RECENT DEVELOPMENTS

CHILD ABUSE AND THE FIFTH AMENDMENT: *Baltimore City Department of Social Services v. Bouknight*, 110 S. Ct. 900 (1990).

For months after the Supreme Court agreed to hear the case of *Baltimore City Department of Social Services v. Bouknight*,[1] child-care agencies, constitutional scholars, and people concerned about child abuse eagerly awaited the decision. The case appeared to present a direct conflict between a parent's Fifth Amendment privilege against self-incrimination[2] and the States' recognized interest in protecting the health, safety, and well-being of children.[3] The Supreme Court supported this phrasing of the question when it limited the issues to be considered.[4] When the decision was announced, some interpreted the opinion as upholding the States' interest at the expense of the Fifth Amendment privilege.[5]

Despite the hopes and expectations that the Court would take strong steps to protect abused children, the decision was disappointingly modest. While holding that Bouknight, the parent, could not assert her privilege against self-incrimination to avoid a court order to produce her child, the Court limited the scope of its holding to a narrow range of cases, thus skirting the question of whether the need to protect abused children can generally overcome an individual's Fifth Amendment privilege. Though avoiding this question could be praised as wise judicial restraint, other aspects of the decision are less laudable. In reaching its decision, the majority shed little light on

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1. 110 S. Ct. 900 (1990).

2. U.S. CONST. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself . . . .").

3. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 165 (1944) ("It is the interest of youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens.").

4. The Court's grant of certiorari was limited to the following questions:

> 1. Does a court order directing a parent to produce her previously abused infant son compel incriminating testimony in violation of the parent's Fifth Amendment privilege against self-incrimination?
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> 2. Even if the Fifth Amendment privilege is implicated by a court order to produce a child, is the privilege overcome by the important societal interest in protecting children in jeopardy of serious injury?

109 S. Ct. 1636 (1989).

5. *See* Wash. Times, Feb. 21, 1990, at A1, col. 1 ("In a 7-2 opinion, Justice Sandra Day O'Connor, writing for the majority, said that the state's power to protect children from abuse supersedes a parent's constitutional right against self-incrimination.").

whether producing a child is a "testimonial communication" and suggested that the state may have to grant immunity to Bouknight should it decide to bring criminal charges against her. These factors combined to create a confusing, overly-technical decision that could hinder future state attempts to protect abused children.

The *Bouknight* case centered around Maurice M., the respondent's abused infant son. When Maurice was three months old, he was taken to the hospital with a fractured left femur. While he was there, doctors discovered several partially healed bone fractures and other evidence of abuse. After Maurice had been placed in a spica cast, Ms. Bouknight was observed shaking Maurice and dropping him in his crib. Hospital officials alerted the Baltimore City Department of Social Services (BCDSS), which sought and obtained a court order removing Maurice from Bouknight's control and placing him in shelter care.[6]

Several months later, the order was modified to allow Maurice to be returned to his mother. After a hearing, the Baltimore Juvenile Court declared Maurice to be a "child in need of assistance" and approved his return to Bouknight, subject to a protective supervision order. The order required Bouknight to cooperate with BCDSS, continue in therapy, participate in parental aid and training programs, and refrain from physically punishing Maurice. Bouknight agreed to these conditions.[7]

When BCDSS caseworkers later tried to visit Maurice, Bouknight refused to let them see him. Fearing for his safety, BCDSS petitioned the juvenile court for an order removing Maurice from Bouknight's control and placing him in foster care. The caseworkers told the court that Bouknight had "in nearly every respect violated the terms of the protective order."[8] The Department also petitioned the court for an order requiring Bouknight to produce Maurice or disclose his whereabouts. The court granted these petitions and ordered Bouknight to produce Maurice. At a subsequent hearing, Bouknight asserted that Maurice was with relatives in Texas. An investigation proved this assertion to be false. The court again ordered Bouknight to produce Maurice, and Bouknight

6. *See* 110 S. Ct. at 903.
7. *See id.*
8. *Id.*

again failed to comply.[9] Thereafter, the juvenile court found Bouknight in contempt for failure to produce the child, and Bouknight was imprisoned.[10] Bouknight then claimed that the contempt order violated her Fifth Amendment privilege against self-incrimination. The juvenile court rejected this claim.[11] On appeal, Maryland's highest court vacated the contempt order, holding that the order compelled Bouknight implicitly to admit through the act of production "a measure of continuing control and dominion over Maurice's person" in circumstances in which "Bouknight has a reasonable apprehension that she will be prosecuted."[12] The Supreme Court granted BCDSS's petition for certiorari.[13]

Before the Supreme Court, BCDSS and a representative for Maurice argued that Bouknight could not properly claim a Fifth Amendment privilege because her act of producing the child was not a testimonial communication. Additionally, they argued, even if the production were sufficiently testimonial to be covered by the privilege, the state's interest in protecting Maurice outweighed Bouknight's privilege.[14] Though the Court agreed, by a margin of seven to two, that Bouknight could not properly assert the privilege in this context, it did not directly address either of the petitioners' main arguments. The Court instead based its holding on the fact that Bouknight had become Maurice's custodian pursuant to a previous court order, reasoning that the subsequent order to produce Maurice was merely the exercise of the state's non-criminal regulatory power.

The majority opinion by Justice O'Connor first responded to the petitioners' argument that Bouknight's production of Maurice would not be a testimonial communication.[15] The Court began by noting that the Fifth Amendment's protection "applies only when the accused is compelled to make a *testimonial*

9. At no time did Bouknight claim that she was unable to produce Maurice.

10. *See id.* at 903-04.

11. *See id.*

12. In re Maurice M., 314 Md. 391, 403-04, 550 A.2d 1135, 1141 (1988).

13. *See* 109 S. Ct. 1636 (1989).

14. This argument was apparently based on the notion that the parent's Fifth Amendment privilege should be balanced against the state's *parens patriae* interest in promoting child welfare.

15. Chief Justice Rehnquist and Justices White, Blackmun, Stevens, Scalia, and Kennedy joined Justice O'Connor's opinion.

communication that is incriminating."[16] The Court asserted, however, that compliance with a production order may implicate the privilege if production would be communicative as to the "existence, possession, or authenticity of the things produced," but that a person may not claim the Amendment's protection based upon the incrimination that may result from the "contents or nature of the thing demanded."[17] The Court found that Bouknight's implicit communication of control over Maurice at the moment of production might aid the state in prosecuting her, and thus the production order *might* compel incriminating testimonial communication.[18]

The Court chose, however, not to decide this issue. Instead, the majority maintained that, even assuming that production would be testimonial, Bouknight still could not assert the Fifth Amendment privilege because she had assumed custodial duties related to production and because production was required as part of a non-criminal regulatory regime.[19] The Court likened Bouknight to a keeper of "required records" that the "defendant was required to keep, not for his private uses, but for the benefit of the public, and for public inspection."[20] Thus, once the juvenile court declared Maurice a "child in need of assistance," he became the particular object of the state's regulatory interest. When Bouknight agreed, upon several state-imposed conditions, to resume control of Maurice, she became *an agent of the state* and submitted herself to the routine operation of its regulatory system. As such an agent, Bouknight agreed to take care of Maurice in a manner consonant with the state's oversight and subject to inspection by BCDSS. Hence, she could not assert the Fifth Amendment privilege when the state desired to inspect Maurice.[21]

The Court did recognize that there are limitations on such state power. The state's power to demand production is limited by the Fifth Amendment where its requirements are directed toward a "selective group inherently suspect of criminal activi-

16. 110 S. Ct. at 904 (quoting Fisher v. United States, 425 U.S. 391, 408 (1976)) (emphasis in original).

17. *Id.* at 905 (citations omitted).

18. *See id.*

19. *See id.*

20. *Id.* (quoting Shapiro v. United States, 335 U.S. 1, 17-18 (1948) (quoting Wilson v. United States, 221 U.S. 361, 381 (1911))).

21. *See id.* at 907.

ties."[22] The Court did not believe, however, that this limitation applied to Bouknight. Rather, the power to demand production of children was directed at all parents, guardians, and custodians who accepted placement of juveniles in custody. The Court noted that most orders of this type arise in circumstances entirely devoid of criminal conduct. Hence, the power to order production of children was simply part of a broadly applied regulatory regime which was unrelated to criminal law enforcement, making the Fifth Amendment privilege against self-incrimination inapplicable.[23]

Although Bouknight could not assert a Fifth Amendment privilege to avoid production, the Court suggested without deciding that the state might have to grant some sort of immunity to Bouknight should she produce incriminating evidence.[24] The Court stated that often "the Fifth Amendment limits prosecutors' ability to use testimony that has been compelled."[25] The Court declined to be more specific, however, noting that the case did not require it to "define the precise limitations."[26]

The dissent, written by Justice Marshall and joined by Justice Brennan, stated that the majority correctly assumed that Bouknight's production of Maurice would be testimonial. The dissent argued that production would establish Bouknight's physical control over Maurice. Noting that the Baltimore Police were treating Maurice's disappearance as a homicide, the dissent stated that production of the child could present a real and appreciable threat of self-incrimination.[27]

Justice Marshall criticized the "public recordkeeper" analogy used by the Court, arguing that Bouknight was still Maurice's mother, with rights and responsibilities not determined solely by Maryland juvenile protection law. Because Bouknight was acting in a personal capacity rather than on behalf of the state, Justice Marshall argued that the extension of the recordkeeper analogy to Bouknight was unwarranted.[28] Moreover, the dis-

22. *Id.* at 906 (quoting Marchetti v. United States, 390 U.S. 39, 57 (1968) (quoting Albertson v. Subversive Activities Control Bd., 382 U.S. 70, 79 (1965))).

23. *See id.* at 908.

24. "The same custodial role that limited the ability to resist the production order may give rise to corresponding limitations upon the direct and indirect use of that testimony." *Id.*

25. *Id.* at 909.

26. *Id.* at 908.

27. *See id.* at 909 (Marshall, J., dissenting).

28. *See id.* at 910-11 (Marshall, J., dissenting).

sent challenged the Court's characterization of the juvenile protection laws as part of a non-criminal regulatory regime. These laws are so intimately related to the enforcement of state criminal laws, Justice Marshall argued, that they are directed at a "selective group inherently suspect of criminal activities."[29]

Finally, the dissent accused the Court of "riding roughshod over Bouknight's constitutional privilege against self-incrimination,"[30] but found "some comfort in the Court's recognition that the state may be prohibited from using any testimony given by Bouknight in subsequent criminal proceedings."[31] Marshall implied that Maryland should, as a good faith gesture, grant use immunity to Bouknight in exchange for her production of Maurice, noting that the state's failure to have already done so made it difficult to believe that the state was "sincere in its protestations of concern for Maurice's well-being."[32]

The *Bouknight* decision is not satisfying because it did not address or apply the standard Fifth Amendment testimonial-communication analysis.[33] The Court correctly acknowledged that the privilege against self-incrimination applies only when the accused is compelled to make an incriminating *testimonial* communication.[34] The petitioners conceded that Bouknight was being compelled but argued that the result of this compulsion would not be testimonial. The Court, however, did not feel compelled to decide whether the act of producing Maurice would be testimonial.

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29. *Id.* at 912 (Marshall, J., dissenting and referring to majority opinion, 110 S. Ct. at 906); *see supra* note 22.

30. *Id.* at 914 (Marshall, J., dissenting). This criticism is somewhat ironic in light of the recent dissenting opinion in DeShaney v. Winnebago County Dep't of Social Servs., 109 S. Ct. 998 (1989), written by Justice Brennan and joined by Justices Marshall and Blackmun. The dissenters in *DeShaney* argued that the Constitution places an affirmative obligation on states with departments of social services to protect children from abuse. Should a department of social services fail to protect a child from abuse, the dissenters contended, the state should be held liable for all damages to the child. The *Bouknight* dissenters demand action but restrict the ability to act, illustrating the tightrope on which they would require state departments of social services to walk. *See* 109 S. Ct. at 1007-12 (Brennan, J., dissenting).

