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THE GOOD, THE BAD, AND THE BURGER COURT: VICTIMS' RIGHTS AND A NEW MODEL OF CRIMINAL REVIEW

TIMOTHY P. O'NEILL*

On the final day of the 1982 Term, the United States Supreme Court issued its opinion in *Michigan v. Long*.¹ Although primarily a fourth amendment decision,² *Long*'s true significance lies in its establishment of a new test for determining when a state decision rests on independent and adequate state grounds, thus precluding federal review. The Court held that when such a decision either appears to rest on or be "interwoven" with federal law, and when the independence or adequacy of a state ground is not clear from the opinion, the Court will presume that the federal grounds were primarily relied upon.³ This new test undoubtedly will increase the number of prosecution appeals from state court criminal decisions that the Supreme Court will review. Consequently, it is important to ask why this Court, which has continually bemoaned its swollen docket,⁴ would voluntarily seek to expand the number of cases available for its review.

The most intriguing portion of the *Long* case was the dissent filed by Justice Stevens.⁵ Repeating a theme he had sounded in previous opin-

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¹ 103 S. Ct. 3469 (1983).

² *Id.* The Court expanded the scope of a *Terry* search, *Terry v. Ohio*, 392 U.S. 1 (1968), in holding that a police officer may conduct a limited protective search of a suspect's vehicle as well as the suspect's person. The vehicle search must be based upon a reasonable belief that the suspect is dangerous and may gain immediate access to a weapon. The scope of the search is limited to the areas of the vehicle that may conceal a readily accessible weapon. 103 S. Ct. at 3480.

³ 103 S. Ct. at 3476.

⁴ See Brennan, *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230 (1983); Burger, *Rx for an Overburdened Supreme Court: Is Relief in Sight?*, 66 JUDICATURE 394, 407 (1983).

⁵ 103 S. Ct. at 3489 (Stevens, J., dissenting).

ions during the Term,⁶ Justice Stevens questioned the Court's interest in reviewing state criminal cases in which the defendant had prevailed below. Reasoning that the task of the Supreme Court is to vindicate an individual's federal constitutional rights, Justice Stevens argued that the Court should have no interest in reviewing cases in which state courts have merely "overprotected" a criminal defendant.⁷ Perhaps inadvertently, Justice Stevens highlighted a nascent trend in Supreme Court jurisprudence that deserves close attention.

Traditionally, Supreme Court review of criminal cases has proceeded on two levels. On one level, of course, the Court is determining whether the rights of the particular defendant in the case at bar were violated. On a higher level, however, the Court selects such cases for the purpose of fine-tuning the rights of all citizens versus the machinery of government. By the time his case reached the Supreme Court, for example, Ernesto Miranda ceased being a small-time hoodlum and instead functioned as a representative for each and every American citizen.⁸ The rights Miranda was found to possess were rights all citizens thus possessed against the government.

A new model appears to be replacing the traditional "citizens versus government" model of criminal appellate review in the Supreme Court. Instead of viewing the criminal case as a tension merely between the government and the citizen/defendant, the Court now appears to recognize a separate tension between what it perceives as two discrete classes of citizens who have conflicting interests. Throughout several criminal decisions of the 1982 Term, the Court seems to have viewed the criminal case as an opportunity to adjudicate the respective constitutional rights of the law-abiding ("good citizens") and the criminals ("bad citizens"). The Court perceives this tension, moreover, as a zero-sum game: gains in rights for the "criminal class" result in losses for the law-abiding. Arguably linked to the growing interest both in "victims' rights" and the "rights" of law-abiding citizens in general,⁹ this new "good citizen/bad citizen" dichotomy has had a profound effect on the types of criminal cases the Court has recently accepted for review.¹⁰ A still more significant change is the Court's apparent use of this dichotomy to decide which criminal defendants will have their rights vindicated and which defendants will not. As will be demonstrated, the

⁶ See *California v. Ramos*, 103 S. Ct. 3446, 3668 (1983) (Stevens, J., dissenting); *South Dakota v. Neville*, 103 S. Ct. 916, 924 (1983) (Stevens, J., dissenting).

⁷ 103 S. Ct. at 3490.

⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966), established the now-famous "Miranda warnings" that the police must provide to an individual prior to any custodial interrogation.

⁹ See *infra* notes 25-37 and accompanying text.

¹⁰ See *infra* notes 41-46 and accompanying text.

Supreme Court during its 1982 Term was most protective of defendants who were in positions in which the "good citizens" of the law-abiding middle class might conceivably find themselves; conversely, it consistently ruled against prisoners, indigents, the insane, and other members of the "criminal class."

This Article will analyze the Court's new interest in protecting "good citizens" by first examining the traditional model, in which the Supreme Court viewed a criminal case as a conflict solely between the government and the citizen/defendant. Next, it discusses the rise of "victims' rights" organizations which have challenged the old premise that third parties have no "standing" in a criminal case. I suggest that this spirit has helped create a new model for analyzing criminal cases. This new model questions whether expanding the rights of a citizen/defendant in a particular case should always be viewed as a victory for citizens as a whole against government; to the contrary, according to the new model, such a decision often redounds to the benefit of "bad citizens" and works to the detriment of "good citizens." Finally, the Article examines how this interest in the rights of "good citizens" has affected not only the kinds of criminal cases the Court is accepting for review, but the actual disposition of the cases as well.

I. THE TRADITIONAL MODEL

A criminal case pits the machinery of government against the individual citizen/defendant. The "traditional model," as I refer to it, is a system of review in which the rights of citizens in general are developed through a series of confrontations between the government and specific citizen/defendants. When the reviewing court determines the rights of the defendant in the case at bar, it is indirectly defining the rights of citizens in general. Thus, when the Supreme Court granted Ernesto Miranda's petition for certiorari, the narrow question facing the Court was whether any of Miranda's federal constitutional rights had been violated. The Court's eventual decision in *Miranda v. Arizona* not only decided Ernesto Miranda's case, but also further refined the great balance between the rights of all citizens and the powers of government. This idea that the rights of citizens as a whole are often honed through disputes between the government and the most unsavory of the citizenry was eloquently described by Justice Frankfurter, who noted:

It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people. And so, while we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes

expressed by the Fourth Amendment.¹¹

The "traditional model" is also rooted in established concepts of federalism. According to this model, the only rights that the United States Supreme Court can vindicate in a state criminal prosecution are the federal rights of a particular criminal defendant. Justice Stevens, dissenting in *Michigan v. Long*, summarized this aspect of the "traditional model" when he questioned what interest the Supreme Court could have in a case in which a state court had acquitted the state defendant charged with possession of drugs:

In this case the State of Michigan has arrested one of its citizens and the Michigan Supreme Court has decided to turn him loose. The respondent is a United States citizen as well as a Michigan citizen, but since there is no claim that he has been mistreated by the State of Michigan, the final outcome of the state processes offended no federal interest whatever. Michigan simply provided greater protection to one of its citizens than some other State might provide or, indeed, than this Court might require throughout the country.¹²

Justice Stevens did not suggest that any other group of citizens could have had an interest in the outcome of the case. Nowhere did he intimate, for example, that the law-abiding citizens of Michigan might have an interest in seeing that both state and federal drug laws are enforced. In fact, consider Justice Stevens' analogy of this case to that of a United States citizen abroad:

[Cases such as this] should not be of inherent concern to this Court. The reason may be illuminated by assuming that the events underlying this case had arisen in another country, perhaps the Republic of Finland. If the Finnish police had arrested a Finnish citizen for possession of marijuana, and the Finnish courts had turned him loose, *no American would have standing to object*. If instead they had arrested an American citizen and acquitted him, we might have been concerned about the arrest but we surely could not have complained about the acquittal, even if the Finnish Court had based its decision on its understanding of the United States Constitution. That would be true even if we had a treaty with Finland requiring it to respect the rights of American citizens under the United States Constitution. We would only be motivated to intervene if an American citizen were unfairly arrested, tried, and convicted by the foreign tribunal.¹³

Note the presumptions made. Justice Stevens posits that the United States Supreme Court's only interest is whether Citizen Long's rights have been violated. Thus, the argument goes, the Court has absolutely no interest in whether the law-abiding United States citizens of Michigan believed that the Michigan Supreme Court had violated their interest in strict enforcement of drug laws. Justice Stevens intimates that a

¹¹ *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

¹² 103 S. Ct. at 3490 (Stevens, J., dissenting).

