) that there is none depends upon one variable: who is making the claim. If it is the defense, there must be actual conflict that adversely affects the case; if it's the prosecution (which of course will support, and usually trigger, any trial court decision to override codefendants' requests for the same counsel), there need be only a potential conflict.[53]

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48. 486 U.S. 153 (1988).

49. *Id.* at 156-57.

50. *Id.* at 163.

51. *Id.* at 161.

52. *See Sullivan*, 446 U.S. at 348. To elaborate, *Sullivan* stands for the proposition that a defendant "waives" the right to argue conflict under the lesser potential standard unless the conflict is raised prior to trial. *See id.*

53. *See Wheat*, 486 U.S. at 163-64. *Wheat* did provide some measure of reciprocity because, under its holding, a trial court's *acceptance* of defendant waivers must also be given "substantial latitude" by appellate courts. *Id.* at 163. But that doesn't change the fact that *Sullivan* imposes a harsher standard of appellate review on defendants. One could also argue that *Wheat's* lesser "potential conflict" requirement is justified on the ground that actual conflict is hard to prove when, as was the case in *Wheat*, the defendants ended up being represented by separate counsel and thus conflict has to be assessed in the abstract. *Id.* at 157. But *Wheat* itself assumed that actual conflict can be shown prior to trial. *See id.* at 162 ("[W]here a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver, and insist that defendants be separately represented.").

V. ATTORNEY MISCONDUCT DURING DISCOVERY

In *Taylor v. Illinois*,[54] the defense attorney failed to notify the prosecution of a defense witness until the second day of trial, in violation of state discovery rules.[55] Although a continuance could have been granted, the Supreme Court held that the trial court did not violate the Sixth Amendment's Confrontation or Compulsory Process Clauses when it refused to permit the witness to testify, especially in light of voir dire evidence suggesting that the witness would perjure himself.[56] In *Michigan v. Lucas*,[57] the Court went even further by sanctioning the exclusion of presumptively *reliable* evidence (the victim's past sexual conduct with the defendant) when the defendant failed to give notice of intent to use the evidence as required by state rule.[58] In both cases, the rationale for upholding exclusion was that the state had a legitimate need to ensure the orderly operation of its processes against "willful misconduct" designed to obtain "a tactical advantage."[59]

Such exclusionary sanctions prevent the jury from hearing potentially probative evidence (as the dissent in *Taylor* pointed out, even a belief that a witness is a liar generally does not authorize a judge to prevent the jury from making its own assessment of credibility).[60] Further, such sanctions make the (presumptively innocent) defendant pay for the sins of the attorney. Meaningful application of ethical sanctions would provide a more direct deterrent for attorney misbehavior, and a continuance will usually assuage any harm done to the prosecution when such conduct does occur.

While all of these points are good ones, they do not necessarily trump the "legitimate state interests in protecting against surprise, harassment, and undue delay" that the Court believes are served by exclusion.[61] Furthermore, there is ample precedent for the types of sanctions imposed in *Taylor* and *Lucas*. Indeed, overall the prosecution

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54. 484 U.S. 400 (1988).

55. *Id.* at 403.

56. *Id.* at 416-18.

57. 500 U.S. 145 (1991).

58. *Id.* at 152-53. The Court did not express an opinion as to whether exclusion was warranted in *Lucas* itself; rather it merely rejected the lower court's ruling that "preclusion is unconstitutional in all cases where the victim had a prior sexual relationship with the victim." *Id.* at 153.

59. *Lucas*, 500 U.S. at 152; *Taylor*, 484 U.S. at 417.

60. *Taylor*, 484 U.S. at 428 (Brennan, J., dissenting) ("[P]reventing a jury from hearing the proffered testimony based on its presumptive or apparent lack of credibility would be antithetical to the principles laid down in *Washington v. Texas*, 388 U.S., at 20-23, and reaffirmed in *Rock v. Arkansas*, 483 U.S., at 20-23.").

61. *Lucas*, 500 U.S. at 153.

suffers much more than the defense from the effects of prophylactic exclusionary sanctions. Suppression of illegally seized evidence[62] and illegally obtained confessions,[63] just to name the most obvious examples, also excludes reliable evidence because of misdeeds that are neither the fault of the party harmed by the suppression or incapable of being deterred through other means. The notion that the reliability of a particular proceeding can be sacrificed to achieve the larger goal of deterring systemic misconduct afflicts both defense *and* prosecution.