31. 110 S. Ct. at 914 (Marshall, J., dissenting).

32. *Id.* at 914 n.2 (Marshall, J., dissenting).

33. This analysis has been developed in cases involving the Fifth Amendment privilege and the production of documents. Though this case, involving the production of a child, was one of first impression, neither the majority nor the dissent suggested that the standard analysis was inapplicable. In fact, by arguing that production would be testimonial, the dissent incorporated, at least implicitly, the testimonial communication analysis.

34. *See* 109 S. Ct. at 904 (citing Fisher v. United States, 425 U.S. 391, 408 (1976)).

The starting point in the analysis is *Fisher v. United States*.[35] In *Fisher*, the Court had to decide whether a taxpayer, ordered to produce documents, the contents of which might incriminate him, could assert a Fifth Amendment privilege to avoid a production order. The Court acknowledged that production would amount to an implicit communication of the existence of the documents, their possession or control by the taxpayer, and the taxpayer's belief that the documents were those described in the production order. Even so, the Court held that the taxpayer's act of producing the documents was not "testimonial self-incrimination."[36] The Court stated, however, that whether such implicit communications are testimonial and incriminating "depend[s] on the facts and circumstances of particular cases or classes thereof."[37]

Despite the Court's failure in *Fisher* to announce a categorical definition of "testimonial communication," the reasons it gave for its holding provide important insight into what makes a communication testimonial. The Court said that the act of production would not be testimonial because the Government was not relying on the "truthtelling" of the defendant to prove either the existence of or the defendant's access to the documents; the existence of the papers and the taxpayer's possession of them were "foregone conclusions," and therefore the taxpayer would be adding "little or nothing to the sum total of the Government's information by conceding [that] he in fact ha[d] the papers."[38] Thus, an act of production is not testimonial if the existence, possession, control, and authenticity of the thing produced are "foregone conclusions."

The Court remained faithful to this line of analysis in *United States v. Doe* (*Doe I*).[39] In that case, a federal grand jury issued five subpoenas, requiring Doe to produce any and all documents fitting into certain categories. There was genuine doubt as to the existence of some of the documents. Apparently believing that the government was on a "fishing expedition," the district court held that Doe could assert his Fifth Amendment privilege because, by producing the documents, Doe would be testifying to their existence, a fact which was not a "foregone

35. 425 U.S. 391 (1976).
36. *Id.* at 410-11.
37. *Id.* at 410.
38. *Id.* at 411.
39. 465 U.S. 605 (1984).

conclusion."[40] In affirming the ruling,[41] the Supreme Court distinguished *Fisher* because "we have the explicit finding of the District Court that the act of producing the document would involve testimonial self-incrimination. . . . Therefore, we will not overturn that finding unless it has no support in the record."[42]

In a case unrelated to *Doe I*, *Doe v. United States* (*Doe II*),[43] the Supreme Court issued its latest word on production as testimony. The Court affirmed a ruling requiring Doe to sign a consent form authorizing the release of bank account records that could have incriminated him. In doing so, the Court stated that to be testimonial, "an accused's communication must itself, explicitly or implicitly, relate to a factual assertion or disclose information."[44] The privilege protects only compelled *disclosures*. Hence, if the act of production does not disclose some previously unknown or unproven information pertaining to the existence, possession, control, or authenticity of the thing produced, it is not testimonial. This conclusion is consistent with cases in which the Court has upheld orders to submit a blood test,[45] to provide a handwriting sample,[46] and to provide a voice sample[47]—none of which, as physical acts of production, have been found to violate the accused's privilege against self-incrimination.[48]

It is in this context that the reasons the Court offered for suggesting that Bouknight's production of Maurice "might" be testimonial are completely dissatisfying. The Court conceded that production would not result in sufficiently incriminating testimony regarding Maurice's existence or authenticity. It apparently recognized that Bouknight's possession and control of Maurice were "foregone conclusions."[49] Nevertheless, the

40. *See id.* at 613 n.12.

41. The Third Circuit had previously affirmed the district court. *See* In re Grand Jury Empanelled March 19, 1980, 680 F.2d 327 (3d Cir. 1982).

42. 465 U.S. at 613-14.

43. 487 U.S. 201 (1988).

44. *Id.* at 210.

45. *See* Schmerber v. California, 384 U.S. 757 (1966).

46. *See* Gilbert v. California, 388 U.S. 263 (1967).

47. *See* United States v. Dionisio, 410 U.S. 1 (1973).

48. "While the Court in *Fisher* and [*Doe I*] did not purport to announce a universal test for determining the scope of the privilege, it also did not purport to establish a more narrow boundary applicable to acts alone. To the contrary, the [C]ourt applied basic Fifth Amendment principles." *Doe II*, 487 U.S. at 209.

49. *See* 110 S. Ct. at 905 ("[T]he State could readily introduce evidence of Bouknight's continuing control over the child—[for example], the custody order, testi-

Court asserted that Bouknight's implicit communication of control over Maurice at the moment of production might aid the state in prosecuting Bouknight, and that a production order might thus compel incriminating testimonial assertions.[50]

The Court's conclusion is baffling because the Court is unclear as to what it considers testimonial. If the Court believes that Bouknight's "communication of control" is testimonial, then it ignores the "foregone conclusion" test of *Fisher*, as well as *Doe I*'s suggestion that the trial court is the proper forum in which to determine whether certain facts are "foregone conclusions."[51] If the Court is focusing on control "at the moment of production," then it fails to explain why *this* moment of control is more significant than control at all times prior to production. Producing evidence that "might aid the State in prosecuting" is not inherently testimonial, because production of almost anything, be it blood samples or documents, can aid the state in its prosecution. Finally, all aspects of the Court's conclusion seem to rest on the possibility that production of Maurice will reveal evidence of abuse. That conclusion, however, contradicts the Court's earlier statement that Bouknight "cannot claim the privilege based upon anything that examination of Maurice might reveal."[52]

The ramifications of the *Bouknight* decision and its line of reasoning are at once narrow and potentially broad. Because the Court based its decision on Bouknight's status as a parent who had received custody through a court order, the decision applies only to those parents from whom a court has taken, and then returned, a child. The decision does not prevent abusive parents from asserting the Fifth Amendment privilege against self-incrimination to avoid an initial court order to produce their children. Thus, the decision will do little to protect most abused children. Other possible implications of the *Bouknight* decision are broad. The Court may be suggesting that all court orders to produce children can be testimonial communications,

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mony of relatives, and Bouknight's own statements to Maryland officials before invoking the privilege . . . .").

50. *See id.*

51. *See Doe I*, 465 U.S. at 613-14. Assuming it followed the Court-established testimonial analysis, the juvenile court must have determined that Bouknight's control and possession of Maurice was a "foregone conclusion" because it held that Bouknight's production was not testimonial and would not implicate the Fifth Amendment's guarantee against self-incrimination.

52. 110 S. Ct. at 905.

implying that a parent's control over his or her child is always an issue with respect to which production of the child would be communicative. Alternatively, the Court may be suggesting that the "foregone conclusion" analysis of *Fisher* is obsolete as a legal test and should be replaced by an "aid-the-state" test. Unfortunately, because the Court was unclear as to why it considered the act of production potentially testimonial, Fifth Amendment scholars will have to wait for another decision to determine the significance of the case.

Finally, the *Bouknight* decision may seriously impair the States' ability to protect children and to prosecute child abusers. By suggesting that a state may have to grant some sort of immunity to parents in exchange for the production of their children, the Court may give abusive parents an incentive to hide their children once they have abused them. Consequently, the state may be forced to choose between protecting abused children and punishing their abusers. Even if the state grants immunity, such a grant is no guarantee that the abusive parent will produce the child. Moreover, "cutting a deal" involving an abusive parent, the Department of Social Services, and the prosecutor's office could prolong the process of gaining access to children in need. Having to provide an abusive parent with immunity may very well jeopardize the health and well-being of abused children.

Those who were hoping that *Baltimore City Department of Social Services v. Bouknight* would represent a strong step toward protection of abused children have reason to be disappointed. Although the immediate result is praiseworthy, the effects of the positive decision will likely be minimal. One newspaper's reaction to the decision seems especially appropriate: "Somehow, some way, we have to do better."[53]

Gregory J. English

53. *Right Decision on Child Abuse*, Chicago Tribune, Feb. 23, 1990, § 1, at 12, col. 1 (editorial).

DOUBLE JEOPARDY, DUE PROCESS, AND EVIDENCE FROM PRIOR ACQUITTALS: *Dowling v. United States*, 110 S. Ct. 668 (1990).

Although evidence from prior convictions has long been recognized as admissible in the subsequent trial of a criminal defendant,[1] the admissibility of evidence from a previous *acquittal* has not been so universally accepted.[2] In *Dowling v. United States*,[3] the Supreme Court settled the debate by rejecting many of the objections that defense attorneys commonly raise to the admission of this evidence. With this decision, the Court sent the clear message that even when a defendant has been acquitted at a prior proceeding, little protection remains from the inferences a prosecutor can create in the minds of jurors simply by referring to that proceeding. While defense attorneys watch as their objections to evidence from prior acquittals are overruled, they can only begin to wonder if their clients have any protection against the inevitably prejudicial effects of telling a juror that the defendant had been charged with a similar act before and even worse, had been "let go."

At Petitioner Dowling's trial for bank robbery, the prosecution introduced evidence from a similar crime with which he previously had been charged and of which he had been acquitted. Dowling objected to admission of the evidence on two constitutional fronts: the Double Jeopardy and Due Process Clauses of the Fifth Amendment.[4] The Court refused to bar the evidence under either of these provisions[5] and rejected Dowling's argument that admission of the evidence created a "con-

1. Evidence from prior convictions may be introduced provided that it is not offered to show the defendant's "bad character."

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

FED. R. EVID. 404(b). For a more detailed discussion of the many avenues through which evidence from prior convictions may be admitted at a subsequent trial, see MCCORMICK ON EVIDENCE § 190 (3d ed. 1984).

2. *Compare* United States v. Mespoulede, 597 F.2d 329 (2d Cir. 1979) (acquittal bars admission of evidence in subsequent proceeding) *with* Oliphant v. Koehler, 594 F.2d 547, 553-55 (6th Cir. 1979), *cert. denied*, 444 U.S. 877 (acquittal does not bar admission of evidence in subsequent proceeding).

3. 110 S. Ct. 668 (1990).

4. U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb, . . . nor be deprived of life, liberty, or property, without due process of law.").

5. *See* 110 S. Ct. at 673, 675.

stitutionally unacceptable" risk of an erroneous conviction on inferences drawn from the acquitted conduct.[6]

Given the Supreme Court's rejection of constitutional challenges, defense attorneys will have to rely upon the Federal Rules of Evidence to secure protection from the inevitably prejudicial effects of the evidence from a prior acquittal and from the perils of a juror who considers the evidence improperly.[7] Rule 403 requires an initial determination by the judge that the evidence is more probative than prejudicial before it can be offered.[8] Assuming, as in *Dowling*, that the introduction of the evidence passes this hurdle, Rule 105 becomes especially relevant, as this rule requires the judge to instruct the jury "accordingly" as to the limited purpose for which the evidence is being introduced.[9] These instructions are often the only statements made from the bench telling the jurors how they can lawfully consider the introduced evidence. Yet these instructions are generally unclear and difficult to follow,[10] and they are widely thought to be disregarded by juries once the door to the jury room closes.[11] In the wake of *Dowling*, therefore, defense attorneys will have to turn their attention to challenging the sufficiency of jury instructions in the hope that with more explicit direction from the judge, the jurors will not consider the evi-

6. *See id.* at 675.

7. *Cf.* Government of the Virgin Islands v. Toto, 529 F.2d 278, 283 (3d Cir. 1975) (referring to the near impossibility of eradicating the prejudicial effects of evidence from prior crimes: "A drop of ink cannot be removed from a glass of milk.").