¹³ *Id.* (Stevens, J., dissenting) (emphasis supplied).

petition from those citizens expressing such an interest would be accorded the same respect that the Court would extend to a petition from citizens of a foreign country. It is an analogy at which law-abiding Michigan citizens might well take offense.

Yet Justice Stevens was by no means incorrect in his characterization of either the federal system or the Court's traditional role in criminal cases. Indeed, the Justice may have been guilty of an understatement when he wrote that if the Finnish police had arrested a Finnish citizen for a drug violation and the Finnish court had released him, no American would have standing to object.¹⁴ Indeed, if the FBI arrests an *American* citizen for a crime and the federal courts turn him loose, no American citizen other than the defendant has standing to object.

The lack of third-party standing in criminal cases was emphasized by the Supreme Court in *Linda R.S. v. Richard D.*¹⁵ In that case, the mother of an illegitimate child brought a class action seeking to enjoin the local district attorney from prosecuting nonsupport cases only against the fathers of legitimate children. In holding for the district attorney,¹⁶ the majority opinion noted:

The Court's prior decisions consistently hold that a citizen lacks standing to contest the policies of the prosecuting authority when he himself is neither prosecuted nor threatened with prosecution. . . . [I]n American jurisprudence at least, a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another.¹⁷

The ordinary law-abiding citizen, whether an actual victim of a crime or a member of the community at large, is given no role in traditional American criminal prosecutions. The criminal prosecution is solely a matter between the state and the criminal defendant.¹⁸

Two distinct forces have combined to produce the state of affairs described in *Linda R.S.* The first was the trend in common law from

¹⁴ *Id.* (Stevens, J., dissenting).

¹⁵ 410 U.S. 614 (1973).

¹⁶ *Id.* at 619. Because the statute in question created a criminal penalty rather than a civil remedy, the Court held that the plaintiff did not have standing to compel the prosecutor to act. *See id.* at 618; *see also infra* text accompanying note 20. *But cf.* Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 Miss. L.J. 515, 550-54 (1982) (criticism of *Linda R.S.* on the ground that some types of government prosecutions properly warrant citizen participation).

¹⁷ 410 U.S. at 619 (citations omitted). *See* *Younger v. Harris*, 401 U.S. 37, 42 (1971); *Bailey v. Patterson*, 369 U.S. 31, 32 (1962); *Poe v. Ullman*, 367 U.S. 497, 501 (1961).

¹⁸ *See supra* note 17 and accompanying text. *See generally* Goldstein, *supra* note 16, at 518-20; Hall, *Interrelations of Criminal Law and Torts* (pts. I & II), 43 COLUM. L. REV. 753 (1943), 43 COLUM. L. REV. 967 (1943); Note, *Private Prosecution—The Entrenched Anomaly*, 50 N.C.L. REV. 1171 (1972); Annot., 66 A.L.R.3d 732 (1975).

private to public prosecution.¹⁹ The second force is reflected in the very character of both our state and federal constitutions. These documents essentially *prohibit* the government from interfering with citizens; they rarely require that government promote positive goals.²⁰ This idea has been brought sharply into focus with the recent proliferation of suits initiated by crime victims against the state and its agents alleging malfeasance in allowing a dangerous individual under state control to return to society and harm the plaintiff.²¹ Plaintiffs have had little success in these suits, for reasons most starkly stated in *Bowers v. DeVito*.²² In that case, the estate of a murdered young woman brought suit against the Illinois Department of Mental Health and Developmental Disabilities. The woman's assailant had been committed to the department after being found not guilty by reason of insanity of the murder of another young woman. One year after his release, the man killed Ms. Bowers. Her estate charged the department with knowledge of the assailant's dangerousness and with recklessness in placing him back into the community.

In holding that the plaintiff failed to state a cause of action under 42 U.S.C. § 1983,²³ Judge Posner, speaking for the Seventh Circuit, announced:

[T]here is no constitutional right to be protected by the state against being murdered by criminals or madmen. It is monstrous if the state fails to protect its residents against such predators but it does not violate the

¹⁹ See *supra* note 18 and authorities cited therein. For an interesting historical perspective of the movement in England towards public prosecution of crimes, see Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U. CHI. L. REV. 1, 55-84 (1983).

²⁰ See *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982). For a discussion of *Bowers*, see *infra* notes 22-24 and accompanying text. See also *Doe v. South Fla. State Hosp.*, 549 F. Supp. 838, 840-41 (S.D. Fla. 1982) (following *Bowers*). But see generally L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 5-22 (1978) (contending that local governments must provide citizens with certain services).

²¹ See, e.g., *Martinez v. California*, 444 U.S. 277 (1980); *Bowers v. DeVito*, 686 F.2d 616 (7th Cir. 1982); *Doe v. South Fla. State Hosp.*, 549 F. Supp. 838 (S.D. Fla. 1982); *Doyle v. United States*, 530 F. Supp. 1278 (C.D. Cal. 1982). Cf. *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (imposing limited duty on therapists to warn foreseeable victims of threats posed by dangerous patients, but recognizing immunity of government therapists and police for certain decisions as to whether to confine an individual).

²² 686 F.2d 616 (7th Cir. 1982).

²³ 42 U.S.C. § 1983 (Supp. V 1981) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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 and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

due process clause of the Fourteenth Amendment or, we suppose, any other provision of the Constitution. The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order.²⁴

Faced with this response from the courts, it is not surprising that America is currently witnessing the rise of a popular movement that proclaims that victims of crimes—and law-abiding citizens in general—do indeed have “rights” under the criminal law.

II. THE VICTIMS’ RIGHTS MOVEMENT

Historically, victims of crimes have had very few rights or remedies. Since the early eighteenth century, when crimes began to be viewed as wrongs against the state, government officials have maintained almost absolute control over criminal proceedings against alleged perpetrators.²⁵ Victims’ roles in the process became increasingly ill-defined, resulting in victims’ alienation from criminal prosecutions. As witnesses for the state, the victims often were left ignored and uninformed in courthouse hallways.²⁶ As aggrieved members of society, the victims had little hope for compensation from either the “judgment proof” defendants²⁷ or from the state. Particularly during the past few decades, while American courts were paying increased attention to the rights of criminal defendants, little attention was paid to their victims. In response to this state of affairs, “good citizens” have begun to clamor for more protection.

The “victims’ rights” movement has manifested itself in a diverse array of grass roots organizations such as the Crime Victims Legal Advocacy Institute,²⁸ Mothers Against Drunk Drivers,²⁹ and the Guardian

²⁴ 686 F.2d at 618.

²⁵ See generally Goldstein, *Prosecution: History of the Public Prosecutor*, in *ENCYCLOPEDIA OF CRIME AND JUSTICE* 1286 (S. Kadish ed. 1983); Goldstein, *supra* note 16, at 515-20; Note, *supra* note 18, at 1171-73; Note, *Compensating Victims of Crimes: Evolving Concept or Dying Theory?*, 82 W. VA. L. REV. 89, 90-91 (1979-80) [hereinafter cited as Note, *Compensating Victims*].

²⁶ See Goldstein, *supra* note 16, at 519-20 (noting that the victim is alienated from participation in the criminal prosecution because lack of guidance and communication by the prosecutor makes the victim feel uninvolved).

²⁷ Most defendants are not in a financial position that would make obtaining a judgment against them worthwhile. See Goldstein, *supra* note 16, at 521-24; Laster, *Criminal Retribution: A Survey of Its Past History and an Analysis of Its Present Usefulness*, 5 U. RICH. L. REV. 71, 71-98 (1970); Turpen, *The Criminal Injustice System: An Overview of the Oklahoma Victims’ Bill of Rights*, 17 TULSA L.J. 253, 253-59 (1981).

