May it Please the Constitution: Judicial Activism and its Effect on Criminal Procedure

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COMMENTS

MAY IT PLEASE THE CONSTITUTION: JUDICIAL ACTIVISM AND ITS EFFECT ON CRIMINAL PROCEDURE

I. INTRODUCTION

Years ago, a young attorney who had just been admitted to the bar received a substantial shock. An ex-president of the American Bar Association, S. S. Gregory, a man more than ordinarily aware of legal realities, told the young lawyer that "the way to win a case is to make the judge want to decide in your favor and then, and only then, to cite precedents which will justify such a determination. You will almost always find plenty of cases to cite in your favor."

In other words, the judge forms a conclusion or has a result in mind, and then reasons backwards to justify the desired result. Another name for this process is judicial activism. By using judicial activism, a court may reach what it believes to be a "right" or "just" result in a particular case. However, the effects of this process on the Constitution and defendant's rights are not so "right" or "just."

The Constitution was written to protect citizen's individual rights and make everyone aware of those rights and the corresponding responsibilities. By altering the meaning of the Constitution to achieve the result the Court wants to reach, neither law enforcement, lower courts, nor the people know the scope of their rights and responsibilities. The Supreme Court must interpret the Constitution, not rewrite it according to the Justices' own agendas or revise it to reach a certain result.

Part II of this Comment will focus on the constitutional problems created when the Supreme Court engages in the backward reasoning which constitutes judicial activism, focusing specifically on the area of criminal procedure. This part examines some of the Court's landmark cases and how the Court's judicial activism has undermined the constitutional requirements in the area of criminal procedure. Part III suggests ideas to correct the problems created by the Court's judicial activism and offers measures to help prevent judicial activism in the

1. JEROME FRANK, LAW AND THE MODERN MIND 102-03, n.* (1930).
2. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").
future. Part III also discusses ways in which to limit the damage already done by judicial activism.

II. THE DETERIORATION OF THE CONSTITUTION

Every lawyer has heard the saying that hard cases make bad law. Unfortunately, blaming bad law on hard cases is neither the problem nor the solution. Instead, the problem is a judicially active Court that is trying to reach a certain result. The Court decides the way it does in these cases not because the Constitution demands such decisions, or because the prior precedent was wrong and the Court now realizes it; instead, the Court simply wants to reach a certain result in a particular case. The United States Supreme Court has historically ignored reliable precedent and the Constitution to reach a certain result in particular cases. In doing so, the Court often fails to address the long-term consequences of such decisions.

A. Mapp & Leon

The most blatant example of judicial activism occurred in the Supreme Court's decision in United States v. Leon, which came about because of the decision in Mapp v. Ohio. The Court in Mapp held that the exclusionary rule, a remedy for Fourth Amendment violations, was mandated by the text of the Fourth Amendment because without a remedy to enforce the right, there was no right at all. Additionally, the exclusionary rule was also applicable to the states through the Fourteenth Amendment by selective incorporation.

3. Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1856) (holding that the defendant, a black man, was not a citizen and could not sue in the United States courts), superseded by U.S. CONST. amend. XIII. See also Scott v. C.I.R., 63 T.C.M. (RIA) ¶ 93,406 (1993) (holding that Dred Scott was nullified by the Thirteenth Amendment, and, that therefore, African-Americans were not exempt from paying taxes).
4. Plessy v. Ferguson, 163 U.S. 537 (1896) (implicitly overruled by Brown v. Board of Education, 347 U.S. 483 (1954)) (Plessy held that separate facilities for blacks and whites were "equal" and did not violate the Fourteenth Amendment. However, Brown held that separate was not equal in public education.)
5. See infra part II.A-E.
8. Id. at 660. The Fourth Amendment states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV.
10. The Fourteenth Amendment's Due Process Clause states "nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." U.S. CONST. amend.
Mapp was a landmark case. It overruled Wolf v. Colorado, in which the Court held that the states could choose any remedy for a Fourth Amendment violation because the text of the Fourth Amendment did not mandate the use of the exclusionary rule. However, in United States v. Leon, the Supreme Court undermined the constitutional basis for the exclusionary rule that the Court had found in Mapp. The Leon Court found that the text of the Fourth Amendment did not mandate the exclusionary rule, and instead held that the rule was only a judicially-created remedy. As only a judicially-created remedy, exceptions to the exclusionary rule could exist and the Leon Court was free to recognize a good faith exception to the exclusionary rule. Therefore, based on the decision in Leon, the courts need not always apply the exclusionary rule.

If the exclusionary rule is only a judicially-created remedy, then the Supreme Court cannot require the states to apply the exclusionary rule to Fourth Amendment violations. The Leon decision removed the constitutional basis for the exclusionary rule. Because the exclusionary rule is only a judicially-created remedy, the states are free to ignore it and to choose their own remedy. Yet, the Supreme Court still requires the states to apply the exclusionary rule to Fourth Amendment violations, even though the Court can only require states to use a constitutionally mandated remedy, not a judicially-created one. This is neither logically nor constitutionally consistent.