But not in the discovery context. Compare *Taylor* and *Lucas* with the Supreme Court's rules governing prosecutorial disclosure of exculpatory evidence. In *United States v. Bagley*,[64] the defendant specifically requested from the prosecution information about "any deals, promises or inducements made to witnesses in exchange for their testimony."[65] Not only did the prosecution fail to inform the defense that such financial inducements had been made to two of its witnesses, it also forwarded affidavits from those witnesses that stated they had *not* been promised any reward.[66] Clearer evidence of misconduct designed to gain a "tactical advantage" is hard to imagine. Yet the Court did not require a retrial[67] (which, because the witnesses had already testified, was the only functional equivalent of exclusion available in this context). Rather, the Court remanded the case with the instruction to determine whether there was "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[68] In other words, no procedural sanction should be imposed on bad faith conduct by the prosecution in the discovery setting unless the misconduct affects the outcome of the trial.

Again, this result by itself is justifiable on the ground that there is no need for a retrial if the outcome would be the same. The question is why the same approach isn't appropriate when it is the defense attorney who tries to gain a tactical advantage through manipulation of the system. If symmetry is to be maintained, when a defense discovery violation occurs the judge should determine whether the proffered evidence would affect the outcome of the trial. Only if it wouldn't (because, for example, it is clearly incredible) should it be excluded. In

62. *See, e.g.*, Mapp v. Ohio, 367 U.S. 643, 657-60 (1961).
63. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436, 491-99 (1966).
64. 473 U.S. 667 (1985).
65. *Id.* at 669-70.
66. *Id.* at 670.
67. *Id.* at 678.
68. *Id.* at 682.

the meantime, regardless of how the evidence is treated, the miscreant attorney should be punished under the ethical rules.[69]

Much can be said for a system of sanctions directed at the wrongdoer rather than the evidence.[70] Exclusion of reliable evidence or reversal of a reliable conviction may not make sense if other more direct sanctions are effective at curbing the abuse. But, at least in the discovery setting, the Supreme Court seems to recognize this point only when it is the prosecution that might thereby be harmed.

VI. FEDERAL REVIEW OF STATE COURT DECISIONS

In the past two decades a revolution in state constitutional law has taken place as state courts, bothered by the Supreme Court's favoritism toward the prosecution, have ignored the Court's rulings and adopted more defense-oriented positions based on state constitutional provisions or other state law.[71] Generally, such state court rulings are insulated from Supreme Court review because they are based on adequate and independent state grounds.[72] Apparently frustrated by this fact, the Supreme Court has held that a state court ruling must *clearly* rest on state law before that law will be considered sufficiently "independent."[73]

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69. Although it involves a different type of situation, the Supreme Court's decision in United States v. Hastings, 461 U.S. 499 (1983), helps illustrate the double standard with respect to sanctions for attorney misconduct. In *Hastings*, an appellate court reversed the defendant's conviction because of evidence showing that prosecutors in the jurisdiction repeatedly, in case after case, violated the ruling in Griffin v. California, 380 U.S. 609 (1965), by making adverse comments about the defendant's failure to take the stand. *Hastings*, 461 U.S. at 504-05. The prosecutors apparently felt no compunction about doing so because such statements routinely had been found to be harmless error and thus cost-free—at least until the reversal by the court of appeals. *See* Hastings v. United States, 660 F.2d 301 (7th Cir. 1981). The prosecutorial conduct in this case was clearly a bad faith attempt to gain a tactical advantage (why else do it?). But the Supreme Court held that federal appellate courts do not have the authority to reverse convictions based on error which is harmless. *Hastings*, 461 U.S. at 505. Rather, local disciplinary action is the correct sanction in such cases. *Id.* at 506 n.5. If that is a good holding when prosecutors misbehave why shouldn't the same type of rule apply to defense attorney misconduct?

70. Indeed, I have misgivings even with the Fourth and Fifth Amendment exclusionary rules to the extent they suppress reliable evidence. *See* Christopher Slobogin, *Testilying: Police Perjury and What to Do About It?*, 67 U. COLO. L. REV. 1037, 1057-59 (1996).

71. *See generally* Christopher Slobogin, *State Adoption of Federal Law: Exploring the Limits of Florida's "Forced Linkage" Amendment*, 39 U. FLA. L. REV. 653, 661-64 (1987) (discussing state reaction to the post-1970 Supreme Court decisions dealing with search and seizure).

72. *See, e.g.*, Herb v. Pitcairn, 324 U.S. 117, 128 (1945).

73. *See id.* at 127-28 (stating that when it is not clear what law the state courts relied upon, the state courts should be given a chance to clarify what they intended).