²⁸ The Institute collects and disseminates information about various programs that assist victims throughout the country. In addition, the group lobbies for the improvement of the plight of the victim. For more information about the Institute, contact Frank Carrington,

Angels.³⁰ In response to this movement, many governmental entities at the federal, state, and local levels have enacted programs designed to prepare victims and witnesses for the criminal process, to assist victims in the post-crime adjustment period, and to financially aid victims of crime. To date, twenty-eight states have promulgated some type of "victim compensation" statute.³¹ Although the compensation programs vary in administration, funding, eligibility requirements, and the amount compensated, the programs basically offer financial assistance to victims suffering post-crime economic hardship. Various governmental bodies also have implemented victim/witness programs to assist citizens in their adjustment to courtroom experiences by familiarizing them with criminal procedure, informing them of relevant occurrences in

Executive Director, The Crime Victims Legal Advocacy Institute, Inc., Suite 9, FSM Building, 210 Laskin Road, Virginia Beach, Virginia 23451.

The National Association for Crime Victims' Rights seeks, through a concerted national effort, "to reverse the overconcern for criminals' rights at the expense of victims' rights." The Association can be contacted at P.O. Box 16161, Portland, Oregon 97216.

²⁹ MADD consists of the victims of drunk driving accidents and other concerned citizens who voice their concerns about the drunk driving problem to legislatures, communities, and business groups seeking to eradicate the drunk driving problem. In addition to lobbying for legislative changes, the organization also monitors the decisions of various courts and operates a Victim Outreach Program that aids victims by taking them through the court process step by step. For further information, contact William A. VanDyke, Vice President, Mothers Against Drunk Drivers, 5330 Primrose, Suite 146, Fair Oaks, California 95628.

³⁰ The Guardian Angels are a group of unarmed volunteers who combat crime in various urban areas. After a three month period of physical and legal training, the red beret-clad members patrol subways, buses, streets, ferries, and multiple dwellings in search of crime. For further information, contact the Guardian Angels, c/o Curtis Sliwa, 982 East 89th Street, Brooklyn, New York 11236.

³¹ See ALASKA STAT. §§ 18.67.010-.67.180 (1982); CAL. GOV'T CODE §§ 13959-13974 (West Supp. 1979); CONN. GEN. STAT. ANN. §§ 54-201 to -218 (West Supp. 1983); DEL. CODE ANN. tit. 11, §§ 9001-9017 (1980); FLA. STAT. ANN. §§ 960.01 to .28 (West Supp. 1983); HAWAII REV. STAT. §§ 351-1 to -70 (1976); ILL. REV. STAT. ch. 70, §§ 71-90 (1983); IND. CODE ANN. §§ 16-7-3.6-1 to .6-19 (Burns Supp. 1978); KAN. STAT. ANN. §§ 74-7301 to -7318 (1980); KY. REV. STAT. §§ 346.010 to .190 (1983); MD. ANN. CODE art. 26A, §§ 1-17 (Supp. 1983); MASS. ANN. LAWS ch. 258A, §§ 1-17 (Michie/Law. Co-op. 1980); MICH. COMP. LAWS ANN. §§ 18.351-.368 (West Supp. 1978); MINN. STAT. §§ 299.B.01-.B.17 (1980); MONT. CODE ANN. §§ 53-9-101 to -133 (1979); NEB. REV. STAT. §§ 81-1801 to -1841 (1981); NEV. REV. STAT. §§ 217.010 to .350 (1979); N.J. STAT. ANN. §§ 52:4B-1 to :4B-21 (West Supp. 1983); N.Y. EXEC. LAW §§ 620-635 (McKinney 1982); N.D. CENT. CODE §§ 65-13-01 to -13-20 (Supp. 1983); OHIO REV. CODE ANN. §§ 2743.43, 2743.51 to .72 (Baldwin 1983); OR. REV. STAT. §§ 147.005 to .365 (1983); PA. STAT. ANN. tit. 71, §§ 180-7 to -7.18 (Purdon Supp. 1983); TENN. CODE ANN. §§ 29-13-101 to -13-208 (1980); TEX. REV. CIV. STAT. ANN. art. 8309-1 (Vernon Supp. 1983); VA. CODE §§ 19.2-368.1 to -368.18 (1981); WASH. REV. CODE ANN. §§ 7.68.010-.68.910 (1983); WIS. STAT. ANN. §§ 949.01-.18 (West 1981); see also GA. CODE ANN. §§ 47-518 to -526 (1979) (compensation to person injured while preventing crime); R.I. GEN. LAWS §§ 12-25-1 to -25-14 (1981) (program enacted but not funded); V.I. CODE ANN. tit. 34, §§ 151-177 (1978) (Virgin Islands compensation program); see generally Harland, *Compensating the Victims of Crime*, 14 CRIM. L. BULL. 203 (1978); Comment, *Rehabilitation of the Victims of Crime: An Overview*, 21 UCLA L. REV. 317 (1973); Note, *Compensating Victims*, *supra* note 25.

their cases, and offering counseling and protection.³² Several states now require that victims be granted a "right of allocution" that allows them to voice their views during the defendant's sentencing hearing.³³ In addition, various states have passed so-called "Son-of-Sam" laws that prohibit convicted felons from profiting from their crimes through the sale of book or movie rights.³⁴ In passing the Victim and Witness Prosecution Act of 1982,³⁵ the federal government adopted a number of the aforementioned policies for establishing a more active role for the victims and witnesses in criminal prosecutions.

These developments illustrate the growing feeling that a criminal prosecution must concern itself with more than simply the rights of the criminal defendant. Because many other commentators have documented the rise of victims' rights legislation,³⁶ it is sufficient to note that the Supreme Court's tilt toward the new model in criminal appeals has been paralleled, and perhaps even prompted, by the enactments of the various state legislatures and the proliferation of victim-oriented groups. The cumulative effect is that the long-established principle that "a private citizen lacks a judicially cognizable interest in the prosecution . . . of another"³⁷ is under fire.

III. THE NEW MODEL

Thus, Justice Stevens was quite correct in viewing *Michigan v. Long*

³² See generally VERA INST. OF JUST., FELONY ARRESTS: THEIR PROSECUTION AND DISPOSITION IN NEW YORK CITY COURTS 135-40 (1977); T. WEIGEND, ASSISTING THE VICTIM (Max Planck Inst. for Foreign & Int'l Crim. Law 1981).

³³ See, e.g., ARIZ. REV. STAT. ANN. § 13-702F (Supp. 1983); CAL. PENAL CODE § 1191.1 (West 1982). The "right of allocution," that is, the right to address the court prior to sentencing, has traditionally been a right enjoyed only by defendants.

³⁴ See, e.g., ALA. CODE §§ 41-9-80 to -84 (1982); ARIZ. REV. STAT. ANN. § 13-4202 (1978); GA. CODE ANN. § 27-3401 (1983); IDAHO CODE § 19-5301 (1979); Criminal Victims' Escrow Account Act § 3, ILL. REV. STAT. ch. 70, § 403 (1983); KY. REV. STAT. § 346.165 (Supp. 1980); MASS. GEN. LAWS ANN. ch. 258A, § 8 (West Supp. 1981); MINN. STAT. ANN. § 299B.17 (West Supp. 1983); NEB. REV. STAT. § 81-1836 (1981); N.Y. EXEC. LAW § 632-a (McKinney 1982); S.C. CODE ANN. §§ 15-59-40 to -59-80 (Law. Co-op. Supp. 1983); TENN. CODE ANN. §§ 29-13-201 to -208 (1980); TEX. REV. CIV. STAT. ANN. art. 8309-1, §§ 16-18 (Vernon Supp. 1983); WASH. REV. CODE ANN. § 7.68.200 (Supp. 1983). For excellent studies of the issues raised by "Son of Sam" statutes, see Comment, *Compensating the Victim from the Proceeds of the Criminal's Story—The Constitutionality of the New York Approach*, 14 COLUM. J.L. & SOC. PROBS. 93 (1978); Note, *Criminals-Turned-Authors: Victims' Rights v. Freedom of Speech*, 54 IND. L.J. 443 (1979); Comment, *In Cold Type: Statutory Approaches to the Problem of the Offender as Author*, 71 J. CRIM. L. & CRIMINOLOGY 255 (1980).

³⁵ 18 U.S.C. §§ 1503, 1505, 1510 (1982). Pursuant to Section 6 of the Act, the Attorney General promulgated guidelines for the Department of Justice. The Attorney General's guidelines bear a great resemblance to the typical state victim programs. See *Attorney General Issues Guidelines for Victim, Witness Assistance*, 33 CRIM. L. REP. (BNA) No. 17, at 1066 (Aug. 3, 1983).