The Court did not base its decision in Leon on the Constitution. Instead, the Court side-stepped the Constitution to reach a desired result. In no other situation is the statement "the ends justify the means" so prominent. In Leon, a law enforcement officer attempted to comply with

XIV, § 1.

11. Selective incorporation is the means by which parts of the Bill of Rights, originally only applicable to the federal government, became applicable to the states. The Fourteenth Amendment's Due Process Clause became the vehicle for incorporation.
13. Id. at 28-29.
15. Id. at 906.
16. Id.
17. Id. at 913.
18. Id. at 906.
19. Twelve years before Mapp, the Court in Wolf held that the exclusionary rule was not constitutionally mandated. See supra notes 12-13 and accompanying text. Since then, the Court has come full circle on the issue of whether the exclusionary rule is constitutionally required or judicially created, and now holds that the exclusionary rule is only judicially-created and not constitutionally mandated. Leon, 468 U.S. at 906.
all the constitutional requirements for searching someone's home, but failed because of an error in the warrant. The judicially active Court did not want a seemingly guilty man to go free because of a law enforcement officer's mistake. Therefore, the Court created a good-faith exception to the exclusionary rule.

Leon was not correctly decided. The Court created bad precedent undermining the constitutionality of the exclusionary rule as the required remedy for a Fourth Amendment violation due to a difficult case. As Justice Jackson said in another case, "if we review and approve, that passing incident becomes the doctrine of the Constitution.... The principle then lies about like a loaded weapon ready for... any authority that can bring forward a plausible claim." 21

After Leon, the states could, at any time, avoid the exclusionary rule because it is no longer constitutionally mandated. Therefore, as a result of Leon, state criminal procedure is now unsettled and unpredictable. If the states ever refuse to use the exclusionary rule, the Supreme Court may have difficulty finding that the states are constitutionally required to use it. Because of the way the Court decided Leon, it must not have considered these long-term consequences in reaching the "desired result."

The trial court in Leon held the search unconstitutional and protected the defendant's rights. 22 The appellate court upheld that decision. The United States Supreme Court granted certiorari and reversed the decision. 23 Ironically, the Court expended its judicial resources to take this case and drastically altered the constitutional guarantees of the Fourth Amendment.

B. Olmstead, Katz, & Riley

The next example of unwarranted judicial activism in the area of criminal procedure and the Fourth Amendment centers on Katz v.

20. The police had watched Leon, his home, and his car. Based on the information gained from a police informant and from the police surveillance, a warrant was issued. Leon, 468 U.S. at 901-02. A search of Leon's home pursuant to the warrant produced drugs. Id. The warrant was later found to be invalid because it was not based on probable cause. Id. at 903-04. The trial court granted Leon's motion to suppress the evidence as fruit of the poisonous tree, holding that the search was a violation of the Fourth Amendment because it was based on an invalid warrant. Id. at 903. The California Supreme Court upheld the trial court's decision and the United States Supreme Court granted certiorari. Id. at 905.


22. See supra note 20.

23. Leon, 468 U.S. at 905.
In 1928, prior to *Katz*, the United States Supreme Court decided *Olmstead v. United States*. In *Olmstead*, the Court interpreted the Fourth Amendment literally. The government had attached a listening device to the outside of Olmstead’s house and recorded his conversations. At trial, the government used these conversations against him and Olmstead was ultimately convicted. The Court concluded that the phone conversation was not a material object protected by the Fourth Amendment. The Court also held that because there was no actual physical penetration of Olmstead’s house, there was no invasion of a protected Fourth Amendment interest.

However, thirty-nine years later, the United States Supreme Court denounced, but did not specifically overrule, *Olmstead* in its decision in *Katz v. United States*. In *Katz*, the police, without a warrant, attached a listening device to the outside of a phone booth that Katz used frequently. Katz’s conversations were recorded and, based on this information, Katz was convicted of transporting wagering information across state lines. The lower courts upheld the conviction based on *Olmstead*. However, the Supreme Court reversed the lower courts and held that “the Fourth Amendment protects people, not places.” The Court also held that a physical invasion was not necessary to show a Fourth Amendment violation. In essence, the *Katz* decision overruled *Olmstead*. The Fourth Amendment protected more than just the specific materials, objects, or places enumerated. Therefore, even if someone was in a public place, the person could still have an expectation of privacy.

The Supreme Court then went from a very expansive view of the Fourth Amendment in *Katz*, back to a limited one when the Court held that the Fourth Amendment did not protect intimate places such as the

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25. 277 U.S. 438 (1928).
26. *Id.* at 456-57.
27. *Id.* at 455.
28. *Id.* at 466.
29. *Id.* at 464.
31. *Id.* at 348.
32. *Id.*
33. *Id.*
34. *Id.* at 351.
35. *Id.* at 353.
36. *Id.*
The Court based this change not on what the Constitution actually says or the Court's own precedent, but on the Court's interpretation of what the Constitution should say. It is the Court's job to interpret the Constitution, but that job does not include interpreting the Constitution so that the Court may reach any result it wants. Because of the Court's judicial activism, the people have no idea what their rights are or what government action is forbidden. Unfortunately, the confusion created by the Court's judicially-active decisions does not end here.