Thus, in *Michigan v. Long*,[74] the Court decided it could review a Michigan Supreme Court opinion holding invalid a vehicle search despite the lower court's statement that the search was "proscribed by the Fourth Amendment to the United States Constitution *and* art. 1, § 11 of the Michigan Constitution."[75] The United States Supreme Court was "unconvinced" that this language meant the decision rested on an independent state ground.[76] In a vigorous dissent, Justice Stevens noted that, as an historical matter, the Court had always indulged a presumption *against* asserting jurisdiction over cases where an independent state basis may exist, in order to avoid advisory opinions that might interfere with state prerogatives.[77] But the majority, noting that the Michigan court had relied exclusively on federal cases in coming to its conclusion,[78] decided that United States Supreme Court review of the state's decision was appropriate.[79] Similarly, in *Arizona v. Evans*,[80] the Court held it could review an Arizona Supreme Court decision, despite the latter's explicit rejection of the governing United States Supreme Court precedent, because federal caselaw figured prominently in the state court's opinion.[81]

Because *Long* merely requires the state court to make a "plain statement" that it is basing its decision solely on state law,[82] it does not cast an impossible burden on state courts seeking to avoid federal review. But *Long*'s plain statement rule became less palatable eight years later, when the Court decided *Coleman v. Thompson*.[83] *Coleman* involved the question of when a state's procedural default rule (i.e., a rule barring untimely appeals) is an adequate and independent ground for barring federal habeas review of a state court decision against a defendant.[84] In the earlier case of *Harris v. Reed*,[85] the Supreme Court had appeared to decide that state courts wanting to avoid federal habeas review on such grounds would have to make a *Long*-type "plain

74. 463 U.S. 1032 (1983).

75. *Id.* at 1037 n.3 (emphasis added).

76. *Id.* at 1043.

77. *Id.* at 1066-67 (Stevens, J., dissenting).

78. *Id.* at 1043.

79. *Id.* at 1044.

80. 115 S. Ct. 1185 (1995).

81. *Id.* at 1190-91.

82. *Long*, 463 U.S. at 1041 ("[A state court] need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.").

83. 501 U.S. 722 (1991).

84. *Id.* at 729-30.

85. 489 U.S. 255 (1989).

statement" that their default rule was the reason for their holding.[86] However, in *Coleman* the Court held that federal habeas review is presumptively barred simply if it "fairly appears" on the record that the state court's dismissal was based "primarily" on the state procedural rule.[87] Thus, in *Coleman*, the Court held that federal review of the defendant's claim was inappropriate even though the state court had dismissed it only after an analysis of whether the dismissal would abridge the defendant's federal constitutional rights and without plainly stating it was acting on procedural grounds. The same term, in *Ylst v. Nunnemaker*,[88] the Court moved even further from a plain statement rule in this context by holding that when an upper level state court does not indicate the ground for dismissal, federal courts should "presume" that the basis for dismissal is the same rationale that lower state courts explicitly relied upon (which often may be procedural default).[89] Incredibly, in light of the holding and rationale of *Long*, the Court explained its stance in these cases on the ground that a plain statement requirement would evidence a "loss of respect" for state court decisions and "put too great a burden on the state courts."[90]

CONCLUSION

At this point some readers, especially those of the Crime Control Crusader persuasion, may be thinking of a number of ways in which the Supreme Court has manifested a preference for the defense. There is the defendant's right to remain silent[91] versus the prosecution's obligation to divulge exculpatory information.[92] There is the "right" to appeal convictions[93] versus a general prohibition on appeal of acquittals.[94]

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86. *Id.* at 260-65.

87. *Coleman*, 501 U.S. at 740.

88. 501 U.S. 797 (1991).

89. *Id.* at 803.

90. *Coleman*, 501 U.S. at 738-39. Of course, the Court has long been particularly solicitous of state court determinations in the habeas context, whereas *Long* involves appeals to the Court. *See* CHARLES WHITEBREAD & CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 905-06 (3d ed. 1993). But determining when a state ground is "independent" would seem to be an issue that transcends a particular setting.

91. *See generally* Miranda v. Arizona, 384 U.S. 436, 458-66 (1966) (reviewing the history and evolution of the "privilege against self-incrimination").

92. Brady v. Maryland, 373 U.S. 83, 87 (1963).

93. The word "right" is in quotation marks in the text because the Supreme Court has never recognized that appeal is a constitutional right. *Cf.* McKane v. Durston, 153 U.S. 684, 687 (1894) (stating that review by an appellate court was not required "at common law and is not now a necessary element of due process of law"). But in those states in which appeal is permitted (i.e., all of them) the Court clearly contemplates that the appeal may not be significantly circumscribed. *See* Abney v. United States, 431 U.S. 651, 656 (1977).