8. "When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly." FED. R. EVID. 105. Rule 105 requires a specific request from counsel before the court is required to issue limiting jury instructions. The judge, though, may give an instruction on his own initiative without any request.

9. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." FED. R. EVID. 403. At trial, the judge struck this balance and admitted the evidence as "highly probative." Defense counsel appealed this characterization to the Third Circuit but did not raise the issue before the Supreme Court. *See* 110 S. Ct. at 670-71.

10. *See* United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985) ("To tell a jury to ignore the defendant's prior convictions in determining whether he or she committed the offense being tried is to ask human beings to act with a measure of dispassion and exactitude well beyond mortal capacities.").

11. *See* Note, *Other Crimes Evidence at Trial: Of Balancing and Other Matters*, 70 YALE L.J. 763, 777 (1961). The author argues that "[jury] instructions are frequently if not always fruitless." Results from jury examinations are also cited that disclose that jurors have an "almost universal inability and/or unwillingness either to understand or follow the court's instruction on the use of defendant's prior criminal record for impeachment purposes. The jurors almost universally used defendant's record to conclude that he was a bad man"—exactly the conclusion the instructions are meant to prevent.

dence for something other than the limited purpose for which its introduction was permitted.

The *Dowling* case came to the Supreme Court more than four years after Reuben Dowling was arrested in connection with a robbery at a bank in the Virgin Islands. After Dowling's initial trial ended in a hung jury, and after a second trial handed down a guilty verdict that was overturned by the Third Circuit,[12] Dowling was convicted at a third trial and sentenced to seventy years imprisonment.[13] During this third trial, testimony from witnesses at the scene was introduced describing the culprit as having worn a mask and carried a small pistol.[14] One eyewitness was later able to identify Dowling as the man running from the scene of the crime.

Over the objection of the defendant, the testimony of Vena Henry was also introduced. Ms. Henry, a resident of the Virgin Islands, had been robbed by a masked man with a handgun two weeks after the bank robbery. During the course of that robbery, Henry had struggled with the culprit and had removed his mask. At Dowling's trial for that incident, Henry identified Dowling as the culprit, but the jury nevertheless had acquitted Dowling of all charges.[15] At Dowling's subsequent trial for the bank robbery, the prosecution introduced this evidence of Dowling's previous acquittal purportedly for "purposes other than character evidence." The District Court characterized the evidence as highly probative; it was admitted;[16] and Dowling was convicted.

On appeal, the Third Circuit determined that the district court had erred in allowing the evidence from the Henry trial.[17] The court ruled that Dowling's acquittal for the robbery at Henry's home collaterally estopped the prosecution from introducing any evidence from that crime.[18] In reaching this conclusion, the Third Circuit relied on its prior opinion in *United States v. Keller*. In that case, the court ruled that to offer evidence that a defendant committed a prior crime which another

12. *See* Government v. Dowling, 814 F.2d 134 (3d Cir. 1987).
13. *See id.*
14. *See* 110 S. Ct. at 670.
15. *See id.*
16. *See id.* at 670-71.
17. *See* United States v. Dowling, 855 F.2d 114, 122 (3d Cir. 1988).
18. *See id.* at 121. The court was not convinced by the government's argument that the issue for which the evidence was being introduced, Dowling's identity and his use of a mask and handgun, had not been decided by the prior acquittal.

jury concluded he did not comit was "fundamentally unfair and totally incongruous with our basic concepts of justice . . . ."[19] The court also reversed the district court's characterization of the evidence by finding that its probative value *did not* outweigh the danger of unfair prejudice.[20] The Third Circuit affirmed the conviction, however, finding the admission to be "harmless error."[21] The Supreme Court granted Dowling's petition for certiorari to consider his constitutional objections to the evidence,[22] and presumably to cure the confusion in the circuits over whether evidence from a prior acquittal is indeed admissible in a subsequent proceeding.

Dowling argued that under the definition of collateral estoppel put forth by the Supreme Court in *Ashe v. Swenson*[23] the prosecution was estopped from introducing the evidence from the Henry robbery trial. In *Ashe*, the Court ruled that "when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[24] Because the introduction of Ms. Henry's testimony required Dowling to re-introduce his defenses to the Henry prosecution to impeach her story, and to ensure that the jury was well-informed, Dowling contended that this constituted re-litigation in violation of the Constitution's double jeopardy protections.

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19. United States v. Keller, 624 F.2d 1154, 1160 (3d Cir. 1980) (quoting Wingate v. Wainwright, 464 F.2d 209, 215 (5th Cir. 1972)).

20. 855 F.2d at 122. The Third Circuit also found the evidence to be inadmissible on the basis of the Supreme Court's ruling in *Huddleston v. United States*, 485 U.S. 681 (1988). In that case, the Court ruled that "[i]n the Rule 404(b) context, similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." 485 U.S. at 689. The Circuit Court ruled that such a conclusion could not be reasonably reached in this case.

21. 855 F.2d at 124. The harmless-error standard used by the Third Circuit involved applying "the 'highly probable' standard of appellate review to determine the harmlessness of the error." *Id.* at 123 (quoting United States v. Grayson, 795 F.2d 278, 290 (3d Cir. 1986), *cert. denied*, 481 U.S. 1018 (1987)). The court went on to explain that " '[h]igh probability' requires that the court have a 'sure conviction that the error did not prejudice the defendant' but need not disprove every 'reasonable possibility' of prejudice." *Id.* at 123 (quoting United States v. Grayson, 795 F.2d at 290 (citing United States v Jannotti, 729 F.2d 213, 219-20 & n.2 (3d Cir. 1984), *cert. denied*, 469 U.S. 880 (1984))). Defense counsel challenged this standard before the Supreme Court, arguing instead for the more stringent harmless-error standard applied to constitutional issues as described in Chapman v. California, 386 U.S. 18, 23-24 (1967) ("The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." (quoting Fahy v. Connecticut, 375 U.S. 85, 86 (1963))). The Supreme Court, however, did not address this specific objection.

22. *See* 109 S. Ct. 1309 (1989).

23. 397 U.S. 436 (1970).

24. *Id.* at 443.

The six-to-three majority,[25] in an opinion by Justice White, was unconvinced. Distinguishing the case from *Ashe*, the Court concluded that the ultimate issue of fact for this second case had not been decided at Dowling's first trial for the robbery of Ms. Henry.[26] Even though Dowling was acquitted of the Henry robbery, the Court reasoned that the ultimate issue of fact pertaining to the *identity* of the masked man in the Henry home was not specifically adjudicated, and therefore collateral estoppel principles and the Double Jeopardy Clause were not implicated.[27] Attributing to the jury great skill in parsing out the issues involved, the majority found that a reasonable juror could conclude that Dowling was the masked man in Henry's home but nonetheless conclude that he did not commit the crimes perpetrated there.

The majority went on to cite previous rulings in which the Court did not allow collateral estoppel principles to bar re-litigation of issues governed by a lower burden of proof than when previously litigated.[28] The Court concluded that even if the threshold for the introduction of evidence were not lower than that for meeting the burden of proof in a criminal trial, collateral estoppel still would not apply given the facts: "Dowling did not demonstrate that his acquittal in his first trial represented a jury determination" that he had not entered Henry's home.[29] In such a narrow conception of the meaning of acquittal, the Double Jeopardy Clause is not implicated when a defendant is merely asked to reassert facts arguably not essential to the prior verdict.

The Court went on to reject Dowling's contention that the admission of the evidence here failed the due process test of "fundamental fairness."[30] Dowling cited four specific reasons

25. Justice White was joined by Chief Justice Rehnquist and Justices Blackmun, O'Connor, Scalia, and Kennedy.

26. *See* 110 S. Ct. at 672.

27. *See id.*

28. "[T]o introduce evidence on this point at the bank robbery trial, the Government did not have to demonstrate that Dowling was the man who entered the [Henry] home *beyond a reasonable doubt*." *Id.* (emphasis added) (citing United States v. One Assortment of 89 Firearms, 465 U.S. 354 (1984) (acquittal on charge of dealing firearms without license did not preclude in rem forfeiture proceeding against those firearms); One Lot Emerald Cut Stones v. United States, 409 U.S. 232 (1972) (difference in burden of proof in criminal and civil cases precludes application of collateral estoppel, thus Double Jeopardy Clause did not bar forfeiture action subsequent to acquittal on underlying offense)).

29. *See id.* at 673.

30. *See id.* at 674. The standard of fundamental fairness necessary to avoid due pro-

that he felt the introduction of Henry's testimony was fundamentally unfair, every one of which the Court rejected: First, Dowling emphasized the inherent unreliability of the evidence; the Court deferred to the judgment of the jury. Second, Dowling alleged that the evidence created a constitutionally unacceptable risk of an erroneous conviction; the Court discounted this claim by citing the power of the trial judge to exclude prejudicial evidence. Third, Dowling appealed to the desirability of consistent jury verdicts; the Court held this not to be a relevant issue, given that two different incidents were being adjudicated. Finally, Dowling cited the respected tradition of not forcing an acquitted person to defend repeatedly against the same accusation; that tradition, the Court held, is "amply protected" by the Double Jeopardy Clause—not implicated in this case.[31]

Joined by Justices Marshall and Stevens, Justice Brennan dissented. After first describing the value of the constitutional prohibition of double jeopardy and the general meaning of an acquittal,[32] Justice Brennan turned to a more systematic rebuttal of the majority's conclusions. He reiterated that the *Huddleston* standard[33] for relevance of similar-act evidence required the jury to conclude by a preponderance of the evidence that Dowling had been the actor involved in the Henry robbery. For Justice Brennan a re-litigation of the previous facts—"thereby increas[ing] the likelihood of an erroneous conviction on the charged offense"[34]—was necessary for the evidence to reach this level of preponderance. Because protecting defendants from the risk of erroneous conviction is the very purpose of constitutional safeguards, Justice Brennan concluded that such

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cess problems was put forth by the Court in *Rochin v. California*, 342 U.S. 165, 172 (1952):

> In each case, "due process of law" requires an evaluation based on a disinterested inquiry pursued in the spirit of science, on a balanced order of facts exactly and fairly stated, on the detached consideration of conflicting claims, . . . on a judgment not *ad hoc* and episodic but duly mindful of reconciling the needs both of continuity and of change in a progressive society.

31. *See* 110 S. Ct. at 674 (pointing out the tendency of the Court to define the "category of infractions that violate 'fundamental fairness' very narrowly").

32. *See id.* at 675-76 (Brennan, J., dissenting). Justice Brennan's overriding concern with respect to trial issues such as these is the protection of individuals from "governmental overreaching. . . . [T]o permit a second trial after an acquittal, however mistaken the acquittal may have been, would present an unacceptably high risk that the Government, with its vastly superior resources, might wear down the defendant, so that 'even though innocent, he may be found guilty.' " *Id.* (quoting Green v. United States, 355 U.S. 184, 188 (1959)).

33. *See supra* notes 21 & 29.

34. 110 S. Ct. at 677 (Brennan, J., dissenting).

re-litigation is unacceptable and hence, the preponderance threshold cannot be reached.[35]

The most persuasive rebuttal Justice Brennan offered was a syllogism in which he analyzed what was actually decided by Dowling's acquittal in the previous trial. Unlike the majority, Justice Brennan determined that, in fact, the *only* issue decided through the acquittal was that Dowling had not been the intruder in Henry's home.[36] Justice Brennan explained that "if the jury had acquitted petitioner of attempted robbery because he lacked the requisite intent, it would still have found him guilty of a weapons offense [if they had determined he was in the house]." He therefore argued that the only "rationally conceivable" conclusion was that the acquittal indicated the jury's belief that Dowling had never been in Henry's home.