After holding in *Katz* that the Constitution protected more than just the enumerated places and things, and that a physical invasion was not necessary, the Court held that the Fourth Amendment did not protect intimate places such as the curtilage of one's house, unless a physical invasion could be shown. In *Florida v. Riley*, the Court held that police flying over Mr. Riley's yard to specifically look for marijuana growing in the greenhouse attached to the back of his house did not violate the Fourth Amendment. The curtilage of one's house has long been a sacrosanct area. Yet the Court, after expanding the Fourth Amendment in *Katz*, held in *Riley* that the Fourth Amendment did not protect the curtilage of the house.

After this line of cases, it is difficult to understand what the Fourth Amendment actually protects. Perhaps the Fourth Amendment only

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37. Curtilage is where the intimate activities associated with the "sanctity of [one's] home and the privacies of life" take place. Oliver v. United States, 466 U.S. 170, 180 (1984) (quoting Boyd v. United States, 116 U.S. 616, 630 (1886)).
39. The "Fourth Amendment simply does not require the police traveling in the public airways . . . to obtain a warrant in order to observe what is visible to the naked eye." *Id.* at 450 (citing California v. Ciraolo, 476 U.S. 207, 215 (1986)). The text of the Fourth Amendment requires a warrant for any search and seizure. U.S. CONST. Amend. IV. All the Supreme Court's precedent has given a high level of protection to someone's house and the curtilage of someone's house. See infra note 46 and accompanying text.
40. *See supra* note 2.
42. *Id.* at 452. The Court suggested such physical invasions might be the creation of noises, wind, dust, or injury within the curtilage. *Id.*
44. *Id.* at 353.
45. *Id.*
46. The concept of curtilage originated at common law. The law of burglary extended the protection of the house to the area immediately surrounding the house. United States v. Dunn, 480 U.S. 294, 300 n.3 and accompanying text (1987); WILLIAM C. SPRAGUE, ABRIDGMENT OF BLACKSTONE'S COMMENTARIES 449 (1895).
provides, someone's person, house, papers, and effects as is specifically enumerated in the Fourth Amendment. Perhaps the Fourth Amendment is more expansive and protects the person anytime the person has an expectation of privacy, even if in a public place. What the Fourth Amendment protects is unknown and uncertain at this time. The Court keeps changing what protections the Constitution mandates to fit the desired result that it considers "just." However, in the process of changing these protections, the Court is slowly destroying the Constitution. The Constitution is becoming not what the framers intended, but what a majority of nine Justices want at a particular moment. If the Court continues in this manner, soon the exceptions to the Fourth Amendment will encompass the Fourth Amendment, and its protections will cease to exist.

Stare decisis and precedent are the basis of the law. Therefore, the Court should be interpreting the Constitution and following those interpretations. One understands that sometimes the Court realizes a case was decided wrongly and that it needs to be overturned. Overruling a case is not objectionable. However, the Court does not and should not have the power to alter the protections afforded by the Constitution on a case by case basis. The Court should not be above the law and able to change it on a whim. The Constitution places limits upon the Court like any other branch of government.

C. Miranda & Quarles

Like the Fourth Amendment, the Fifth Amendment has also been undermined by the Court's judicial activism. The Fifth Amendment guarantees the defendant freedom from self-incrimination. In Miranda v. Arizona, the Court held that officers must read the

48. Olmstead v. United States, 277 U.S. 438 (1928); U.S. CONST. amend. IV.
51. See supra note 4. Fifty-eight years after the Supreme Court held in Plessy v. Ferguson that separate facilities for blacks and whites were "equal," the Court reversed itself and held that separate was not equal at least in the area of public education. Brown v. Board of Education, 347 U.S. 483 (1954). See also Comment, Issues in School Desegregation: The Dissolution of a Well-Intentioned Mandate, 79 MARQ. L. REV. 347, 350-51 (1995).
53. U.S. CONST. art. I-III.
54. "No person shall... be compelled in any criminal case to be a witness against oneself..." U.S. CONST. amend. V.
defendants their rights before beginning questioning.\textsuperscript{56} The Court said that when an individual is in custody and subject to police interrogation, the Fifth Amendment’s protection against self-incrimination is jeopardized.\textsuperscript{57} Therefore, \textit{Miranda} required that officers warn defendants of their rights before the interrogation begins.\textsuperscript{58} “[U]ntil such warnings and waiver are demonstrated[,] . . . no evidence obtained as a result of [the] interrogation can be used against [the defendant].”\textsuperscript{59} Therefore, \textit{Miranda} warnings are necessary to protect the rights guaranteed by the Fifth Amendment. Unfortunately, the Court has once again severely limited a defendant’s rights because of its judicial activism.