³⁶ See *supra* notes 16, 25, 27, 31-32, 34-35.

³⁷ *Linda R.S.*, 410 U.S. at 619.

as representative of a shift in the Court's traditional analysis of criminal cases.³⁸ *Long* did not involve a situation in which the lower courts violated a defendant's federal constitutional rights; clearly, *Long* did not need any help from the United States Supreme Court. Under the traditional model, the Michigan Supreme Court's liberal construction of search and seizure law would have been of little concern to the Court because *Long*, as representative of all Michigan citizens, emerged as a "winner" in the balancing of individual rights against governmental powers. If *Long* was not aggrieved, then no one else could possibly have been injured.

The new model questions this assumption. It would find that the Michigan Supreme Court's decision in *Long* caused Michigan's "good citizens" to feel less secure knowing that now it would be more difficult for the police to search for contraband. This model divides citizens into two groups—those who are law-abiding and those who are criminal. Lower court decisions that favor defendants do not redound to the benefit of all citizens, as the traditional model of "individual versus the state" intimated. Rather, the interests of the two groups are inversely related—gains for criminals result in losses for the law-abiding. In a case such as *Long*, the Supreme Court continues its role as vindicator of federal rights; yet here the "rights" being vindicated are those of "law-abiding citizens," and not of the defendant. Considered in this light, both the Supreme Court's interest in *Long* and the concerns voiced in Justice Stevens' dissent can best be understood.

IV. EVIDENCE OF THE NEW MODEL

The Court's opinion in *Long*, of course, makes no explicit mention of this "good citizen/bad citizen" dichotomy. Yet evidence of the new concern can be seen in several other aspects of the 1982 Term: first, by the continued increase in the number of prosecution appeals in state criminal cases being entertained by the Court; second, through several other decisions, notably *South Dakota v. Neville*³⁹ and *California v. Ramos*,⁴⁰ in which Justice Stevens expressed sentiments similar to those that he expressed in *Long*; and third, and most clearly, through a fascinating series of comments made by Chief Justice Burger in three opinions deliv-

³⁸ *Long*, 103 S. Ct. at 3489-90 (Stevens, J., dissenting). See, e.g., *California v. Ramos*, 103 S. Ct. 3446 (1983); *Illinois v. Andreas*, 103 S. Ct. 3319 (1983); *Florida v. Casal*, 103 S. Ct. 3100 (1983); *Oregon v. Bradshaw*, 103 S. Ct. 2830 (1983); *Illinois v. Lafayette*, 103 S. Ct. 2605 (1983); *Illinois v. Gates*, 103 S. Ct. 2317 (1983); *Texas v. Brown*, 103 S. Ct. 1535 (1983); *Connecticut v. Johnson*, 103 S. Ct. 969 (1983); *South Dakota v. Neville*, 103 S. Ct. 916 (1983); *Missouri v. Hunter*, 103 S. Ct. 673 (1983). In all these cases, the Supreme Court granted certiorari to review state court decisions favorable to the individual defendant.

³⁹ 103 S. Ct. 916, 924 (1983) (Stevens, J., dissenting).

⁴⁰ 103 S. Ct. 3446, 3468 (1983) (Stevens, J., dissenting).

ered during the ten weeks prior to the decisions in *Michigan v. Long* and *California v. Ramos*.

A. THE INCREASE OF PROSECUTION APPEALS FROM STATE COURT CRIMINAL DECISIONS

The Court's interest in protecting "good citizens" from state court decisions that favor "bad citizens" is reflected in the increasing number of prosecution appeals in which certiorari is being granted.

Justice Stevens' dissent in *Long* succinctly described the recent dramatic increase of cases, both civil and criminal, in which the Court is reviewing a request by a state to have its own judiciary reversed. Justice Stevens noted that "[u]ntil recently we had virtually no interest in cases of this type."⁴¹ He went on to say that thirty years before, the Court had reviewed only one such case.⁴² Fifteen years before, the Court had reviewed no prosecution appeals, although it did deny three petitions for certiorari.⁴³ Justice Stevens opined that the Court's position shifted around the time of *Zacchini v. Scripps-Howard Broadcasting Co.*,⁴⁴ and he characterized the Court's recent docket as being "swollen with requests by states to reverse judgments that their courts have rendered in favor of their citizens."⁴⁵ Justice Stevens noted that the Court had heard argument in thirteen such cases during the 1982 Term, and at least eighty such certiorari petitions had already been filed.⁴⁶ Certainly the *Long* decision will do nothing to decelerate the trend.

B. SOUTH DAKOTA V. NEVILLE AND CALIFORNIA V. RAMOS

In a variety of cases decided earlier in the Term, Justice Stevens criticized the Court's tendency to meddle in areas that were properly under the control of state courts.⁴⁷ On several occasions, he chastised the Court for engaging in factfinding that properly belonged to state courts⁴⁸ and for erroneously finding federal questions lurking in state

⁴¹ *Michigan v. Long*, 103 S. Ct. at 3491 (Stevens, J., dissenting).

⁴² *Id.* (Stevens, J., dissenting) (citing *Nevada v. Stacher*, 358 U.S. 907 (1953)).

⁴³ 103 S. Ct. at 3491 n.2 (Stevens, J., dissenting).

⁴⁴ 433 U.S. 562 (1977). The *Zacchini* Court held that the news media is not immune from liability for invasion of privacy when it publishes a performer's entire act without that performer's permission to do so. Justice Stevens, in dissent, noted that he would have remanded the case to the Ohio Supreme Court for clarification concerning whether the holding rested on a separate and adequate state ground. *Id.* at 582-83 (Stevens, J., dissenting).

⁴⁵ *Long*, 103 S. Ct. at 3491 (Stevens, J., dissenting).

⁴⁶ *Id.* at n.3.

⁴⁷ Justice Stevens expressed similar views in an article generally critical of the Court's selection of cases. See Stevens, *Some Thoughts on Judicial Restraint*, 66 JUDICATURE 177, 180-81 (1982).

⁴⁸ See *Illinois v. Andreas*, 103 S. Ct. at 3330 n.* (1983) (Stevens, J., dissenting) (criticizing the majority for engaging in a state-reserved factual determination as to whether a desk may

court decisions.⁴⁹ In two of these cases, Justice Stevens took positions against the majority similar to his stance in *Long*. Not surprisingly, they also involved prosecution appeals in which, arguably, the Court chose to protect "good citizens" despite the fact that traditional federal interests were simply not at stake.

*South Dakota v. Neville*⁵⁰ concerned a state statute providing that a person suspected of driving while intoxicated could refuse to take a blood-alcohol test, but emphasizing that such a refusal could be used as evidence against him or her at a subsequent drunk-driving prosecution. The South Dakota Supreme Court found that the introduction of such evidence violated both the federal and state privileges against self-incrimination. In a 7-2 decision with Justices Stevens and Marshall dissenting, the Supreme Court reversed, finding no violation of the fifth amendment.

Before reaching the merits of the case, the Court had to explain why the lower court's decision did not rest on independent and adequate state grounds. The majority opinion held that although the South Dakota Supreme Court's reference to its state constitution may have provided an *adequate* state ground for its decision, its opinion did not rest on an *independent* state ground.⁵¹ The Court stated, "Rather, we think the [South Dakota] court determined that admission of this evidence violated the Fifth Amendment privilege against self-incrimination, and then concluded without further analysis that the state privilege was violated as well."⁵²

Finding that the South Dakota decision had indeed rested on an independent and adequate state ground, Justice Stevens, in an opinion joined by Justice Marshall, wrote, "If a state court judgment is premised on an adequate state ground, that ground must be presumed independent unless the state court suggests otherwise."⁵³ He went on to argue that the burden was on the petitioner to establish jurisdiction, and observed that the Court's practice had been to dismiss cases as long as a

have contained contraband); *Illinois v. Gates*, 103 S. Ct. at 2361 (Stevens, J., dissenting) (criticizing the majority for attaching no weight to the factual determinations of the state court that is better able to evaluate the facts); *Texas v. Brown*, 103 S. Ct. at 1548 (Stevens, J., concurring in the judgment) (fact-bound inquiries not made by the Texas courts should not be made by the Supreme Court).