Justice Brennan also disagreed with placing the burden of proof on the defendant as to what determinations had been made by the first trial. By forcing the defendant to prove that the issue he seeks to foreclose was decided in his favor, Justice Brennan argued that "the Court essentially denies the protection of collateral estoppel to those defendants who affirmatively contest more than one issue or who put the Government to its burden of proof with respect to all elements of the offense."[37] For all of these reasons, the dissent concluded that to allow the introduction of the evidence would violate both the Double Jeopardy and Due Process Clauses of the Fifth Amendment.

Justice Brennan's underlying concern was the potentially damaging effect that evidence from a prior acquittal might have on a defendant's chances of receiving a fair trial. The dissent refers at numerous times to the inherently prejudicial effect of this evidence and the risk of erroneous convictions caused by it. Justice Brennan ultimately concluded that *whenever* evidence from a prior acquittal is introduced and the defendant must re-

35. *See id.* (Brennan, J., dissenting). Justice Brennan persuasively pointed out that to meet the *Huddleston* standard, some "re-litigation" of the facts may be necessary in order for the jury to be informed of the previous circumstances. This point, however, may prove too much. If his conclusion is correct that the evidence ought to be inadmissible for this reason, then it is unclear when evidence from other crimes would ever be admitted, because each time such evidence is admitted, some re-litigation is necessary. The real issue for Justice Brennan is the *extent* of that re-litigation and at what point the Double Jeopardy Clause is implicated.

36. *See id.* (Brennan, J., dissenting).

37. *See id.* (Brennan, J., dissenting).

litigate its underlying facts, an unacceptable risk exists for the jury to conclude erroneously that he is actually guilty of that prior offense.[38]

Justice Whitê and the majority offered little consolation to alleviate Justice Brennan's fears. Though the majority effectively precluded a number of substantive challenges that can be made to the introduction of evidence from prior acquittals, they offered little to protect against erroneous convictions and unfairly biased jurors. Justice White did refer once during his opinion to the limiting instructions given jurors, citing them as a protection against the fundamentally unfair consideration of evidence.[39] The Federal Rules of Evidence also place faith in these instructions as an effective avenue through which judges instruct jurors "accordingly" as to the proper use of the potentially abusive evidence before them.[40] The question remains, however, whether these instructions are sufficient safeguards relative to the risk of erroneous conviction that they are designed to minimize.

Dowling itself graphically illustrates how insufficient jury instructions can be. At Dowling's trial, the judge first stated to the jury that the Henry testimony "was presented to you for you to consider in the context, and to the extent that it helps you in determining the identity of the person who committed the crimes [in question]."[41] The judge continued by instructing the jury that "[i]f [the evidence from the Henry testimony] does not fall into that category, you may disregard it."[42] Although these instructions might seem to articulate limits on jury discretion, they give no guidance with respect to how jurors might determine the "category" into which the evidence falls. Indeed, even judges and others experienced in legal analysis may have

38. *See id.* at 679 (Brennan, J., dissenting).

39. *See id.* at 674. Justice White also referred, at one point, to the authority of the trial judge to exclude potentially prejudicial evidence. *See id.* at 675. Before evidence from any extrinsic offense is admitted, the trial judge must determine that the evidence is relevant to an issue other than the defendant's character, and that the evidence possesses a probative value outweighing its prejudicial effect. *See generally* United States v. Beechum, 582 F.2d 898 (5th Cir. 1978). This judicial screening device is thought to safeguard the defendant from highly prejudicial evidence, but, as the *Dowling* case itself illustrates, whether this safeguard is effective is a questionable proposition.

40. *See supra* note 9 (quoting FED. R. EVID. 105). The "proper use" of evidence is defined by Rule 404(b). *See supra* note 1 (quoting FED. R. EVID. 404(b)).

41. 855 F.2d at 124 (quoting trial judge's instructions to the jury).

42. *Id.* (quoting trial judge's instructions to the jury).

difficulty with this classification.[43] If the judicial system is to defer to the jury's judgment in using the evidence from a prior acquittal appropriately, then it must at least provide some basic guidelines and exact some assurances that the jury understands how to distinguish permissible from non-permissible uses of testimony.[44]

The instruction in this case is even more fundamentally flawed because the jury was informed that they "may" disregard the evidence should they find it susceptible to a non-permissible use. According to the Federal Rules, however, the evidence *must* be disregarded if it is deemed non-permissible. Moreover, to allow the *jury* to decide whether to disregard it is to entrust the untrustworthy with the task of policing themselves.

The trial judge concluded his instructions to the jury with a terse appraisal of the prior history of the Henry case, reiterating that "Mr. Dowling was found not guilty of the crime of robbery in connection with that [incident]."[45] Again, though, a reasonable juror cannot be expected to understand the full legal meaning of an acquittal. How can a juror know exactly what issues were and were not decided by that earlier acquittal when Justices of the Supreme Court themselves disagree? Without assistance from the judge, how can a juror understand what it means to place a defendant in double jeopardy? Jurors must be given specific guidance and knowledge of such issues if the faith that the system of criminal justice places in juries to parse out prejudicial evidence from probative evidence is to be justified. Notwithstanding these doubts, the Supreme Court explicitly determined that the judge in the *Dowling* trial instructed the jury "accordingly" and that the introduction of Henry's testimony therefore did not unfairly prejudice the verdict.[46]

The lesson of *Dowling* is clear: To minimize the harm caused

43. *See* Note, *supra* note 12, at 777 n.89 ("Our data 'suggest that the jury, like everybody else, has enormous difficulty in understanding what it means to use the evidence on impeachment only and not on guilt.' ").

44. *See* United States v. Daniels, 770 F.2d 1111, 1118 (1985) ("[I]t becomes particularly unrealistic to expect effective execution of the 'mental gymnastics' required by limiting instructions.") (quoting Nash v. United States, 54 F.2d 1006, 1007 (2d Cir.) (Learned Hand, J.), *cert. denied*, 285 U.S. 556 (1932)).

45. *See* 855 F.2d at 124 (quoting trial judge's instructions to the jury).

46. *See* 110 S. Ct. at 674 ("Especially in light of the limiting instructions provided by the trial judge, we cannot hold that the introduction of Henry's testimony [violates fundamental conceptions of justice].").

by the introduction of evidence from prior acquittals, defense attorneys must look not to the Constitution; rather, they must challenge the sufficiency of the jury instructions and the possibly "naive assumption[s]" on which they may be predicated.[47] Clearly, a defense attorney's concerns will be placated fully only by a judicial ruling that prohibits this evidence from reaching the ears of the jury. Such a ruling is still attainable under Rule 403, if not under the Bill of Rights.[48] Assuming that the evidence will be admitted, defense attorneys must advocate clearer, more precise, and more authoritative instructions to the jury. Jurors must be explicitly instructed regarding the exact purpose for which the evidence has been admitted and regarding the exact use to which it is to be put. If the jury feels that the evidence fails to satisfy that purpose, they must be required to disregard that evidence. The judge should also make clear the inevitable result of a jury's failure to follow the instructions given—the condemnation of a possibly innocent individual.

Proposals for better and more explicit jury instructions are necessarily more suggestive than they are substantive. Indeed, even the most explicit and most definitive message from the bench might not suffice in eradicating the prejudice inevitable in the introduction of evidence from prior proceedings. Through *Dowling* the Supreme Court has made clear that constitutional and other doctrinal objections to this evidence will not likely be upheld. Defense attorneys, therefore, have nowhere else to turn.

What is meant by instructing the jury "accordingly" is certainly a malleable standard, but that is not to say that a meaningful minimum standard cannot be established by courts, insisted upon by counsel, and challenged on its own terms under the Constitution's requirement of due process. Without some standard and some guidelines, judges will continue to give juries no more than a simple, unexplained, and often unclear statement of the purposes for which the evidence is offered. The inevitable perils of allowing that evidence will still

47. *See* United States v. Daniels, 770 F.2d 1111, 1118 (1985) (Jackson, J., concurring) (When a judge instructs a jury to ignore a defendant's prior conviction in deciding guilt or innocence, "the naive assumption that prejudicial effects can be overcome by instructions to [the] jury becomes more clearly than ever 'unmitigated fiction.' " (quoting Krulewitch v. United States, 336 U.S. 440, 453 (1949))).

48. *See supra* note 10 (quoting FED. R. EVID. 403).

exist. Criminal defendants and, indeed, the entire criminal justice system, would be well-served by defense attorneys who attack insufficient instructions and force judges to be mindful of the need for more careful instruction.

Ronald A. Goldstein

FOREIGNERS, FOREIGN PROPERTY, AND THE FOURTH AMENDMENT: *United States v. Verdugo-Urquidez*, 110 S. Ct. 1056 (1990).

In waging the war against drugs, both in the United States and abroad, law enforcement officials rely heavily on searches to provide evidence to convict suspected drug traffickers and dealers. Within the United States, searches must comply with the Fourth Amendment.[1] Until recently it was unclear to what extent the Fourth Amendment governed searches conducted outside the United States, although at least one court had assumed that when the United States government acted abroad, the Constitution as a whole circumscribed that action.[2] The Supreme Court's recent decision in *United States v. Verdugo-Urquidez*[3] rejects that assumption, holding that the Fourth

1. U.S. CONST. amend. IV:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. United States v. Verdugo-Urquidez, 856 F.2d 1214, 1217 (9th Cir. 1988) ("[I]ndeed, until this case, we have been content simply to assume that the Fourth Amendment constrains the manner in which the federal government may pursue its extraterritorial law enforcement objectives."); *see also*, Reid v. Covert, 354 U.S. 1, 5-6 (1957) (plurality opinion):

> The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another country.

The Supreme Court, however, has also clearly rejected the notion that the Constitution has extraterritorial effect in a long line of cases. *See, e.g.*, Balzac v. Porto Rico, 258 U.S. 298 (1922) (Fifth Amendment right to jury trial inapplicable in Puerto Rico); Ocampo v. United States, 234 U.S. 91 (1914) (Sixth Amendment grand-jury provisions inapplicable in the Philippines); Dorr v. United States, 195 U.S. 138 (1904) (Fifth Amendment jury-trial provisions inapplicable in the Philippines); Hawaii v. Mankichi, 190 U.S. 197 (1903) (Sixth Amendment provisions on indictment by grand jury and Fifth Amendment jury-trial provisions inapplicable in Hawaii); Downes v. Bidwell, 182 U.S. 244 (1901) (Revenue Clauses inapplicable to Puerto Rico).

3. 110 S. Ct. 1056 (1990), *reh'g denied*, 110 S. Ct. 1839 (1990).

Amendment does not apply to the search and seizure by United States agents of a nonresident alien's property on foreign soil.[4] The holding itself may be heralded because of the impact it may have on the war against drugs generally and the trial of former Panamanian dictator Manuel Noriega specifically. The opinion, however, lacks the theoretical coherence that would make it a useful analytic tool for understanding the nature of the Fourth Amendment.

In January 1986, at the request of American officials, six Mexican police officers apprehended and transferred Rene Martin Verdugo-Urquidez across the border to American hands.[5] In Calexico, California, United States marshals arrested Verdugo-Urquidez on drug trafficking charges. The following day four United States Drug Enforcement Agency (DEA) personnel searched the suspect's homes in Mexicali and San Felipe, Mexico, for evidence of both narcotics trafficking and involvement in the kidnapping and murder of DEA Special Agent Enrique Camarena.[6] At the time, Verdugo-Urquidez was not under investigation in Mexico for any crime.[7]

United States agents arrested Verdugo-Urquidez pursuant to a valid United States warrant, but no warrant was issued for the subsequent search of his Mexican homes. In the United States, Verdugo-Urquidez was indicted on forty-one counts of narcotics-related crimes, including conspiracy to import marijuana, possession with intent to distribute tons of marijuana, and engaging in a continuing criminal enterprise.[8] At trial, Verdugo-Urquidez, a resident and citizen of Mexico, moved to suppress the evidence on the ground that the searches violated his rights under the Fourth Amendment. He maintained that the government did not obtain a warrant and that the searches did not fall within any cognizable exception to the warrant requirement.[9] The Federal District Court for the Southern District of California agreed and suppressed the evidence, and the Ninth Circuit

4. The facts in *Verdugo-Urquidez* involved three levels of foreignness: (1) the suspect was an alien, (2) the suspect was a nonresident, and (3) the property searched was foreign property on foreign soil. The Court did not make clear whether all three elements were essential to its holding.