Only eighteen years after \textit{Miranda}, the Court recognized a public-safety exception to \textit{Miranda} warnings\textsuperscript{60} In \textit{New York v. Quarles},\textsuperscript{61} a rape suspect was apprehended at 12:30 a.m. in a small grocery store. Upon frisking the suspect, officers found an empty shoulder holster. Realizing that the gun was probably somewhere in the store, the officer asked the suspect where it was before advising the suspect of his rights.\textsuperscript{62} The suspect’s response led police to recover the gun.\textsuperscript{63} According to \textit{Miranda}, the questioning which occurred in the store prior to any \textit{Miranda} warnings being given violated the suspect’s Fifth Amendment right to be free from self-incrimination.\textsuperscript{64}

Contrary to \textit{Miranda}, the \textit{Quarles} Court decided to recognize an exception to the requirement that suspects be given \textit{Miranda} warnings before questioning. Specifically, the Court created a “public-safety” exception\textsuperscript{65} because “absent actual coercion by the officer, there is no constitutional imperative requiring the exclusion of the evidence . . . .”\textsuperscript{66} The Court held \textit{Miranda} did not require exclusion of the evidence in this case.\textsuperscript{67}

Unfortunately, the Court again undermined the rights protected by the Constitution by holding that \textit{Miranda} warnings, which were not

\begin{thebibliography}{99}
\bibitem{56} Id. at 471.
\bibitem{57} Id. at 478.
\bibitem{58} Id. at 471.
\bibitem{59} Id. at 479.
\bibitem{61} 467 U.S. 649 (1984).
\bibitem{62} Id. at 651-52.
\bibitem{63} Id.
\bibitem{64} \textit{Miranda}, 384 U.S. at 471.
\bibitem{65} \textit{Quarles}, 467 U.S. at 655.
\bibitem{66} Id. at 658 n.7.
\bibitem{67} Id.
\end{thebibliography}
constitutionally mandated,68 applied only to custodial interrogations.69 However, the Court severely limited what situations were considered custodial interrogations so as to avoid application of the *Miranda* warnings.70 Therefore, because the Court held that law enforcement officers need not give *Miranda* warnings if there is not custodial interrogation, the Court is free to make exceptions to *Miranda* at will. Creating exceptions to the *Miranda* warnings presents the same problem that the Court's judicial activism caused when it created the “good-faith” exception to the exclusionary rule in *United States v. Leon*.71 The problem once again becomes that the defendant's rights and state criminal procedure are unsettled and unpredictable because no one knows when *Miranda* warnings are required. If the Court can change, on a case by case basis, the definition of custodial interrogation, then neither law enforcement officers, defendants, nor states will know when *Miranda* warnings are required. This not only creates confusion, but strips defendants of a right that has become an integral part of criminal procedure over the last thirty years.

By changing the definition of custodial interrogation, the Court leaves this area of criminal procedure in a state of confusion. Unfortunately, this leaves the states free to make exceptions to the *Miranda* warning requirement, by redefining custodial interrogation. In *Miranda*, the Court held that unless adequate protection to dispel the compulsion inherent in interrogations is in place, “no statement obtained from the defendant can truly be the product of [the defendant's] free choice.”72 A continually changing definition of what constitutes a custodial interrogation is not sufficient to dispel the compulsion inherent in custodial interrogations, because courts may, at will, create exceptions to the remedy.

Again, the bad constitutional law created in *Quarles* comes from another difficult case. The law enforcement officer's hasty effort

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68. See id. at 654 ("The prophylactic *Miranda* warnings ... are 'not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected.") (quoting Michigan v. Tucker, 417 U.S. 433, 444 (1974)).

69. At this time, the Court had defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Id. at 444 (footnote omitted). Clearly, by this definition, Mr. Quarles was being questioned in a custodial interrogation and should have been informed of his *Miranda* rights prior to being asked about the gun.


71. See supra part II.A.

response to locate the gun was a mistake because the suspect incriminat-
ed himself before the officers administered any *Miranda* warnings. The
Court, however, cannot change the definition of custodial interrogation
merely to accommodate one officer who ignored a suspect's rights
because of the situation. Altering the definition of custodial interroga-
tion in this way will result in confusion and a hodge-podge of irreconcil-
able cases. By continually redefining custodial interrogation, the Court
is ignoring its duty and its precedent.

If the Court continues to create exceptions to the rule, the exceptions
will soon become the rule. In the end, there may be no constitutional
protections at all. Considering how few cases the United States Supreme
Court takes every year, and the precedent set out in *Quarles* and *Leon*,
the lower appellate courts have the authority to make exceptions
to the defendant's individual rights by citing *Quarles* and *Leon* as
precedent.

The suspect in *Quarles* was probably guilty of rape. He fit the
description of the perpetrator, he was in the area where the victim said
the perpetrator could be found, and he had an empty shoulder holster
that coincided with the victim's statement that the perpetrator had a
gun. However, everyone's constitutional rights and protections should
not be sacrificed to punish a specific suspect.

The Court's justification for this exception to *Miranda* was that the
gun, hidden in the store somewhere, posed a public safety concern. The
majority found that an accomplice, a customer, a store clerk, the
suspect, or someone else might have discovered the gun before the
officers, and everyone in the store might have been in danger. However,
as the dissent states, there was absolutely no public safety
concern at the time. The officers never believed an accomplice
existed. In fact, there was no accomplice. Likewise, the event
occurred at night and no one else was in the store except the suspect,
the officers, and the clerks. In addition, the suspect was under the

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73. Lower appellate courts are the courts of last resort in most cases because the
Supreme Court grants certiorari in only a small number of cases appealed to it each year.
*Statistical Recap of Supreme Court's Workload During Last Three Terms*, 63 U.S.L.W. 3134
(Aug. 23, 1994).
75. Id. at 657.
76. Id.
77. Id. at 676 (Marshall, J., dissenting).
78. Id. at 675.
79. These events all took place at 12:30 a.m. Id. at 651.
80. Id. at 676.
officer's control and posed no threat. Finally, the officers obviously did not fear for anyone's safety because they had already put away their guns by the time they interrogated the suspect about his gun.