⁴⁹ See *City of Revere v. Massachusetts Gen. Hosp.*, 103 S. Ct. 2979, 2984-85 (1983) (Stevens, J., concurring in the judgment) (although the Court had the power to hear case, it was an unwise exercise of discretion); *Connecticut v. Johnson*, 103 S. Ct. at 978-79 & n.4 (Stevens, J., concurring in the judgment) (because a state is not required to apply the *Chapman* harmless error test, no federal question arises if a state declines to apply the test).

⁵⁰ 103 S. Ct. 916 (1983).

⁵¹ *Id.* at 919 n.5.

⁵² *Id.*

⁵³ *Id.* at 925-26 (Stevens, J., dissenting).

state decision even “*might* have rested on an independent and adequate state ground.”⁵⁴ Justice Stevens asserted that “[u]nless we have explicit notice that a provision of a State Constitution is intended to be a mere shadow of the comparable provision in the Federal Constitution, it is presumptuous—if not paternalistic—for this Court to make that assumption on its own.”⁵⁵

Faced with this conflicting view, why was the Court so anxious to decide *Neville* and render what Justice Stevens cuttingly referred to as an “advisory opinion”?⁵⁶ On the surface, *Neville* appeared to be a particularly poor case in which to have granted a petition for certiorari. First, as in *Long*, the defendant certainly had not been denied any federal constitutional right by the South Dakota courts. Second, the South Dakota Supreme Court’s decision that the statute violated the right against self-incrimination placed the court within a distinct minority of jurisdictions that had decided the issue;⁵⁷ there was little danger that its arguably improper view of the fifth amendment would extend much beyond the Black Hills.⁵⁸ Third, it was particularly odd to doubt that the South Dakota Constitution would not provide an independent and adequate state ground. Seven years before, the United States Supreme Court in *South Dakota v. Opperman*⁵⁹ reversed the South Dakota Supreme Court and found a police inventory search of a vehicle to be proper under the fourth amendment. On remand, the South Dakota Supreme Court found the search to be violative of its state constitution and noted: “We have always assumed the independent nature of our state constitution regardless of any similarity between the language of that document and the federal constitution.”⁶⁰

Obviously, the Supreme Court must have felt there was more at stake in *Neville* than merely correcting a decidedly minority view of the fifth amendment. The Court’s interest in vindicating the rights of the law-abiding is suggested by the fact that the majority opinion’s analysis, written by Justice O’Connor, began not with a review of fifth amendment principles, but rather with this introduction:

The situation underlying this case—that of the drunk driver—occurs

⁵⁴ *Id.* at 926 n.4 (Stevens, J., dissenting) (emphasis in original).

⁵⁵ *Id.* at 925 (Stevens, J., dissenting).

⁵⁶ *Id.* at 924 (Stevens, J., dissenting).

⁵⁷ *Id.* at 921.

⁵⁸ Indeed, the mere fact that a decision conflicts with a ruling of the United States Supreme Court is no guarantee that a petition for certiorari will be granted. For an interesting discussion, see *Brown Transp. Corp. v. Atcon, Inc.*, 439 U.S. 1014 (1978) (White, J., dissenting from denial of certiorari).

⁵⁹ 428 U.S. 364 (1976) (approving concept of “inventory searches” at police stations).

⁶⁰ *State v. Opperman*, 247 N.W.2d 673, 674 (S.D. 1976). See also *South Dakota v. Neville*, 103 S. Ct. at 926 n.5 (Stevens, J., dissenting) (discussing *Opperman*).

with tragic frequency on our Nation's highways. The carnage caused by drunk drivers is well documented and needs no detailed recitation here. This Court, although not having the daily contact with the problem that the state courts have, has repeatedly lamented the tragedy. See *Breithaupt v. Abram*, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield"); *Tate v. Short*, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring) (deploring "traffic irresponsibility and the frightful carnage it spews upon our highways"); *Perez v. Campbell*, 402 U.S. 637, 657 and 672 (1971) (Blackmun, J., concurring) ("The slaughter on the highways of this Nation exceeds the death toll of all our wars"); *Mackey v. Montrym*, 443 U.S. 1, 17-18 (1979) (recognizing the "compelling interest in highway safety").⁶¹

With *Neville*, and again later in the term in *Illinois v. Batchelder*,⁶² the Court signaled its intention to join the fight of the "good citizens" against drunk drivers even though federal interests as traditionally conceived did not appear to be at stake.

It could be contended that the federal constitutional issues at stake in *Neville* simply were not serious enough to merit a grant of certiorari. Yet that perception pales when compared to the Court's decision to review a California Supreme Court decision in *California v. Ramos*.⁶³

Ramos involved yet another appeal by a state attorney general, asking the Supreme Court to reverse a criminal decision of the state's highest court. As in *Long* and *Neville*, the Supreme Court reversed the state court in a majority opinion by Justice O'Connor, with Justice Stevens filing a dissent.⁶⁴

The issue in *Ramos* was the constitutionality of a jury instruction given at the sentencing phase of capital cases in California. The jury's choice at that point is to sentence the convicted murderer to death or to life imprisonment without possibility of parole.⁶⁵ In 1978, the voters of

⁶¹ 103 S. Ct. at 920.

⁶² 103 S. Ct. 3513 (1983) (per curiam). The Court summarily reversed the Illinois Appellate Court and held that the United States Constitution did not require a police officer, in enforcing an implied consent statute, to recite in an affidavit the specific and concrete matter that led him to believe that a defendant was driving while intoxicated. The majority opinion admitted that the Court decided the case summarily because of its concern that the decision of the Illinois Appellate Court would have an adverse effect on the effort to halt the "carnage" on our nation's highways. *Id.* at 3516. In dissent, Justices Stevens, Brennan, and Marshall could find no reason why the case had to be decided without either briefing or oral argument. *Id.* at 3517 (Stevens, J., dissenting).

⁶³ 103 S. Ct. 3446 (1983).

⁶⁴ *Ramos*, 103 S. Ct. 3446, and *Long*, 103 S. Ct. 3469, were each decided on July 6, 1983.

⁶⁵ The statute provides:

After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall impose a sentence of death if the trier of fact concludes that the aggravating circumstances outweigh the mitigating circumstances. If the trier of fact determines

the State of California, through a statewide voter initiative that reinstated the death penalty, amended the California Penal Code to mandate that a particular jury instruction be given in all death penalty cases.⁶⁶ That instruction informed the jury that a sentence of life imprisonment without possibility of parole later could be commuted by the governor to a sentence that included the possibility of parole.⁶⁷ The California Supreme Court subsequently found that this instruction, commonly referred to as the "Briggs Instruction," violated the fifth, eighth, and fourteenth amendments to the United States Constitution because it admitted irrelevant and arbitrary considerations to the death sentence determination, and it failed to inform the jury of the governor's power to likewise commute an imposition of the death penalty.⁶⁸ The United States Supreme Court granted the California attorney general's petition for certiorari and reversed, finding no federal constitutional violation.

Just why the Court accepted this case is not easy to fathom. It was hardly a constitutional issue for which the states breathlessly awaited a Supreme Court decision. Justice Marshall, in dissent,⁶⁹ noted that twenty-eight states other than California had considered the same issue. Of those states, twenty-five had held the instruction to be improper.⁷⁰ On this point, moreover, even the majority opinion conceded that in many of those jurisdictions, the decision appeared to be based not on federal constitutional principles, but rather on state statutory grounds.⁷¹ Whether the *Ramos* decision will have substantial impact—indeed, whether it will even change the final decision of the California courts⁷²—is a matter of considerable doubt.

This provides the background for Justice Stevens' argument that certiorari never should have been granted in *Ramos*. Unlike his dissents in *Long* and *Neville*, Stevens did not argue that the lower court opinion was based on independent and adequate state grounds. Rather, he

that the mitigating circumstances outweigh the aggravating circumstances the trier of fact shall impose a sentence of confinement in state prison for a term of life without the possibility of parole.

CAL. PENAL CODE § 190.3 (West Supp. 1984).

⁶⁶ Initiative measure approved on November 7, 1978.

⁶⁷ The new amendment provided:

The trier of fact shall be instructed that a sentence of confinement to state prison for a term of life without the possibility of parole may in future after sentence is imposed, be commuted or modified to a sentence that includes the possibility of parole by the Governor of the State of California.