5. *See* 856 F.2d at 1216.

6. *See id.* at 1216-17. In a separate proceeding, Verdugo-Urquidez was convicted of involvement in the murder of Camarena. *See* 110 S. Ct. at 1059.

7. *See* 856 F.2d at 1218.

8. *See* 856 F.2d at 1215.

9. *See* 110 S. Ct. at 1059.

affirmed.[10]

On appeal, however, the Supreme Court reversed by a vote of six-to-three with an opinion authored by Chief Justice Rehnquist.[11] Justice Kennedy joined the Court's opinion in a separate concurrence, and Justice Stevens concurred separately in the judgment. Justice Brennan, joined by Justice Marshall, dissented, and Justice Blackmun likewise dissented in a separate opinion.

In its analysis of the applicability of the Fourth Amendment to nonresident aliens, the majority focused on the specific language of the Amendment. The Court noted that the Fourth Amendment extends its protection to "the people," unlike the Fifth and Sixth Amendments, which apply to "any person" and "the accused" respectively. In a brief textual exegesis, the Court maintained that "the people" is "a term of art employed in select parts of the Constitution" that refers only to "a class of persons who are part of a national community or who have otherwise developed sufficient connections with this country to be considered part of that community."[12]

The Court further analyzed both the legislative history and original applications of the Amendment to argue that the Fourth Amendment only protects the people of the United States against their government. For example, during the undeclared war with France in 1798, Congress and President Adams gave "the same license and authority" to commanders of public armed vessels as the government itself had and instructed these commanders to "subdue, seize and take any armed French vessel" found within the jurisdictional limits of the United States.[13] The French received no constitutional protection against these searches. The Court thus concluded that

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10. *See id.*

11. *See id.* at 1060. The majority included Chief Justice Rehnquist and Justices White, Stevens, O'Connor, Scalia, and Kennedy.

12. *Id.* at 1061.

> The Preamble declares that the Constitution is ordained and established by "*the people* of the United States." The Second Amendment protects "the right of *the people* to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "*the people.*"

Id. (emphasis in original). Moreover, the First Amendment provides that "Congress shall make no law . . . abridging . . . the right of *the people* peaceably to assemble," and Article I provides for election of Representatives from "*the People*" of the States. *Id.* (emphasis in original).

13. *Id.* (citing 1 Stat. 578, 579).

the Fourth Amendment protects only "the people" of the United States and not nonresident aliens like Verdugo-Urquidez.

Throughout his opinion, Chief Justice Rehnquist argued that at least two criteria must be met before an alien becomes one of "the people." First, the alien must be within the territory of the United States voluntarily, and second, he must have developed substantial connections with this country, also voluntarily.[14] Chief Justice Rehnquist further implied that an alien's presence in the United States must be lawful.[15] Because Verdugo-Urquidez's presence in the United States was lawful but *involuntary* and because he lacked other significant voluntary connections, he was not one of "the people" for purposes of the Fourth Amendment; the Fourth Amendment did not apply to a search of his foreign property.

While denying Verdugo-Urquidez any Fourth Amendment protection, the Court left unclear what would constitute a "significant voluntary connection" sufficient to trigger Fourth Amendment protection for aliens. At one extreme, the requisite significant connections might be full citizenship or at least permanent resident status, but such a standard seems extremely harsh, as it would exclude millions who voluntarily and legally live in or visit the United States. Beyond a suggestion that residency status is *sufficient* to invoke the Fourth Amendment, Chief Justice Rehnquist provided little guidance on what a meaningful minimum threshold for significant connections would be.[16]

Is residency status the minimum connection or would a less significant tie suffice? Does the Fourth Amendment apply to an alien with largely inchoate connections, but who is lawfully,

14. *See id.* at 1064. *But see id.* at 1070 n.5 (Brennan, J., dissenting):

> None of the cases cited by the majority[] require an alien's connections to the United States to be 'voluntary' before the alien can claim the benefits of the Constitution . . . . Furthermore, even if a voluntariness requirement were sensible in cases guaranteeing certain governmental benefits to illegal aliens, it is not a sensible requirement when our Government chooses to impose our criminal laws on others.

(Citations omitted).

15. *See id.* at 1064 ("But this sort of presence—lawful but involuntary—is not the sort to indicate any substantial connection with our country.").

16. *See id.* The dissent noted the majority's ambiguity over what connections are sufficient to invoke the Fourth Amendment by citing four possible substantive standards intimated in the majority opinion: (1) substantial connections, (2) voluntary presence, (3) societal obligations, or (4) possession of property in the United States. *See* 110 S. Ct. at 1070 (Brennan, J., dissenting).

voluntarily, and permanently present in the United States? If an alien earns money in the United States through a job or through investments and therefore pays taxes, would those activities meet the significant connections standard? Is a sightseeing foreign tourist with no intentions of becoming part of the people protected against unreasonable searches and seizures? Because of both its imprecision and its inherent malleability, the significant-connections standard poses more questions than it answers.

In denying the similarity between Verdugo-Urquidez and several other instances where aliens have been granted constitutional protection,[17] the Court relied upon its new requirement of a significant voluntary connection. None of the cases the majority cited, however, actually stated that an alien must have significant voluntary connections with the people of the United States to claim any constitutional protection.[18] For example, *Plyler v. Doe* explicitly stated that even if an alien enters this country illegally, her presence is, in and of itself, sufficient to invoke the Due Process Clause of the Fourteenth Amendment.[19] *Yick Wo v. Hopkins* applied the Fourteenth Amendment universally "to all persons within the territorial jurisdiction" of the United States.[20] *Wong Wing v. United States* held that "all persons within the territory of the United States" receive the protection of the Fifth and Sixth Amendments.[21] Although these cases apply constitutional protections to resident aliens, it is clear that personal presence within American territory, not the nature of alienage or residency, is what triggers the protec-

17. *See* 110 S. Ct. at 1064 (citing Plyler v. Doe, 457 U.S. 202 (1982) (illegal aliens protected by Equal Protection Clause); Kwong Hai Chew v. Colding, 344 U.S. 590 (1953) (resident alien is "person" for purposes of Fifth Amendment); Bridges v. Wixon, 326 U.S. 135 (1945) (resident aliens have First Amendment rights); Russian Volunteer Fleet v. United States, 282 U.S. 481 (1931) (Just Compensation Clause of Fifth Amendment applies to aliens); Wong Wing v. United States, 163 U.S. 228 (1896) (Fifth and Sixth Amendments apply to resident aliens); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (Fourteenth Amendment protects resident aliens)).

18. In his concurring opinion, Justice Kennedy argued that no matter to whom the property belongs, the "full protections of the Fourth Amendment" apply if the search is conducted in the United States. Justice Kennedy's analysis avoids the problems of applying the significant connections test to aliens—resident and nonresident, legal and illegal—by stating that the Fourth Amendment applies to all property *in the United States*. *See* 110 S. Ct. at 1067-68 (Kennedy, J., concurring).

19. *See Plyler*, 457 U.S. 202, 215 (1981). In recognizing the due process and equal protection rights of illegal aliens, *Plyler* held that illegal alien children in Texas could not be excluded from public schools.

20. *Yick Wo*, 118 U.S. 356, 369 (1886).

21. *Wong Wing*, 163 U.S. 228, 238 (1896).

tions involved. Of course, residency status heightens the significant connections between an alien and the American community, but in the past the Court has not made that connection the basis for granting constitutional protection.[22] Indeed, after imparting crucial substance to the semantic distinction between a "person" and "the people," Chief Justice Rehnquist surprisingly drew the Fourth Amendment significant-voluntary-connections test from discussions of other amendments that do grant protections to persons rather than to the people.[23]

Chief Justice Rehnquist's bifurcation of the Fourth Amendment standard into (1) presence within American territory and (2) significant connections with the American people seems an attempt to avoid the problem that Verdugo-Urquidez was in fact within the territorial jurisdiction of the United States at the time the search of his Mexican residences took place. If the standard for Fourth Amendment protection were presence within the United States alone, Verdugo-Urquidez would qualify for that protection. Chief Justice Rehnquist argued that application of the Fourth Amendment to a nonresident alien's property should not turn on the fortuity "of whether the custodian of [a] nonresident alien owner had or had not transported [the nonresident alien] to the United States" at the time of the search.[24]

While making application of the Fourth Amendment less "fortuitous" for nonresident aliens whose property is searched abroad and who may or may not be transported to the United States, the significant-connections standard makes the application of Fourth Amendment protections to other aliens extremely fortuitous. The need for significant connections may legitimate searches of aliens who are legally and voluntarily within the United States but whose connections to "the people" are as limited as those of Verdugo-Urquidez because of the timing or nature of their entry or the search itself—camera-toting tourists, for example. Thus, the significant-connections

22. Two cases cited by the Court, *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) and *Bridges v. Wixon*, 326 U.S. 135, 148 (1945), suggest obliquely that residency rather than mere presence may be important for some constitutional protections. *See supra* note 17. *But see* Matthew v. Diaz, 426 U.S. 67, 77 (1976) (explicitly rejecting the idea that an alien must have sustained connections before receiving constitutional protection).

23. *See* 110 S. Ct. at 1064.

24. *Id.*

requirement overcomes fortuity of presence for nonresident aliens seized abroad only through reliance on circumstances that are equally fortuitous for aliens voluntarily present in the United States.

The implied third requirement—that the defendant also be *lawfully* present in the United States—poses yet another problem for aliens voluntarily present in the United States, even if they meet the vague significant-connections test. The boundary between the applicability and inapplicability of Fourth Amendment protections remains clouded. Although Fourth Amendment protection for illegal aliens was not the issue directly in front of the Court in *Verdugo-Urquidez*, the reasoning in *Verdugo-Urquidez* casts doubt on the assumption that illegal aliens are entitled to Fourth Amendment protection. By emphasizing that Verdugo-Urquidez was lawfully present in the United States,[25] Chief Justice Rehnquist implied that legal presence may be a prerequisite for Fourth Amendment protection. The Court of Appeals had relied heavily on *INS v. Lopez-Mendoza*[26] for its decision that the evidence seized against Verdugo-Urquidez must be suppressed. In *Lopez-Mendoza*, the Supreme Court had assumed that Fourth Amendment rights apply to aliens illegally present in the United States in the course of deciding whether the exclusionary rule extends to civil deportation proceedings.[27] Chief Justice Rehnquist, however, pointed out that a mere assumption in one case is not binding on future decisions.[28]

Even if the assumption of Fourth Amendment protection for illegal aliens were binding, the majority distinguished Verdugo-Urquidez's situation. Illegal aliens who are voluntarily present in the United States presumably have accepted some significant "societal obligations." Under the Chief Justice's reasoning, Verdugo-Urquidez's presence in a San Diego jail was neither voluntary nor significant and therefore was insufficient to invoke the Fourth Amendment for a search of his Mexican property.

Putting aside the theoretical difficulties and ambiguities in the Court's standard, a further practical question remains: How

25. *See id.*
26. 468 U.S. 1032 (1984) (exclusionary rule does not apply in a deportation proceeding).
27. *See id.* at 1034.
28. *See* 110 S. Ct. at 1065.

does a government agent ascertain the legality of an individual's status before a search begins? The potential for discrimination against ethnic and immigrant groups with large illegal populations is significant. If the Fourth Amendment does not apply to illegal aliens, police will have a disincentive to observe the Fourth Amendment rights of ethnic populations as a whole. Without some type of initial intrusion—checking birth certificates or green cards—it is extremely difficult if not impossible to distinguish among citizens, legal aliens, and illegal aliens, much less those persons with "significant connections" to the people of the United States. Searches could either become a means to harass ethnic populations or be stymied in their inception.