The officers "knew with a high degree of certainty that the defendant's gun was within the immediate vicinity . . . ." A sweep of the store could have produced the gun. This search would have taken a minimal amount of time and the people in the store could have been asked to step outside until the gun was found. Similarly, the officer could have taken a few minutes to inform the suspect of his Miranda rights before asking where the gun was, and still preserved the defendant's Fifth Amendment right to be free from self-incrimination. Therefore, there was no immediate threat to public safety and the officer was not justified in questioning the suspect without first reading him the Miranda warnings. In conclusion, not only did the Court undermine the constitutional protections provided by the Fifth Amendment and Miranda, but it also rested its decision on a theory that was not supported by the facts.

D. Edwards & Davis

Once again, a defendant's rights under the Fifth Amendment have been undermined because of judicial activism. Judicial activism has undermined a defendant's right to counsel as guaranteed by the Fifth Amendment under Miranda. In Edwards v. Arizona, the Court held that all questioning of a suspect by law enforcement officers must immediately cease once the suspect has asserted the right to counsel. No further questioning may take place until counsel is made available or the suspect initiates further conversations. The prohibition against continued questioning once counsel is requested prevents law enforcement officers from badgering the suspect into waiving his right to counsel. In Minnick v. Mississippi, the Court held that the Edwards

81. Id. at 675.
82. Id.
83. Id. at 676.
84. See supra notes 76-83 and accompanying text.
85. U.S. CONST. amend. V; Miranda v. Arizona, 384 U.S. 436 (1966); see also, supra part II.C.
87. Id. at 484-85.
88. Id.
protection does not cease once the suspect has consulted with counsel.91

Extending the Edwards protection after the suspect has consulted with counsel prevents law enforcement officers from providing the suspect with counsel and then later questioning the suspect outside the presence of counsel claiming that Edwards has been satisfied. Limits on custodial interrogations, such as the Edwards requirement, are necessary to protect a suspect's Fifth Amendment right against self-incrimination.

Once again the Supreme Court's judicial activism has undermined these constitutionally mandated procedural protections. In Davis v. United States,92 the defendant was accused of murder and the police informed the defendant of his Miranda rights, which he waived.93 An hour and a half after the interview began, the defendant said, "[M]aybe I should talk to a lawyer."94 The officers then stated they did not want to violate his rights and inquired if he was asking for a lawyer or if he just made a comment about a lawyer.95 The defendant replied he was not asking for a lawyer and, after a short break, the interview continued.96 An hour later, the defendant again asked for a lawyer and the interview ended.97

According to Edwards, the officers should have ceased questioning when the defendant first communicated that he thought he should talk to a lawyer.98 When the officers questioned the defendant further on what he meant by his statement about a lawyer, they violated the defendant's Fifth Amendment rights. The Edwards Court said "[i]f [a defendant] requests counsel, 'the interrogation must cease until an attorney is present.'"99 Failure to cease questioning is a violation of the defendant's Fifth Amendment rights.100

However, in Davis, the Supreme Court held that Davis's comment about an attorney was not a request for an attorney because it was too equivocal and ambiguous.101 More importantly, the Court held that

91. Id. at 150.
93. Id. at 2353.
94. Id.
95. Id.
96. Id.
97. Id.
99. Id. at 482 (citing Miranda v. Arizona, 384 U.S. 436, 474 (1966)).
100. Because the Court in Edwards held that the defendant's Fifth Amendment rights were violated, the Court did not reach the issue of whether the defendant's Sixth Amendment rights were violated. Id. at 480 and n.7.
101. Davis, 114 S. Ct. at 2357.
"the rule of Edwards is [a judicially-created] rule, not a constitutional command . . . ."

Therefore, the Court can avoid the Edwards rule in the same way it avoided using the Miranda warnings, by semantics. Instead of redefining a word, the Court classifies the defendant's request as equivocal and ambiguous to avoid the Edwards rule. The Fifth Amendment commands that defendants not be required to incriminate themselves. Yet, in Davis, the Court essentially says that law enforcement officers need not cease questioning a defendant even when the defendant exercises his Fifth Amendment rights, unless the defendant's request for counsel is clearly unambiguous and unequivocal. However, the Court fails to define what is required in a request for counsel so that it is not clearly unambiguous and unequivocal. There are no guidelines for suspects or law enforcement officers to follow when a request for counsel is made. Once again, a hard case, heard by a judicially active court, makes bad law.