CAL. PENAL CODE § 190.3 (West Supp. 1984).

⁶⁸ *People v. Ramos*, 30 Cal. 3d 553, 639 P.2d 908, 180 Cal. Rptr. 266 (1982).

⁶⁹ 103 S. Ct. at 3460 (Marshall, J., dissenting).

⁷⁰ *Id.* at 3466 & n.13 (Marshall, J., dissenting).

⁷¹ *Id.* at 3459 n.30.

⁷² The case currently is pending on remand to the California Supreme Court.

questioned whether the granting of certiorari in this case represented "a wise use of the Court's scarce resources,"⁷³ asking:

Why, I ask with all due respect, did not the Justices who voted to grant certiorari in this case allow the wisdom of state judges to prevail in California, especially when they have taken a position consistent with those of state judges in [twenty-five other states]?⁷⁴

I repeat, no rule of law commanded the Court to grant certiorari. No other State would have been required to follow the California precedent if it had been permitted to stand.⁷⁴

Ramos is yet another case in which no federal right of the criminal defendant had been violated by the state courts. Moreover, there was little likelihood that the California Supreme Court decision would have much impact on other jurisdictions. Justice Stevens speculated that the Court's only reason for hearing the case was to "facilitate the imposition of the death penalty in California."⁷⁵ Certainly, the Court's decisions in several 1982 Term death-penalty cases signaled that it would not stand in the way of state decisions to impose the death penalty.⁷⁶ Yet, in all other death cases this Term, the Court was *affirming* state decisions to invoke the death penalty. In *Ramos*, the Supreme Court reversed a state court's decision *not* to invoke it.

A plausible, though unarticulated, reason for the Court's interest in *Ramos* may lie not so much with the substance of the jury instruction, but rather with *how* the instruction had been promulgated. Use of the "Briggs Instruction" had been approved by a statewide voter initiative reinstituting the death penalty. Through the use of such an instruction, the "good citizens" of California agreed to make it slightly easier to have the death penalty imposed; their decision was frustrated when the California Supreme Court voided the instruction based, in the opinion of the United States Supreme Court, on a misinterpretation of federal constitutional law. The real importance of *Ramos* may lie in its suggestion that the United States Supreme Court will come to the aid of "good citizens" whose efforts on behalf of "rational law enforcement"⁷⁷ are

⁷³ 103 S. Ct. at 3468 (Stevens, J., dissenting).

⁷⁴ *Id.* at 3468-69 (Stevens, J., dissenting).

⁷⁵ *Id.* (Stevens, J., dissenting).

⁷⁶ See *Barclay v. Florida*, 103 S. Ct. 3418 (1983) (death penalty may be imposed even though one of "aggravating circumstances" relied upon by trial judge was not one of those included in state death penalty statute); *Barefoot v. Estelle*, 103 S. Ct. 3383 (1983) (no constitutional barrier to admission of psychiatric testimony in a capital case concerning probability of defendant's future dangerousness); *Zant v. Stephens*, 103 S. Ct. 2733 (1983) (death penalty may be imposed even though one of three "aggravating circumstances" found by jury was later found to be unconstitutional); *Alabama v. Evans*, 103 S. Ct. 1736 (1983) (temporary stay of execution vacated; "aggravating factors" of state statute were properly applied); see generally *Lauter, Justices Turn in a Lethal Scorecard in Dealing with Death Penalty Cases*, Nat'l L.J., Aug. 1, 1983, at 3.

⁷⁷ See *Florida v. Casal*, 103 S. Ct. 3100, 3102 (Burger, C.J., concurring).

frustrated by misguided state courts.

Neville, *Ramos*, and *Long* would have been unlikely candidates for the granting of certiorari under the traditional model, which was concerned with whether the individual defendant's rights had been violated by state courts and whether the issue involved was of crucial constitutional significance. Supreme Court review of these cases is supported, however, under the new model's concern with the rights of the law-abiding—the "right" to strict drug enforcement, the "right" to curb drunk drivers, the "right" to impose the death penalty. Moreover, this new concern for the law-abiding has been articulated by the Chief Justice himself.

C. CHIEF JUSTICE BURGER AND THE NEW MODEL

Chief Justice Burger, who was responsible for assigning to Justice O'Connor the majority opinions in *Neville*, *Ramos*, and *Long*,⁷⁸ has perhaps been the Court's most ardent spokesperson on behalf of the rights of the law-abiding. He heralded this shift in focus through his comments in three opinions filed during the 1982 Term.

In *Morris v. Slappy*,⁷⁹ the Chief Justice authored a majority opinion that disdainfully dismissed the Ninth Circuit's holding that the sixth amendment required a "meaningful attorney-client relationship."⁸⁰ The Ninth Circuit had ordered that a third trial be held in a rape prosecution because the court found that defense counsel lacked adequate trial preparation time, despite the fact that the defense counsel had told the trial judge that he had been given sufficient time to prepare. In reversing the order for a new trial, the Chief Justice made the following comment:

In its haste to create a novel Sixth Amendment right, the [Ninth Circuit] wholly failed to take into account *the interest of the victim of these crimes in not undergoing the ordeal of yet a third trial in this case*. Of course, inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused; when prejudicial error is made that clearly impairs a defendant's constitutional rights, the burden of a new trial must

⁷⁸ It is customary that when the Chief Justice is in the majority, he decides which Justice will write the majority opinion. See B. SCHWARTZ, *SUPREME COURT* 29-30 (1983).

⁷⁹ 103 S. Ct. 1610 (1983).

⁸⁰ The defendant in *Slappy* had been represented throughout pretrial proceedings by a deputy public defender. Shortly before trial, the attorney was hospitalized for surgery. Six days before the scheduled trial, a senior trial attorney from the public defender's office was assigned to represent the defendant. After trial began, defendant moved for a continuance, alleging that his attorney did not have time to adequately prepare the case. The attorney denied this and trial resumed. Defendant's convictions eventually were reversed by the Ninth Circuit, which held that the sixth amendment guaranteed a "meaningful attorney-client relationship" and that the denial of the continuance violated this right. See *Slappy v. Morris*, 649 F.2d 718, 719-20 (9th Cir. 1981).

be borne by the prosecution, the courts, and the witnesses; the Constitution permits nothing less. But in the administration of criminal justice, *courts may not ignore the concerns of victims*. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience such as was involved here. *Precisely what weight should be given to the ordeal of reliving such an experience for the third time need not be decided now; but that factor is not to be ignored by the courts.*⁸¹

The Chief Justice cited no authority for this directive that the "concerns of victims" be considered by courts. Consequently, Justice Brennan, who concurred only in the result, noted in a footnote:

Although the Court acknowledges that "inconvenience and embarrassment to witnesses cannot justify failing to enforce constitutional rights of an accused," . . . it nonetheless appears to suggest that the interests of a victim in a particular case should be considered by courts in determining whether to enforce the established rights of a criminal defendant. . . . Such a suggestion finds no support in our cases.⁸²

A month later, the Chief Justice reprised his "victims' rights" theme in *United States v. Hastings*,⁸³ which reversed a decision of the Seventh Circuit granting a new trial because of prosecutorial misconduct. Finding that the Seventh Circuit had acted because it believed that it possessed supervisory power to discipline prosecutors, regardless of whether the prosecutorial conduct involved only harmless error, the Chief Justice chastised the lower court:

It did not consider the trauma the victims of these particularly heinous crimes would experience in a new trial, forcing them to relive harrowing experiences now long past, or the practical problems of retrying these sensitive issues more than four years after the events.⁸⁴

This time the Chief Justice cited to one authority for this proposition—his own opinion in *Morris v. Slappy*. In dissent, Justice Brennan reiterated that the interests of a victim in a particular case are irrelevant vis-a-vis the enforcement of the rights of a criminal defendant.⁸⁵

Several weeks later, the Chief Justice wrote a brief opinion concurring in the Court's dismissal of *Florida v. Casal*.⁸⁶ The opinion forms an intriguing bridge between his own recent comments concerning victims' rights and the decisions in *Long* and *Ramos* soon to follow.

Casal was yet another fourth amendment drug case that the Court

⁸¹ 103 S. Ct. at 1617-18 (emphasis supplied).