The Verdugo-Urquidez reasoning will certainly influence United States government conduct abroad.[29] The majority refused to apply the Fourth Amendment to searches of aliens abroad for fear of disrupting the ability of the executive and legislative branches to respond adequately to "foreign situations involving our national interest."[30] Because modern nation-states must be able to function effectively outside their own borders, sometimes through military force, any restrictions on the extraterritorial operations of the United States government, the Court reasoned, should be imposed by the two political branches themselves.[31] The search of Verdugo-Urquidez's homes, however, did not occur in anything like a military operation, when one might argue that political questions dominate and that the Fourth Amendment is inapplicable.[32] Indeed, the Court's statement on this point appears to be a reference to the invasion of Panama, a full-scale military operation hardly analogous to the present case, in which United States military personnel searched the headquarters of Manuel Noriega pursuant to deposing him and seized evidence of his

29. *See* N.Y. Times, Mar. 5, 1990, at A14, col. 1 (editorial) (analogizing the decision to gunboat diplomacy and viewing it as detrimental to America's reputation for justice).

30. 110 S. Ct. at 1065.

31. *See id.* at 1066:

> Situations threatening to important American interests may arise half-way around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.

32. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (articulating standards for application of the political question doctrine).

drug-trafficking activities. The *Verdugo-Urquidez* decision thus clears the way for the use of that evidence against Noriega, but at the cost of distorting analysis of the immediate case.

The difficulty of sustaining the significant-connections test as a coherent theory of Fourth Amendment protection becomes apparent when applied beyond the specific facts of this case. The Court appeared unwilling to say that Fourth Amendment protection is a benefit of citizenship. At the same time, however, the Court refused to recognize Fourth Amendment guarantees as applicable to all individuals as a matter of natural right. Rather, the significant-connections test is an apparent compromise between these polar conceptions of citizenship-related rights on the one hand and natural rights on the other. The Court wholly failed to explain the theory, however, or the principle behind this compromise.

Whatever the specific reasoning in *Verdugo-Urquidez* means for theoretical understandings of the Fourth Amendment, it seems unlikely that the Court will refuse to grant the Amendment's protections to illegal aliens or other persons voluntarily present in the United States. The holding in *Verdugo-Urquidez* depends on facts specific to the case: the defendant's nonresident alien status and the location of the property abroad. Although the Court did not explicitly rely on the point, this "triple foreignness" of nonresidency, alien status, and foreign property appears to form the intuitive basis for its holding.[33]

In his concurrence, Justice Kennedy suggested a less disruptive standard for application of Fourth Amendment protections. Although Justice Kennedy did not view his concurrence as differing in fundamental respects from the analysis of the majority,[34] his analysis is much more cogent and practical. Under his view, location of the property on American soil and general principles of constitutional interpretation—rather than the identity of the defendant as one of "the people"—control applicability of the Fourth Amendment.

As Justice Harlan noted, concurring in *Reid v. Covert*, all the provisions of the Constitution do not automatically apply in all foreign locations in all circumstances, even for American citi-

33. *See supra* note 4.

34. *See id.* (Kennedy, J., concurring) ("Although some explanation of my views is appropriate given the difficulties of this case, I do not believe they depart in fundamental respects from the opinion of the court, which I join.").

zens; often there are conditions "that would make adherence to a specific guarantee altogether impracticable and anomalous."[35] When United States government agents operate abroad, the need to cooperate with the officials of another sovereign state, the absence of judges and magistrates to issue warrants, and the different notions of privacy and reasonableness all may make application of the Fourth Amendment's warrant requirement impracticable and anomalous.[36] Justice Kennedy insisted that Verdugo-Urquidez would have benefitted from the Fourth Amendment if the property searched had been within United States territory: "If the search had occurred in a residence within the United States, I have little doubt that the full protections of the Fourth Amendment would apply."[37] In the United States, none of the relevant impracticable and anomalous conditions would have existed. With its evident simplicity, Justice Kennedy's "situs" standard harbors none of the practical difficulties and malleability of the majority's significant-connections test.

Though Justice Kennedy's "situs" standard is eminently practical (unlike that of the majority), his analysis is equally troubling theoretically. Under his view, Fourth Amendment protection is implicitly a property right rather than a right vested in the individual. Given prior Fourth Amendment decisions of the Court and the history of the Bill of Rights generally, viewing Fourth Amendment protections as essentially a property-based seems untenable.[38]

Justice Stevens, concurring only in the judgment, argued that Verdugo-Urquidez should receive protection against unreasonable searches because he was lawfully present in the United States, the involuntary nature of his presence notwithstanding. Still, Justice Stevens concurred in the final judgment.[39] The evidence seized against Verdugo-Urquidez was admissible, he argued, because the search was "reasonable" under the

35. 110 S. Ct. at 1067 (Kennedy, J., concurring) (quoting Reid v. Covert, 354 U.S. 1, 74 (1957) (Harlan, J., concurring)).

36. *See* 110 S. Ct. at 1068 (Kennedy, J., concurring).

37. *Id.* at 1067-68 (Kennedy, J., concurring).

38. *See* Warden v. Hayden, 387 U.S. 294, 304 (1967) ("The premise that property interests control the right of the Government to search and seize has been discredited."); Katz v. United States, 389 U.S. 347, 351 (1967) ("The Fourth Amendment protects people, not places.") (extending the Fourth Amendment to the recording of oral statements).

39. *See id.* at 1068 (Stevens, J., concurring in the judgment).

circumstances and because the Warrant Clause should not apply where American magistrates have no power to authorize searches.[40]

Justice Stevens's analysis is pragmatic, at least in terms of the Warrant Clause. Because American magistrates have no power to issue warrants for searches on foreign soil, warrants cannot be the mechanism for protecting Fourth Amendment rights. Although he accepted this particular search as reasonable under the circumstances, Justice Stevens failed to articulate what made the search reasonable. He denied the applicability of the traditional mechanism for guaranteeing reasonableness—the warrant process—without offering a replacement, thereby limiting the usefulness of his opinion as an analytic guide for the future.

In contrast, Justice Brennan's dissent argued that even by the majority's questionable standard of significant connections, Verdugo-Urquidez should receive Fourth Amendment protection.[41] The defendant's connection to the United States, which is undeniably significant in Justice Brennan's mind, is his indictment for violation of American criminal law: "[T]he 'sufficient connection' is supplied not by Verdugo-Urquidez, but by the Government [itself]."[42] Because the United States government has treated him as "one of the governed" for purposes of enforcing American law, he should receive constitutional protections.[43]

Interpreting significant connections in this manner would provide Fourth Amendment protection to all persons whom the United States government chose to indict and thus would create mutuality of law. The law would bind American officials as they sought to impose American law on aliens. As Justice Brennan explained, "[T]he Fourth Amendment is an unavoidable correlative of the Government's power to enforce the criminal law," whether that enforcement occurs in the United States or abroad.[44] Because of this argument for mutuality of law, Justice Brennan ultimately rejected the notion that the Fourth Amendment applies only to "the people" of the United States

40. *See id.* (Stevens, J., concurring in the judgment).
41. *See id.* at 1070. (Brennan, J., dissenting). Justice Brennan was joined by Justice Marshall. Justice Blackmun dissented separately.
42. *Id.* (Brennan, J., dissenting).
43. *Id.* (Brennan, J., dissenting).
44. *Id.* at 1070 (Brennan, J., dissenting).

or to those who have significant voluntary connections with them. The Bill of Rights, in Justice Brennan's conception, dictates how and what the government may do, not against whom the government may act.[45]

In responding to the majority's concern that applying the Fourth Amendment abroad would impede the political branches in protecting national security, Justice Brennan differentiated Verdugo-Urquidez from enemy aliens in times of war. Granting Fourth Amendment protection in this case would not mean that enemy aliens in wartime would have to receive the same protection.[46] Moreover, when sensitive searches abroad involve national security, exigent circumstances could be used to excuse the warrant requirement.

Justice Brennan thus comes closest to a natural-rights view of the Fourth Amendment. In contrast to all the other approaches, Justice Brennan argued not only that protection against unreasonable searches applies abroad, but also that the Warrant Clause applies abroad. The Warrant Clause serves the same purpose abroad as it does at home: It interposes a neutral magistrate, who defines and limits a search, between zealous law enforcement and individual privacy. Although Congress has not granted United States magistrates the authority to issue search warrants for foreign searches,[47] Justice Brennan insisted that "Congress cannot excise the [Warrant] Clause from the Constitution by failing to provide a means for United States agents to obtain a warrant."[48]

Finally, Justice Blackmun argued in dissent that the Fourth Amendment applies to Verdugo-Urquidez because he is essentially one of the governed, given that he is being tried for violations of United States law.[49] In this respect, he agreed with Justice Brennan. Because neither the District Court nor the Court of Appeals addressed the reasonableness of the search, however, Justice Blackmun would have vacated the judgment of the Court of Appeals and remanded for a judgment on reasonableness.[50] Justice Blackmun agreed with Justice Stevens that

45. *See id.* at 1073 (Brennan, J., dissenting). Like the majority, Justice Brennan analyzed historical data and legislative intent to support his point.
46. *See id.* at 1075 (Brennan, J., dissenting).
47. *See* FED. R. CRIM. P. 41(a).
48. 110 S. Ct. at 1070 (Brennan, J., dissenting).
49. *See id.* at 1078 (Blackmun, J., dissenting).
50. *See id.* (Blackmun, J., dissenting).

the Warrant Clause did not apply, but unlike Justice Stevens, he questioned the reasonableness of the search.[51] Justice Blackmun likewise failed to articulate a standard for judging reasonableness, however.

In such an important case directly addressing fundamental rights afforded by the Bill of Rights, it is unfortunate that the majority failed to make clear the constitutional theory guiding their decision. Perhaps the Court did not see Fourth Amendment protection as a benefit of citizenship because they were unwilling to withdraw Fourth Amendment protection from resident aliens and foreign visitors. On the other hand, seeing Fourth Amendment protection as a natural right would grant Verdugo-Urquidez that blessing. Whatever other options exist, the significant-connections compromise proves problematic on both a theoretical and a practical level. Likewise, none of the concurring or dissenting opinions offers a completely sustainable approach. Despite its theoretical incoherence, it is unlikely that the decision will have a large impact on Fourth Amendment protection within the United States, but the license it gives to American agents searching abroad remains broad and undefined.

Kif Augustine Adams

LEGISLATIVE IMMUNITY AND CITY COUNCILS: *Spallone v. United States*, 110 S. Ct. 625 (1990).

Commenting on a recent Supreme Court case, the *New York Times* observed that "[t]he extent of the Federal judiciary's authority to devise remedies for constitutional violations by government agencies has been a contested question for many years."[1] The essence of the question is the tension between judicial authority to enforce judgments on one hand and the power of legislators to act unfettered by courts on the other.

In *Spallone v. United States*,[2] the Supreme Court held that a district court had abused its discretion when it imposed personal contempt sanctions on city council members who failed

51. *See id.* (Blackmun, J., dissenting).
1. N.Y. Times, Jan. 11, 1990, at A1, col. 4.
2. 110 S. Ct. 625 (1990).

to comply with a consent decree without first imposing a fine on the city alone.[3] The narrow, fact-specific holding did not deny the propriety of imposing contempt sanctions on individual council members in all circumstances; it simply maintained that such fines were clearly improper unless and until prior fines on the city proved ineffective.[4] In its opinion, the Court did not offer clear guidance to future litigants about either the extent of a court's powers to enforce prior orders or the immunity of local legislators who defy them. Because the Court found that the district court's order imposing individual fines was "an abuse of discretion under traditional equitable principles,"[5] it never reached the larger issue of whether legislative immunity applies to local legislators in general or the free-speech issue raised by one council member. Where the boundary lies between judicial power and local legislative prerogatives, therefore, remains essentially unclear.