By not forcing law enforcement officers to cease questioning once a defendant has asserted this right, the Court is essentially eliminating this right. In Davis, the Court justifies the result by holding that Davis's assertion of the right to counsel was ambiguous and equivocal. However, whether the statement is ambiguous or equivocal is irrelevant because this Court stated in Miranda v. Arizona that if the defendant "indicates in any manner . . . that [the defendant] wishes to consult with an attorney . . . there can be no questioning." If the Constitution does not require law enforcement officers to cease questioning when a request for counsel is made, no reason exists for defendants to assert these rights. To hold as the Court does in Davis is "to grant the right but in reality to withhold its privilege and enjoyment."

Therefore, holding the request for counsel was ambiguous and equivocal does not justify undermining the Constitution to reach this result. When the Court held that Edwards' request for counsel was equivocal and ambiguous, it undermined a string of cases dating back to Miranda v. Arizona, and put the validity of the Fifth Amendment protections into question. Putting the Constitution into question and undermining precedent is not an acceptable side effect in reaching the

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102. Id. at 2355 (quoting Arizona v. Roberson, 486 U.S. 675, 688 (1988) (Kennedy, J., dissenting)).
103. See supra part II.C.
104. See supra note 54.
105. Davis, 114 S. Ct. at 2357.
"right" decision in a difficult case. Maybe this defendant should have been punished. However, by disregarding the law\textsuperscript{108} to punish those who disregard the law, the Court becomes no better than the defendant.

\subsection*{E. Argersinger & Nichols}

The Fourth and Fifth Amendments are not the only amendments to the Constitution that have been undermined because of judicial activism. A judicially-active Court has also undermined the right to counsel as guaranteed by the Sixth Amendment.\textsuperscript{109} In 1972, the Court decided \textit{Argersinger v. Hamlin}.\textsuperscript{110} In that case, the Court held that, absent a waiver, "no person may be imprisoned for any offense, . . . unless [that person] was represented by counsel at . . . trial."\textsuperscript{111} This is known as the imprisonment in fact standard, as opposed to the imprisonment in law standard.\textsuperscript{112} In order for a defendant to be imprisoned following conviction under \textit{Argersinger}, the defendant must have had the assistance of counsel at the trial.\textsuperscript{113} If the defendant was not represented by counsel, no term of imprisonment could be imposed. Allowing a judge to imprison a defendant, even for a misdemeanor, without the assistance of counsel violates the defendant's Sixth Amendment right to counsel.\textsuperscript{114} The assistance of counsel is required for a fair trial. The right to be heard is meaningless unless it includes the right to be heard by counsel.\textsuperscript{115}

In 1979, the United States Supreme Court decided \textit{Scott v. Illinois},\textsuperscript{116} which held that unless a term of imprisonment was actually imposed, a defendant was not entitled to counsel in a misdemeanor case because it was considered a petty offense.\textsuperscript{117} Only one year later, the

\begin{itemize}
\item \textsuperscript{108} The Constitution is the "supreme Law of the Land." U.S. CONST. art. VI, cl. 2. Therefore, by disregarding the Constitution, the Court is disregarding the law.
\item \textsuperscript{109} The Sixth Amendment states that "In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for [the] defence." U.S. CONST. amend. VI.
\item \textsuperscript{110} 407 U.S. 25 (1972).
\item \textsuperscript{111} \textit{Id.} at 37.
\item \textsuperscript{112} The imprisonment-in-law standard grants a defendant the right to counsel when the law sets as a possible punishment any term of imprisonment. This standard does not require the judge to determine whether the defendant will be imprisoned if convicted, prior to hearing any of the evidence, as the imprisonment-in-fact standard does.
\item \textsuperscript{113} \textit{Argersinger}, 407 U.S. at 40.
\item \textsuperscript{114} \textit{Id.} at 31-32.
\item \textsuperscript{115} \textit{Id.} at 31 (citing Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).
\item \textsuperscript{116} 440 U.S. 367 (1979).
\item \textsuperscript{117} \textit{Id.} at 373-74.
\end{itemize}
Court in *Baldasar v. Illinois*,\(^{118}\) held that the Sixth and Fourteenth Amendments required that no uncounseled misdemeanor, regardless of whether the defendant was actually imprisoned, may be used to increase a term of imprisonment upon a subsequent conviction.\(^{119}\)

However, twenty-two years later the Court stated a judge could imprison a defendant for an uncounseled misdemeanor\(^ {120}\) without violating the Sixth Amendment.\(^ {121}\) In *Nichols v. United States*,\(^ {122}\) the Court held that "an uncounseled misdemeanor conviction . . . is . . . valid when used to enhance punishment at a subsequent conviction."\(^{123}\) The judge increased the defendant's sentence because of the uncounseled misdemeanor. In essence, the defendant was imprisoned for a longer period of time because of the uncounseled misdemeanor. Ironically, the Court in *Argersinger* had held that a defendant could not be imprisoned at all based on a conviction for an uncounseled misdemeanor as it would be a violation of the defendant's Sixth Amendment rights.\(^ {124}\) Yet the *Nichols* Court had no problem with lower courts using old uncounseled misdemeanors to increase a defendant’s length of incarceration. The Court cannot, based on the Constitution and its own precedent, justify allowing the uncounseled misdemeanor to increase the defendant’s sentence for a later conviction.