⁸² *Id.* at 1625 n.10 (Brennan, J., concurring in the result).

⁸³ 103 S. Ct. 1974 (1983).

⁸⁴ *Id.* at 1979.

⁸⁵ *Id.* at 1990 n.7 (Brennan, J., concurring in part and dissenting in part).

⁸⁶ 103 S. Ct. 3100 (1983) (per curiam) (dismissal on ground that certiorari improvidently granted).

faced during the 1982 Term.⁸⁷ Certiorari originally was granted to consider whether a large quantity of marijuana had been improperly seized from a vessel.⁸⁸ The Court subsequently dismissed the appeal, determining that the writ had been improvidently granted in that the decision below rested on independent and adequate state grounds.

In his concurrence, the Chief Justice stated that he personally did not believe that the seizure had run afoul of either the United States or the Florida Constitution; nevertheless, he joined in the Court's decision to dismiss because the Florida Supreme Court "apparently concluded" that its own state law mandated suppression. The operative state laws were Article I, § 12 of the Florida Constitution,⁸⁹ a provision similar to the fourth amendment to the United States Constitution, and a Florida statute that requires consent or probable cause before a vessel can be given a safety inspection.⁹⁰

With regard to the Florida Constitution, the Chief Justice applauded the citizens of Florida for showing "acute awareness"⁹¹ of the general problem of inconsistency between state and federal constitutions. They exhibited this awareness by recently amending Article I, § 12 to provide that it should be interpreted neither more nor less broadly than the United States Supreme Court interprets the fourth amendment.⁹² The Chief Justice also noted that Floridians possess the same power to amend the *statute* involved in the case, the provisions of which forced the courts to suppress the marijuana that was recovered. He then made a statement neatly placing the entire "good citizen/bad citizen" concept into clear focus:

With our dual system of state and federal laws, administered by parallel state and federal courts, different standards may arise in various areas. But when state courts interpret state law to require *more* than the Federal Constitution requires, the citizens of the state must be aware that they

⁸⁷ See, e.g., *Michigan v. Long*, 103 S. Ct. 3469 (1983); *Illinois v. Andreas*, 103 S. Ct. 3319 (1983); *United States v. Place*, 103 S. Ct. 2637 (1983); *Illinois v. Lafayette*, 103 S. Ct. 2605 (1983); *United States v. Villamonte-Marquez*, 103 S. Ct. 2573 (1983); *Illinois v. Gates*, 103 S. Ct. 2317 (1983); *Florida v. Royer*, 103 S. Ct. 1319 (1983); *United States v. Knotts*, 103 S. Ct. 1081 (1983).

⁸⁸ 103 S. Ct. 50 (1982).

⁸⁹ FLA. CONST. art. 1, § 12.

⁹⁰ FLA. STAT. § 371.58 (1977) (current version at FLA. STAT. ANN. § 327.56 (West Supp. 1983)) provides:

No officer shall board any vessel to make a safety inspection if the owner or operator is not aboard. When the owner or operator is aboard, an officer may board a vessel with consent or when he has probable cause or knowledge to believe that a violation of a provision of this chapter has occurred or is occurring.

FLA. STAT. ANN. § 327.56 (West Supp. 1983).

⁹¹ 103 S. Ct. at 3101 (Burger, C.J., concurring).

⁹² *Id.* at 3101-02 (Burger, C.J., concurring). Because this amendment occurred after the Florida Supreme Court's decision in *Casal*, it had no effect on this case.

have the power to amend state law to ensure rational law enforcement.⁹³

In this brief comment, the Chief Justice articulates three points. First, state courts, through constitutional and statutory interpretation, have the right to "require more," i.e., provide more protection to defendants, than the federal constitution requires. Moreover, the United States Supreme Court is powerless to prevent such action, resulting in a state of affairs that the Chief Justice appears to view somewhat ruefully. Second, law-abiding citizens might very well feel that such actions of state courts inhibit "rational law enforcement," a view apparently shared by the Chief Justice. Third, law-abiding citizens have the right to "amend state law" to curb such state judicial activism.

Three weeks after *Casal*, the Supreme Court would decide *Ramos* and *Long*. The Court's reasons for granting certiorari in these cases become clearer in light of the Chief Justice's comments. Certainly, Justice Stevens is correct that under traditional principles, the Court never would have considered hearing either *Ramos* or *Long*. In both cases, however, the Court was sending the same two messages to law-abiding citizens that Chief Justice Burger communicated in *Casal*. First, *Long* suggested to the law-abiding that the Court was prepared to view its jurisdiction as broadly as possible in order to curb the excesses of those state courts that "require more than the Federal Constitution" and thus retard aggressive law enforcement. Second, *Ramos* additionally implied that the Court would enthusiastically support the efforts of law-abiding citizens "to amend state law" against a recalcitrant state judiciary, even to the point of rendering decisions that ultimately may have no real effect on any jurisdiction.⁹⁴

By the end of the 1982 Term, the Court had made it quite clear that the concerns of crime victims and law-abiding citizens in general were definitely a part of its decisionmaking process in criminal law. The new model had definitely begun to take shape.

V. THE NEW MODEL'S EFFECT ON THE WINNERS AND LOSERS OF THE 1982 TERM

At this point, one might contend that this new model is merely another way of saying that the Supreme Court is "getting tough on crime" or becoming more "anti-defendant." There are two responses to such an interpretation.

First, the Court's interest in disciplining activist state courts has resulted in the Court's accepting a different *kind* of criminal case. The Court is far more willing to grant certiorari in criminal cases involving

⁹³ *Id.* (Burger, C.J., concurring) (emphasis in original).

⁹⁴ See *California v. Ramos*, 103 S. Ct. at 3459-60.

defendants who have suffered no constitutional injury if the Court believes that the state courts have flouted the concerns of law-abiding "good citizens." As previously shown, principles of judicial restraint militated against granting certiorari in *Neville*, *Ramos*, and *Long*. Justice Stevens, in the course of criticizing this tendency of the Burger Court, has remarked: "A willingness to allow the decision of other courts to stand until it is *necessary* to review them is not a characteristic of this Court when it believes that error may have been committed."⁹⁵

Second, it is inaccurate to say merely that the Burger Court is "anti-defendant"; in fact, the Court is hostile only to certain *types* of defendants. One can argue that during the 1982 Term, the Supreme Court consistently ruled against *only those defendants who were in situations in which "good citizens" would be unlikely to find themselves.*

Thus, it is not surprising that the Court ruled against the defendant in every case involving a death row appeal.⁹⁶ Prisoners contesting both inter-prison and intra-prison transfers received no help from the Court.⁹⁷ Restraints were tightened on habeas corpus petitions.⁹⁸ The Court made it significantly more difficult for the criminally insane ever to be released from custody.⁹⁹ Convicted criminals attempting to expunge prior convictions received two setbacks.¹⁰⁰ The Court refused to

⁹⁵ Stevens, *supra* note 47, at 181 (emphasis in original).

⁹⁶ See *California v. Ramos*, 103 S. Ct. 3446 (1983) (reversing state court finding of federal constitutional violation in instructing jury that imposition of sentence of life imprisonment without possibility of parole could be commuted by governor to sentence allowing for parole); *Barclay v. Florida*, 103 S. Ct. 3418 (1983) (upholding state court decision even though it relied upon aggravating circumstance that was not included in statute); *Barefoot v. Estelle*, 103 S. Ct. 3383 (1983) (establishing new guidelines for processing death row appeals in federal courts); *Zant v. Stephens*, 103 S. Ct. 2733 (1983) (upholding state court decision although one of three aggravating circumstances found by jury was later found to be unconstitutional); *Alabama v. Evans*, 103 S. Ct. 1735 (1983) (vacating district court's stay of execution); see generally *Lauter*, *supra* note 76; 33 CRIM. L. REP. (BNA) No. 22, at 4143 (Sept. 7, 1983).

⁹⁷ See *Olim v. Wakinekona*, 103 S. Ct. 1741 (1983) (neither fourteenth amendment nor Hawaii Constitution granted a protected interest prohibiting interstate transfers of prisoners); *Hewitt v. Helms*, 103 S. Ct. 864 (1983) (prisoner can be administratively segregated from general prison population); see generally 33 CRIM. L. REP. (BNA) No. 24, at 4159 (Sept. 21, 1983).