The *Spallone* holding, it appears, was *sui generis*. The Court avoided addressing any broad issues by merely holding that there was a less intrusive method of achieving compliance than the method the district court chose. Despite its failure to articulate a general rule in *Spallone*, however, the Court will likely extend the doctrine of legislative immunity[6] to local legislators for actions pursuant to the discharge of legislative responsibilities. Absolute legislative immunity has already been extended to state and regional legislators,[7] and all eight circuits considering the issue since the Supreme Court approved that extension in *Lake Country Estates* have granted such immunity to local legislatures.[8] The peculiar fact pattern in *Spallone*, however, ren-

3. *See id.* at 631, 634.

4. *See id.* at 634-35.

5. *Id.* at 631.

6. Official immunity takes two forms: "absolute" and "qualified." Absolute immunity protects the president, prosecutors, judges, and state and federal legislators. Under no circumstances may these officials be held personally liable in damages for acts within the scope of their government duties. Official immunity, however, is a "qualified" protection—that is, its availability depends upon the facts. It applies to all other government officers. *See* E. CHEMERINSKY, FEDERAL JURISDICTION §§ 8.6.1-8.6.2 (1989).

7. *See* Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979).

8. *See* Brief for Petitioner Henry G. Spallone at 25-26 (citing Haskell v. Washington Township, 864 F.2d 1266 (6th Cir. 1988); Aitchison v. Raffiani, 708 F.2d 96 (3d Cir. 1983); Reed v. Village of Shorewood, 704 F.2d 943 (7th Cir. 1983); Espanola Way Corp. v. Meyerson, 690 F.2d 827 (11th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983); Kuzinich v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); Bruce v.

dered it an inappropriate case through which to extend the doctrine. The actions taken by the council members in question were not the type of conduct that the doctrine of legislative immunity has traditionally protected in the past, nor that it is likely to protect in the future. To understand why this is so, one must first understand the immunity doctrine and then consider the *Spallone* case itself.

Legislative immunity has its American origins in the Speech or Debate Clause, which states that "for any Speech or Debate in either House [of Congress], [members] shall not be questioned in any other Place."[9] The Supreme Court has interpreted this provision narrowly. Rather than shield federal legislators from all liability for conduct relating to legislative matters, the Clause essentially establishes an evidentiary privilege: Members of Congress cannot be prosecuted on the basis of what they say or do while in session with respect to the legislative matters before them.[10] The privilege protects the integrity of the legislative process, not the individual legislators themselves.[11]

The rationale for the immunity closely relates to the Founders' separation-of-powers concerns. The idea is that Congress should act free from any risk of retaliation by the Executive Branch, which wields a menacing prosecutorial power. Without legislative immunity, the will of the people could be frustrated by the threat of suit. The roots of the doctrine, however, extend much deeper into English history.[12] Legislative immunity can be traced back to the parliamentary struggles in Sixteenth- and Seventeenth-Century England. The privilege became stronger as Parliament became increasingly independent from the Crown. American statesmen accepted the doctrine as a matter of course when founding the nation, and individual states were careful to observe the principle. Currently, forty-three

Riddle, 631 F.2d 272 (4th Cir. 1980); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980)).

9. U.S. CONST. art. I, § 6, cl. 1; *see* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 372 (1988).

10. *See* United States v. Brewster, 408 U.S. 501, 512 (1972); *see also* Kilbourn v. Thompson, 103 U.S. 168, 204 (1881) (Speech or Debate Clause covers anything "generally done in a session of the House by one of its members in relation to the business before it.").

11. *See Brewster*, 408 U.S. at 507; Coffin v. Coffin, 4 Mass. 1 (1808).

12. *See* Tenney v. Brandhove, 341 U.S. 367, 372 (1951); Lake Country Estates, Inc., 440 U.S. at 403.

states have specific provisions in their constitutions to protect the privilege.[13]

In more recent years, the immunity doctrine has extended in a new direction. As a matter of federal common law, the Supreme Court has recognized the need to protect government officials from personal liability for damages arising from acts committed within an official capacity.[14] This form of immunity has become increasingly important with the burgeoning expansion of government-officer liability under *Bivens*[15] and section 1983.[16] In *Bivens*, the Supreme Court held for the first time that federal officers could be liable in damages as a matter of federal common law for acts violative of fundamental constitutional rights.[17]

Section 1983, meanwhile, has become a rough analog to *Bivens* with respect to *state* government officers. The statute, originally passed as a provision of the Ku Klux Klan Act to help guarantee civil rights to blacks, received expansive interpretation in the landmark case of *Monroe v. Pape*.[18] Since *Monroe*, section 1983 has been understood to open the federal courts to a broad range of statutory tort actions against state and local officers.[19]

The issue of immunity as it appears in *Spallone* involves both the more traditional, separation-of-powers conception of the doctrine and this newer federal common-law conception. In both respects, the claim of immunity pushed the limits of the

13. *See* Comment, *The Effects of Consent Decrees on Local Legislative Immunity*, 56 U. CHI. L. REV. 1121, 1129 n.57 (1989).

14. *See* Barr v. Matteo, 360 U.S. 564 (1959) (formulating this form of immunity doctrine); Nixon v. Fitzgerald, 457 U.S. 731 (1982) (applying this doctrine to immunize presidential acts).

15. *See* Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

16. Section 1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution or laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1985).

17. *See Bivens*, 403 U.S. 388 (recognizing private damage remedy for violation of Fourth Amendment rights despite absence of statutory authorization for such a claim); Davis v. Passman, 442 U.S. 228 (1979) (same for Fifth Amendment).

18. 365 U.S. 167 (1961) (reading § 1983 to authorize an intentional tort suit against police officers), *rev'd in part*, Monell v. Dep't of Social Serv., 436 U.S. 658 (1978).

19. *See, e.g.*, Maine v. Thiboutot, 448 U.S. 1 (1980) (extending § 1983 to cover claims not arising under "equal rights" statutes).

doctrine beyond the point to which the Court seemed willing to let it go.

Spallone grew out of a desegregation suit involving the city of Yonkers. In 1980, the United States filed an action against the city and its community development agency for intentionally engaging in housing segregation in violation of Title VIII of the Civil Rights Act of 1968[20] and the Equal Protection Clause of the Fourteenth Amendment.[21] The National Association for the Advancement of Colored People (NAACP) intervened as a party. In 1985, the district court held both defendants liable.[22] The court entered its remedial order in early 1986, enjoining the named defendants, their agents, employees, and successors, from intentionally promoting residential segregation in Yonkers.[23] The city was further directed to develop a long-term plan to create additional subsidized housing units in non-integrated neighborhoods.[24] Yonkers, hoping for a reversal on appeal, failed to comply with two parts of the remedial housing order. The district court, in an effort to avoid imposing contempt sanctions, appointed a housing advisor to help Yonkers identify appropriate sites for the housing. In December 1987, the Second Circuit affirmed the district court's judgment against the city.[25]

One month later, the parties entered into a consent decree specifying actions that Yonkers would take to implement the housing remedy order. The Yonkers City Council[26] approved the consent decree by a five-to-two vote,[27] and the district court entered the decree as a judgment. Immediately thereafter,

20. 82 Stat. 81, as amended, 42 U.S.C. § 3601 *et. seq.* (1982).

21. U.S. CONST. amend XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

22. *See* United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276, 1369-73 (S.D.N.Y. 1985).

23. *See* United States v. Yonkers Bd. of Educ., 635 F. Supp. 1577 (S.D.N.Y. 1986). Other parts of the order were directed solely toward the city, requiring affirmative acts to disperse public housing throughout Yonkers. *See* 110 S. Ct. at 628.

24. *See* 110 S. Ct. at 629; 635 F. Supp. at 1582.

25. *See* United States v. Yonkers Bd. of Educ., 837 F.2d 1181 (2d Cir. 1987), *cert. denied,* 486 U.S. 1055 (1988).

26. All legislative powers under the charter of the city of Yonkers are vested in the city council, which consists of an elected mayor and six council members. *See* 110 S. Ct. at 629.

27. Specifically,"the city agreed to adopt, within [ninety] days, legislation conditioning the construction of all multifamily housing on the inclusion of at least [twenty] percent assisted units, granting tax abatements and density bonuses to developers, and providing for zoning changes to allow the placement of housing developments." *Id.* (citation omitted).

however, the council members tried to disavow the decree, and made no attempt to comply with it. In response, the United States and the NAACP moved in district court for the entry of a Long Term Plan Order (LTPO). The court granted the motion on June 13, 1988.[28] The Order provided greater detail for legislation required by the consent judgment. The following day, "the City Council unanimously passed a resolution declaring a moratorium on all public housing construction in Yonkers."[29] At this point, the Supreme Court denied certiorari.[30] On July 26, the district court entered an order requiring Yonkers to enact on or before August 1, the "legislative package" described in the consent decree.[31] The order provided that if the city failed to comply, the court would hold both the city and the individual council members in contempt. It would impose sanctions on the city starting at $100 per day and doubling daily and on each council member, so long as he remained in contempt, of $500 per day. Council members who were still defiant on August 10 would be imprisoned.

The Council failed to enact the required package on August 1, and the district court imposed the threatened sanctions upon the council members' failure to show adequate cause why they should not be held in contempt. On the eve of threatened imprisonment, August 9, the appellate court stayed the contempt fines and ordered an expedited appeal.[32] The Court of Appeals for the Second Circuit then affirmed imposition of the contempt fines against both the city and council members, though limiting the city's payment amounts to a maximum of one million dollars per day.[33] On September 1, the Supreme Court granted a stay of the fines against the individual council members but denied the city's application for a stay.[34] With the city's fines approaching one million dollars per day, the Council finally passed the promised remedy, the Affordable Housing Ordinance, by a vote of five to two.[35]

28. *See id.* at 630.
29. *Id.* at 638 (Brennan, J., dissenting).
30. *See* 486 U.S. 1055 (1988).
31. *See* 110 S. Ct. at 630.
32. *See* United States v. City of Yonkers, 856 F.2d 444, 452 (2d Cir. 1988).
33. The Court of Appeals stayed issuance of its mandate to allow application to the Supreme Court for a further stay pending the filing of petitions for writs of certiorari. *See* 110 S. Ct. at 639 (Brennan, J., dissenting).
34. *See* City of Yonkers v. United States, 109 S. Ct. 14 (1988).
35. *See* 110 S. Ct. at 633.

Henry Spallone, one of the two recalcitrant council members, asked the Supreme Court to declare the district court's imposition of sanctions on the council members invalid and to order return of his $3,500 in fines. He urged the Supreme Court to apply the doctrine of absolute legislative immunity to legislators at the local level,[36] arguing that a federal court does not have the power to direct a specific legislator's vote or to force a legislature to enact specific legislation.[37] He further asserted that the council members could not be fined or imprisoned because "only the parties to the decree can be held in contempt of court for failure to comply with its terms."[38] The city alone, he noted, not the individual council members, was party to the decree. Finally, Spallone maintained that the consent decree was void because legislators cannot waive legislative immunity and cannot enter into an agreement that compels them to enact specific legislation.[39]

The respondents, the United States and the NAACP, emphasized that the Council itself had agreed to the consent decree so that the district court was merely requiring compliance with a promise the council members had previously made. The NAACP argued that "[p]ersons identified with a party; in privity with a party[;] or acting for the party are all bound by injunctions"[40] against that party under Federal Rule of Civil Procedure 65(d). Respondents also pointed out that leading decisions about the immunity doctrine have involved civil-rights suits against individual legislators brought by private plaintiffs.[41] Here, however, the legislators were being asked neither to defend themselves against accusations made by private citizens nor to pay private damage awards. Further, as the United States argued, it would have been a much broader exercise of judicial power for the district court to "enact" the legislation itself or to appoint an independent housing commission to implement the remedy, both alternatives that the petitioner

36. *See* Brief for Petitioner Henry G. Spallone at 10.