And, the granddaddy of them all, there is the requirement that the prosecution prove its case beyond a reasonable doubt,[95] while the defense need not prove a thing unless an affirmative defense is involved.[96] Yet these defense advantages, in contrast to those granted the prosecution in the situations described above, can be said to flow from solid constitutional and policy rationales.

Further, the argument made in this article is only that *some* of the asymmetries in the Supreme Court's jurisprudence are unfair, not that asymmetry between defense and prosecution is per se bad, or that symmetry is automatically good. As an example of good *asymmetry*, consider the Court's mistrial cases: At first glance they appear unfair because they allow retrial not only anytime the court grants a prosecutorial mistrial motion based on defense misconduct[97] but also (virtually) anytime the court grants a defense mistrial motion based on prosecutorial misconduct;[98] at second glance, however, a persuasive, consistent ground exists for both lines of cases.[99] As an example of bad *symmetry* (one so far only implicitly endorsed by the Court[100]), the once-dominant and still-widespread rule that the prosecution can only obtain discovery from the defense if the defense seeks discovery from the prosecution makes little sense, whether one is prosecution- or defense-oriented.[101]

The problem with the situations discussed in this essay, on the other hand, is that the Supreme Court is willing to find for the prosecution even when doing so requires it to be *unjustifiably* inconsistent. Perhaps this outcome is another of the many dangers associated with the recent Court's penchant for balancing analysis.[102] When one is biased in favor of a certain agenda, it is probably very difficult to avoid valuing that

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94. *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 168 (1873).

95. *In re* Winship, 397 U.S. 358, 364 (1970).

96. Mullaney v. Wilbur, 421 U.S. 684, 700-01 (1975).

97. *See* Arizona v. Washington, 434 U.S. 497, 513 (1978).

98. *See* Oregon v. Kennedy, 456 U.S. 667, 672-73 (1982) (stating that the "manifest necessity" standard is not used when a defendant has "elected to terminate the proceedings against him").

99. *See generally* George C. Thomas III, *Solving the Double Jeopardy Mistrial Riddle*, 69 S. CAL. L. REV. 1551 (1996) (arguing that the Court's cases can be reconciled by analyzing them in terms of whether a mistrial amounts to an acquittal).

100. *See* Williams v. Florida, 399 U.S. 78, 80-83 (1970).

101. For an argument to this effect, see Christopher Slobogin, *Discovery by the Prosecution in the United States: A Balancing Perspective*, 36 CRIM. L.Q. 423, 427-33 (1994).

102. *See generally* Laurence Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-Scientific Sieve*, 36 HASTINGS L.J. 155 (1984) (describing seven problems with balancing tests).

group's interests above any competing agenda, even if such preferencing makes for contradictory rationales.

If the assertions that this essay makes about the Court's "unfair" prosecution-orientation withstand scrutiny,[103] two further conclusions might follow. First, the highest court in the country is so fixated on ensuring that a particular side wins that it is willing with some frequency to sacrifice the most basic attribute of any court worthy of the name—the appearance of fairness. This conclusion is a much more fundamental challenge to the Court's integrity than is the simple acknowledgement that a majority of the Justices are biased in favor of the government. Second, to the extent the Court's unfairness becomes common knowledge, its credibility with the general public could be damaged. The potential threat to the Court's status as the preeminent judicial institution in the nation may not be grave, but it is certainly not trivial.

103. I have tried to note and rebut some of the arguments that can be made against the assertions made in this essay. *See supra* notes 18, 31, 53 & 90. One might also wonder whether the contrasting results described here are merely a reflection of changing Court membership and/or "negligent" oversight rather than knowing or willfully blind acts of bias on the part of its individual members. The changing-membership theory seems insupportable. The longest gap between the inconsistent decisions discussed in this essay is 12 years (between *Rakas* and *Rodriguez*), the next longest is 8 years (between *Long* and *Coleman*) and the rest of the gaps are 3 years or less. Furthermore, in the first two instances the Court has explicitly reaffirmed the holdings in the earlier decision in several subsequent cases much closer in time to the latter decision. *See, e.g.*, Minnesota v. Olson, 495 U.S. 91, 95-100 (1991) (reaffirming *Rakas* the same year as *Rodriguez*); *Evans*, 115 S. Ct. at 1190 (affirming *Long* four years after *Coleman*). Whether the asymmetries discussed here are "willful" is harder to gauge. The Court itself explicitly recognized the potential for a double standard in *Wheat*, 486 U.S. at 160, and *Coleman*, 501 U.S. at 735-36. Justice White's dissent in *Rakas* pointed out the tension between the standing and third party consent rules. 439 U.S. at 163-64. Given the three year-or-less gap between the three other pairings discussed in this essay, one would hope for some twinge of judicial conscience in those cases as well.