In *Nichols*, the Supreme Court allowed the defendant’s uncounseled misdemeanor of driving under the influence, which carried a term of imprisonment that was not imposed,\(^ {125}\) to be considered in increasing the sentence for the charge of conspiracy to possess cocaine with intent to distribute.\(^ {126}\) This was all done according to the United States Federal Sentencing Guidelines.\(^ {127}\) As a result of this consideration, the

\(^{119}\) Id. at 226.
\(^{120}\) *Nichols* distinguished between an uncounseled misdemeanor that is valid under *Scott*, and an uncounseled misdemeanor that is not. An uncounseled misdemeanor which may be used to enhance the sentence for a subsequent conviction under *Nichols* is an uncounseled misdemeanor that is also valid under *Scott*.
\(^{121}\) See *Nichols v. United States*, 114 S. Ct. 1921 (1994).
\(^{122}\) 114 S. Ct. 1921 (1994).
\(^{123}\) Id. at 1928 (citing *Scott v. Illinois*, 440 U.S. 367 (1979)).
\(^{124}\) *Argersinger*, 407 U.S. at 37.
\(^{125}\) For the misdemeanor of driving under the influence, the defendant was fined $250.00, but was not imprisoned. *Nichols*, 114 S. Ct. at 1924. The defendant faced a maximum possible sentence of ten days to one year in jail, or a fine of $100-$1000, or both. *Id.* at 1924 n.1.
\(^{126}\) *Id.* at 1924.
\(^{127}\) The *Federal Sentencing Guidelines* allow criminal history points to be added for each prior conviction including, according to the Court, uncounseled misdemeanors. *Id.* at
The defendant's sentence range increased from a minimum 168 months and a maximum of 210 months to a minimum of 188 months and a maximum of 235 months. As a result, the defendant's length of incarceration increased 20-25 months because of the uncounseled misdemeanor. This is a longer period of incarceration than the defendant could have received at the time of the original uncounseled misdemeanor conviction if he had counsel and had been sentenced to a period of imprisonment.

There is no justification for what the Court did in Nichols. Under Nichols, a defendant may be imprisoned for an uncounseled misdemeanor, which is exactly what the Court held was a violation of the Sixth Amendment in Argersinger. Consideration of uncounseled misdemeanors in sentencing is just another example of bad law being created because of a hard case and a judicially-active Court.

Before Nichols was decided, the Sixth Amendment granted a right to counsel: (1) if the defendant was indigent, (2) in capital cases, (3) in misdemeanors where the defendant could be imprisoned, and (4) at critical stages of the process. After Nichols, the right to counsel seems to be an empty right. It does not matter to the Supreme Court if a defendant was represented by counsel in the trial court or not; that defendant could still be incarcerated for the uncounseled misdemeanor conviction at some later time. The only difference is that the court would call it a "penalty enhancer" instead of a direct punishment. If the Supreme Court continues to circumvent defendants' rights in this fashion,
we will come to regret it, "maybe not today, maybe not tomorrow, but soon, and for the rest of our lives."\textsuperscript{135} Again we are brought back to the problem caused by judicial activism: unsettled and unpredictable criminal procedure. After \textit{Nichols}, defendants must be wondering if, or more properly when, a conviction for an uncounseled misdemeanor will come back to haunt them by increasing their time of incarceration on a later conviction as a "penalty enhancer."

Now, under \textit{Nichols}, defendants may be subject to imprisonment for more time than they would have been required to serve if they were imprisoned immediately following their uncounseled misdemeanor convictions. The reasonable inference to be drawn from this case is that the protections previously afforded to defendants' rights change from case to case depending on the whims of a majority of the justices, not on the language of the Constitution or the Court's precedent.

The Supreme Court has held that technicalities cannot be used to circumvent an individual's constitutional protections.\textsuperscript{136} The "silver platter doctrine" arose as a response to the Court's holding in \textit{Weeks v. United States}.\textsuperscript{137} In \textit{Weeks}, the Court held that the exclusionary rule of the Fourth Amendment only applied to federal law enforcement officers and that states were free to choose their own remedies for Fourth Amendment violations.\textsuperscript{138} The silver platter doctrine was the loophole used to admit illegally seized evidence in a federal prosecution without violating the Fourth Amendment. It allowed admission of evidence seized illegally by \textit{state} law enforcement officers to be used in federal prosecutions since the Fourth Amendment's exclusionary rule only barred the use of illegally seized evidence by \textit{federal} law enforcement officers.\textsuperscript{139} Therefore, under the silver platter doctrine, the state officers would seize the evidence illegally and turn it over to the federal officers who would then be allowed to use it because the federal officers

\begin{itemize}
  \item 135. \textit{CASABLANCA} (Metro-Goldwyn-Mayer 1942).
  \item 136. \textit{See} \textit{Elkins v. United States}, 364 U.S. 206 (1960) (holding that use of the "silver platter doctrine" to circumvent the Fourth Amendment's exclusionary rule is unconstitutional).
  \item 137. 232 U.S. 383 (1914).
  \item 138. \textit{Id}.
  
  The crux of that doctrine is that a search is a search by a federal official if [the federal official] had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter.