37. *See id.* at 34; *see also* United States v. Board of School Commissioners, 368 F. Supp. 1191, 1227 (S.D. Ind. 1973), *aff'd.*, 483 F.2d 1406 (7th Cir. 1973), *cert. denied*, 421 U.S. 929 (1975).

38. Brief for Petitioner Henry G. Spallone at 38 (quoting Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 530 (1986)).

39. *See id.* at 38-40.

40. Brief for Respondent NAACP at 17 (citation omitted).

41. *See* Brief for the United States at 27-28 (citing Supreme Court of Va. v. Consumers Union, 446 U.S. 719 (1980); Tenney v. Brandhove, 341 U.S. 367 (1951); Forrester v. White, 108 S. Ct. 538 (1988)).

suggested would have been *more* appropriate for the court to pursue.

Although Chief Justice Rehnquist, writing for a majority of five,[42] declined to address the issue of legislative immunity fully, he examined some of the underlying considerations of the doctrine in determining that the district court had abused its discretion. The Chief Justice referred to *Lake Country Estates*,[43] which had extended absolute legislative immunity to *state* legislators, and noted that "we have emphasized that any restriction on a legislator's freedom undermines the 'public good' by interfering with the rights of the people to representation in the democratic process."[44] The Court held that although *both* the fines on the city and on the individuals were coercive, the individual sanctions were a "greater perversion of the normal legislative process."[45] The individual fines compelled the council members to vote for specific legislation out of concern for their own financial interest, while fines on the city forced the legislators to act in the best financial interest of Yonkers. The Court noted that even the district judge had recognized how extraordinary his measures were.[46]

Given the magnitude of such judicial action, the Supreme Court reasoned that the district court had an equitable obligation to fine only the city if, as appeared from the facts, that approach would likely have achieved the desired compliance.[47] Chief Justice Rehnquist stated that although courts have broad power to enforce compliance with their orders through civil contempt,[48] such powers are not unlimited,[49] and the district court was required to exercise the least amount of power possible to secure compliance with its orders.[50] Indeed, it was inappropriate for the district court even to consider imposing fines on the individual council members until it became evident that

42. Joining the Chief Justice in the majority were Justices White, O'Connor, Scalia, and Kennedy.

43. 440 U.S. 391 (1979); *see supra* note 7 and accompanying text.

44. 110 S. Ct. at 634 (citing Coffin v. Coffin, 4 Mass. 1, 27 (1808) (Massachusetts Constitution grants freedom of speech and debate to state legislators, who hold the privilege at the will of the people, not at the pleasure of the house)).

45. *Id.*

46. *See id.*

47. *See id.* at 633 (noting that earlier in the litigation process, the city had complied with a court order immediately upon threat of bankrupting fines).

48. *See id.* at 632 (citing Shillitani v. United States, 384 U.S. 364, 370 (1966)).

49. *See id.* at 632 (citing Whitcomb v. Chavis, 403 U.S. 124, 161 (1971)).

50. *See id.* at 635 (citing Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 231 (1821)).

fining the city alone would fail to produce compliance within a "reasonable time."[51]

Justice Brennan, writing for the dissent, would have yielded the district court more deference.[52] He noted that the district judge was intimately familiar with the case and the parties and that he was in a better position to decide how to ensure compliance with his orders.[53] Justice Brennan did not share the majority's confidence that fines imposed on the city alone would be effective.[54] Justice Brennan further argued that the Supreme Court has never held that fining or jailing *executive* officials for contempt is more intrusive than fining a government entity.[55] He rejected the majority's conclusion that a district court must take greater steps to preserve the "normal legislative process" for local legislators than to maintain a similar decision-making process for executive officials.[56]

The dissent found the petitioner's appeal to the doctrine of legislative immunity unpersuasive because the district court's order had already placed a limit on the legislative independence of the council members.[57] As Justice Brennan explained: "[O]nce a federal court has issued a valid order to remedy the effects of a prior, specific constitutional violation, the representatives are no longer 'acting in a field where legislators traditionally have power to act.' "[58] While the majority pointed out that the legislators were not parties to the original action, the dissent seized on this very fact as "explain[ing] why the lawsuit did not itself contravene the principle underlying the doc-

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51. *Id.* at 634-35.

52. Joining Justice Brennan in dissent were Justices Marshall, Blackmun, and Stevens.

53. *See* 110 S. Ct. at 635 (Brennan, J., dissenting).

54. *See id.* at 640-41 (Brennan, J., dissenting). The fines against the council members had been stayed since August 9, 1988, so when the council voted in favor of the Affordable Housing Ordinance on September 9, it was apparently responding to the high fines on the city. It appears, therefore, that the majority was correct in its assertion that contempt sanctions on the city alone would have achieved compliance. The dissent suggested, however, that it was appropriate for the district court to consider how promptly compliance would be achieved and that if the judge believed that individual fines would speed the process, he was entitled to take such extreme measures.

55. *See* 110 S. Ct. at 644 (Brennan, J., dissenting) (citing Hutto v. Finney, 437 U.S. 678, 690-91 (1978) (acknowledging broad powers of federal courts to enforce injunctions)).

56. *See id.* (Brennan, J., dissenting).

57. *See id.* at 646 (Brennan, J., dissenting).

58. *See id.* at 645 (Brennan, J., dissenting) (quoting Tenney v. Brandhove, 341 U.S. 367, 379 (1951)).

trine of legislative immunity."[59] The dissent, in short, implicitly accepted the reasoning of the Second Circuit.[60]

With respect to *Spallone*'s impact as a precedent, the majority's references to the rationale for the legislative-immunity doctrine hint that the privilege might eventually be extended to local legislators.[61] It is hardly likely, however, that the Court will extend this privilege to legislators who (a) defy court orders to remedy constitutional violations committed by the cities they represent or (b) refuse to comply with consent decrees to which they themselves have agreed officially. These two situations, both present in the *Spallone* case, typify instances where legislative immunity seems simply inapplicable, even to a Court that favors a broad and expansive application of the doctrine.

First, one must not overlook the fact that the original offense in the Yonkers case was racially discriminatory segregation, an indisputably actionable and remediable constitutional offense. That offense was committed by the city of Yonkers, and the city was held liable for that offense in the original lawsuit.[62] The city *as city* clearly had no immunity to shield it from accountability for this offense or from compliance with court orders to remedy it. Indeed, it had no more immunity than the Board of Education of Topeka, Kansas, had in *Brown*.[63] Moreover, because cities are inanimate legal entities, it seems reasonable to conclude that whatever their liability, they may be forced to remedy their violations through actions authorized by their human representatives—the city council members.

This in essence is what *Spallone* was all about. The Yonkers council members were at no time held in contempt for their own actions in the way that *Bivens* or section 1983 defendants are,[64] nor were they ever at risk for private damage awards. They were subject to court action only because they are the legal personification of their city and, as a practical matter, if city council members could not be employed as vehicles for en-

59. *Id.* at 647 n.14 (Brennan, J., dissenting); *see also id.* (" 'Freedom of legislative activity . . . [is] fully protected if legislators are relieved of the burden of defending themselves.' " (quoting Powell v. McCormack, 395 U.S. 486, 505 (1969))).

60. *Yonkers*, 856 F.2d at 457 ("Whatever the scope of local legislators' immunity, it does not insulate them from compliance with a consent judgment to which their city has agreed and which has been approved by their legislative body.").

61. *See* 110 S. Ct. at 633-34.

62. *See* United States v. Yonkers Bd. of Educ., 624 F. Supp. 1276 (S.D.N.Y. 1985).

63. Brown v. Board of Educ., 347 U.S. 483 (1954).

64. *See supra* notes 15 & 16 and accompanying text.

forcing court orders against their cities, their cities could effectively remain judgment-proof.

The Yonkers council members had no cognizable claim of privilege because the sanctions imposed upon them were not personal punitive fines, but rather contempt fines imposed upon them as city representatives. The district court presented the council members with an "either-or" situation: Either they must bring the city into compliance with the undeniably legitimate court orders entered against it, or they must be held in contempt for failure to give effect to those orders.[65] The underlying judgments were against the city. At all times, the city and not the individual council members remained the proper focus of judicial attention; at no time were the council members subject to punishment for their own initiatives. In such circumstances, legislative immunity seems not to apply.[66]

Second, it is well settled that legislative immunity does not apply to acts that are merely ministerial in nature. The widely followed common-law view is that only discretionary, policy-related functions are immune.[67] Because the Yonkers City Council is endowed with both policy-making and administrative powers, it is logical to conclude that immunity may extend to some of its actions but not to others.[68] Where the determination and implementation of legislative policy is not a legitimate concern—as when a city is faced with a desegregation order and the only issue is compliance with that order—immunity has no place.[69] In *Spallone*, there was a clear duty upon the city to act to remedy the violation of constitutional rights. The enactment of a housing package was a necessary step toward implementing an undeniably legitimate remedy against the city's

65. *See* Young v. United States ex. rel. Vuitton et Fils S.A., 481 U.S. 787, 793 (1987) ("[I]t is long settled that courts possess inherent authority to initiate contempt proceedings for disobedience to their orders.").

66. *See* United States v. Peters, 5 Cranch 115, 136 (1809) ("If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery."); *see also* Butz v. Economou, 438 U.S. 478, 506 (1978) ("Our system of jurisprudence rests on the assumption that all individuals, whatever their position in government, are subject to federal law.").

67. *See* Westfall v. Ervin, 108 S. Ct. 580 (1988) (state law tort suit against Army supervisors).

68. *See* Spallone v. United States, 109 S. Ct. 14, 20 (1988) (Marshall, J., dissenting).

69. *See* Connett v. City of Jerseyville, 125 F.2d 121, 124 (7th Cir. 1942) ("When the city is under a duty to act and refuses to act, that is not an act of discretion but an arbitrary act contrary to law. When a court compels a city to do its duty . . . and to act, that does not control the discretion of the city as to how it shall act.").

offenses; it was not in the nature of an ordinary, discretionary legislative act.[70] As the Justices who dissented from granting a stay of the council members' fines stated, "In short, this case is about a district court's ability to enforce its consent decrees."[71]

Finally, the doctrine of legislative immunity is not implicated because none of the council members was a party to the initial suit to remedy the underlying offense of segregation. None was sued in either an official or an individual capacity. The council members had not personally segregated the city through some legislative action. Had that been the case, the doctrine of legislative immunity might more clearly have applied. Instead, the council members were merely required to act for the city, which obviously could not act on its own. Desegregation in *Spallone*, could only be achieved if the Yonkers city council members implemented a remedy.[72]

By deciding the case on grounds of equitable discretion, the Court in *Spallone* left larger questions about the scope of legislative immunity unanswered. The majority seemed determined to go no further than it had to in order to reprimand the district court for its perceived overzealous sanctioning. The Yonkers council members had hoped for a declaration that they could never be held individually liable for their defiant actions. They received far less: Their fines were remitted, but there were no guarantees that similar actions on their part would not be punishable in the future. More importantly, the Court implicitly acknowledged that refusals by local council members to act in accordance with court orders or consent decrees lie outside the scope of the current and likely future reach of the privilege of legislative immunity. In the face of a valid court order entered against a city to desegregate its public housing,

70. *See Brewster*, 408 U.S. 501, 525 (1972) ("[T]he Speech or Debate Clause protects against inquiry into acts that occur in the *regular course* of the legislative process and into the motivations for those acts." (emphasis added)). Acting under compulsion of court orders to address a constitutional violation is not the "regular course" of legislative business.

71. 109 S. Ct. at 19 (Marshall, J., dissenting).

72. The district court considered two alternative methods of achieving desegregation: (1) creating an independent housing commission, and (2) "deeming" by judicial decree the Housing Ordinance to have been enacted; but the court rejected the first as too intrusive and the second as likely to be ineffective. *See* 110 S. Ct. at 640 n.5 (Brennan, J., dissenting).