  \textit{Id}.
\end{itemize}
had not participated in the illegal seizure. The silver platter doctrine was held unconstitutional in *Elkins v. United States*. The Court held that law enforcement officers could not avoid constitutional protections and admit illegally seized evidence through the use of the silver platter doctrine.

Yet, the Court in *Nichols* allowed the judge to circumvent the defendant's constitutional protections and consider uncounseled misdemeanors when determining the length of the defendant's sentence. Because of the decision in *Nichols*, the Court has created something similar to the silver platter doctrine. The defendant cannot be imprisoned on an uncounseled misdemeanor. Yet, the Court allows a term of imprisonment to be "snuck in" on a later charge by increasing the sentence of the later charge. Allowing consideration of uncounseled misdemeanors lets law enforcement officers and judges know that they do not have to act constitutionally; they just have to find a technicality to rely on. In the end, the circumvention of the Constitution taking place after *Nichols* is the same kind of constitutional circumvention allowed by the silver platter doctrine. The only difference is that the Court realized it had undermined the Constitution by allowing use of the silver platter doctrine and held its use to be unconstitutional in *Elkins*. Maybe someday soon the Court will realize that it made a grievous error in *Nichols*, reverse its decision, and once again protect the rights the Constitution guarantees to the people.

III. REBUILDING THE CONSTITUTION

There are two steps that must be taken to rebuild the Constitution and undo the damage that a judicially-active Court has caused in the area of criminal procedure. The first step addresses how to rectify the past judicial activism of the Court. The second step addresses how to prevent judicial activism from recurring.

The first step is necessary to re-establish the constitutional mandates the Court ignored in the cases discussed above, and other cases like them. The Supreme Court must recognize the extensive damage
done to all areas of the Constitution because of the Court's judicial activism. The Court must also make it a point to accept certiorari on cases where it could rectify the damage done by earlier judicial activism. To rid constitutional law of these result-oriented cases, the Court should specifically overrule them so that a later Court may recognize these judicially-active decisions for what they really are and be deterred from reviving these bad precedents.

In overruling these cases, the Court would be telling law enforcement officers and citizens alike that the Constitution is the supreme Law of the Land. As such, government actions will be measured against what the Constitution actually says, and not what nine Justices think the Constitution should say in a particular circumstance.

The second step, however, is the most important one. This step is necessary to prevent the Court from being judicially active in future cases. To fully understand this step, the Court must look at the process that judges and justices go through in making the decisions that are judicially active instead of Constitutionally based. A judicially-active court reasons backwards in reaching a decision. The court starts with a result in mind. It then works backwards from that result to make the reasoning fit the result. This is why the facts of some cases seem twisted. Courts must twist the facts so that they support the court's conclusion. For example, the reasoning behind the majority's decision in New York v. Quarles did not actually fit the facts of the case, as the dissent pointed out.

Instead of reasoning backwards, the Court should reason in the proper direction. The Court should formulate a rule that applies to all similar cases, and then apply that rule to the facts of the case. The Court must look at the facts honestly as they appear in the record. It is important for the Court to avoid, at all costs, any desire to twist the facts. The Court must accept the facts as they are and deal with those facts appropriately. This process will allow the Court to reach a reasonable and constitutional outcome, instead of one the Court considers "right." This forward reasoning process will eliminate not only judicial activism, but also decisions that are not constitutionally supported. In fact, this process will allow the Court to render decisions without undermining the constitutional protections afforded the people.

147. See supra note 108.
148. JEROME FRANK, LAW AND THE MODERN MIND, 100-104 (1936).
150. Id.; see also supra notes 76-83 and accompanying text.
of this country. Regardless of what the outcome may be, if the outcome is constitutionally supported, it is the "right" outcome.

Realizing that courts and justices are not always willing to reach the constitutionally mandated decision when difficult cases arise, the Court should at least be honest about it. Therefore, if the Court is going to disregard the Constitution and fit the reasoning to the desired outcome, the Court should acknowledge and limit what it is doing. Then the Court could confine the bad precedent to the facts of the particular case, instead of allowing it to become part of the Constitution and undermining the constitutional protections. If the Court follows these steps, the saying would no longer be hard cases make bad law, but instead that hard cases make constitutional law.

IV. CONCLUSION

The Court should not only think about the outcome of the particular case before it, but the Court must think about the long-term consequences of the decision on the Constitution. There is no reason for cases like Leon, Riley, Quarles, Davis, Nichols, and the other judicially-active decisions like them. The framers created a Constitution to guide the Court in making these decisions. The Court should abide by the Constitution and stare decisis rather than going off on its own tangents to reach a desired result. Instead of reasoning backwards to justify the particular outcome, the Court must reason forward to reach a constitutional outcome. However, if the Court is unable to do this in a particular case, at least the Court should be honest about it. The Court must acknowledge that judicial activism, not constitutional mandate, is at work. If the Court does so, then the bad law will be limited to the facts of the particular case. Then, and only then, will the Constitution, and the rights protected within it, survive to protect generations to come.

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* The author would like to thank Professor Christine Wiseman for her assistance and guidance in the revision of this article.