⁹⁸ See *Maggio v. Fulford*, 103 S. Ct. 2261 (1983) (federal reviewing court cannot reassess state court's factual determination of defendant's competency in order to grant habeas relief); *Cardwell v. Taylor*, 103 S. Ct. 2015 (1983) (no habeas review on fourth amendment argument that has been fully and fairly litigated); *Marshall v. Lonberger*, 103 S. Ct. 843 (1983) (state court's factual finding must lack "fair support" in record before finding can be rejected by federal court); *Anderson v. Harless*, 103 S. Ct. 276 (1983) (failure to fully present constitutional claim below was fatal to habeas petition); see generally 33 CRIM. L. REP. (BNA) No. 24, at 4160 (Sept. 21, 1983).

⁹⁹ See *Jones v. United States*, 103 S. Ct. 3043 (1983) (person acquitted by reason of insanity may be held until judged sane even though maximum sentence for original offense has expired).

¹⁰⁰ See *Tuten v. United States*, 103 S. Ct. 1412 (1983) (sentencing court need not expunge

invalidate any statements taken from "confessed" criminals.¹⁰¹ Indigent defendants preparing for trial were told that they had no right to what the Ninth Circuit characterized as a "meaningful attorney-client relationship";¹⁰² the Court informed the same class of defendants that, if convicted, they would have no right to insist that their appointed appellate counsel raise all non-frivolous issues.¹⁰³ Indeed, to call attention to the two major "victories" for criminal defendants during this Term—that a person cannot be given life imprisonment with no possibility of parole for a series of seven non-violent felonies¹⁰⁴ and that an indigent's probation cannot be revoked simply because he currently cannot afford to pay restitution¹⁰⁵—seems almost Dickensian in its irony.

If the Court is interested in vindicating the interests of "good citizens," one would expect it to have dealt with a large number of fourth amendment cases, for there the issue is often whether admittedly "bad citizens" should go free because of a violation of their rights. Indeed, the Court reviewed a large number of fourth amendment cases; they all involved illegal drugs¹⁰⁶ and, almost without exception, the Court affirmed the convictions.¹⁰⁷ Furthermore, the Court was so anxious to decide the "good faith exception" issue that it clumsily ordered reargument in *Illinois v. Gates* solely on that issue,¹⁰⁸ and later "apologize[d]"¹⁰⁹ to the parties for not reaching the issue because it had not been raised below.¹¹⁰

Thus, with few exceptions, the Court found ways to rule against "bad citizens" in criminal cases. This is not to suggest, however, that *all* criminal defendants were given short shrift by the Court. For example,

record of juvenile); *Dickerson v. New Banner Inst., Inc.*, 103 S. Ct. 886 (1983) (post-probation conviction expungement does not allow felon to carry firearms).

¹⁰¹ See *California v. Beheler*, 103 S. Ct. 3517 (1983) (interview of defendant by police in station house five days prior to defendant's arrest did not require *Miranda* warnings); *Oregon v. Bradshaw*, 103 S. Ct. 2830 (1983) (defendant waived fifth amendment rights by initiating conversation with police officer and submitting to polygraph after request for counsel); *Wyrick v. Fields*, 103 S. Ct. 394 (1982) (Eighth Circuit improperly extended *Edwards v. Arizona*, 451 U.S. 477 (1981)).

¹⁰² See *Morris v. Slappy*, 103 S. Ct. at 1615, 1617.

¹⁰³ See *Jones v. Barnes*, 103 S. Ct. 3308 (1983).

¹⁰⁴ See *Solem v. Helm*, 103 S. Ct. 3001 (1983).

¹⁰⁵ See *Bearden v. Georgia*, 103 S. Ct. 2064 (1983).

¹⁰⁶ See *supra* note 87 and accompanying text.

¹⁰⁷ See *supra* note 87 and accompanying text. But see *United States v. Place*, 103 S. Ct. 2637 (1983); *Florida v. Royer*, 103 S. Ct. 1319 (1983).

¹⁰⁸ 103 S. Ct. 436 (1982).

¹⁰⁹ 103 S. Ct. at 2321. In apology, Justice Rehnquist stated that "[w]e decide today, with apologies to all, that the issue we framed for the parties was not presented to the Illinois courts and, accordingly, do not address it." *Id.*

¹¹⁰ It appears that the Court is nevertheless intent on addressing the issue. See *United States v. Leon*, 103 S. Ct. 3535 (1983); *Massachusetts v. Sheppard*, 103 S. Ct. 3534 (1983) (petition for certiorari in each case granted on June 27, 1983).

in *Florida v. Royer*¹¹¹ and *United States v. Place*,¹¹² the Court announced some restrictions on law enforcement officers in detaining people in airports to investigate possible drug violations. In *Kolender v. Lawson*,¹¹³ the Court found a California statute that required persons who loiter or wander on the streets to provide "credible and reliable" identification when stopped by the police to be void for vagueness. In *United States v. Grace*,¹¹⁴ the Court protected the right of peaceful protest on the grounds surrounding the Supreme Court building.

It does not require a Marxist scholar to point out that in these decisions, the Court has come to the aid of the most middle class of interests—to paraphrase, the right of frequent flyers to be free from intrusive luggage searches; the right of joggers not to carry wallets; and the right of political action groups to peacefully picket the Supreme Court. The fact is that the outcome of almost every criminal decision handed down by the Court this past Term could have been correctly predicted by simply asking whether there was any possibility that a law-abiding "good citizen" could ever be in the defendant's position.¹¹⁵ The decisions exhibit a reluctance to come to the aid of those citizens who most need the Court's assistance—that is, the citizens with the least leverage over decisions in the executive and legislative branches. In its rush to

¹¹¹ 103 S. Ct. 1319 (1983).

¹¹² 103 S. Ct. 2637 (1983).

¹¹³ 103 S. Ct. 1855 (1983).

¹¹⁴ 103 S. Ct. 1702 (1983).

¹¹⁵ *But cf.* *United States v. Villamonte-Marquez*, 103 S. Ct. 2573 (1983) (upholding drug conviction of yacht owner); *Simopolous v. Virginia*, 103 S. Ct. 2532 (1983) (upholding conviction of doctor who performed abortion in an unlicensed facility during second trimester of woman's pregnancy in violation of Virginia statute); *South Dakota v. Neville*, 103 S. Ct. 916 (1983) (reversing state court finding that introduction of evidence of one's refusal to take blood alcohol test violated privilege against self-incrimination). Although the cited decisions do not seem to comport with the theory, close analysis reveals that the decisions may be reconciled with the Court's interest in affirming the convictions of "bad people." In *Neville* and *Simopolous*, the Court grapples with conflicting values. On one hand, the defendants are, arguably, solid middle class citizens, not common "criminals." The defendants' transgressions, however, invade areas that are now zealously guarded by the Court. The drunk driver in *Neville* ran afoul of the grassroots movement that has mobilized against the "carnage caused by drunk drivers." *Neville*, 103 S. Ct. at 920. *See also* *Illinois v. Batchelder*, 103 S. Ct. 3513 (1983). The protection of our nation's children from drunk drivers prevailed. Similarly, the doctor in *Simopolous* violated a Virginia statute that required doctors to perform second trimester abortions in a licensed facility. Although a doctor in good standing is an important community asset, the doctor in *Simopolous* violated a statute that protected "an 'important and legitimate interest in the health of the mother' that becomes 'compelling . . . at approximately the end of the first trimester.'" *Simopolous*, 103 S. Ct. at 2536 (quoting *Roe v. Wade*, 410 U.S. 113, 163 (1973)). Again, the Court in *Simopolous* chose to protect what it deemed to be the greater middle class interest, i.e., safe abortions. Similarly, *Villamonte-Marquez* involved another middle class concern—controlling drug traffic. Moreover, Justice Rehnquist assured yacht owners that the customs agents' actions approved in the case would constitute only a "limited" intrusion on their nautical activities. 103 S. Ct. at 2582.

champion the rights of the "forgotten middle class," the Court is coming perilously close to removing itself as the one forum in which truly forgotten Americans occasionally have found relief.

VI. CONCLUSION

The Supreme Court's heightened interest in reviewing prosecution appeals, as dramatically exemplified in *Michigan v. Long*, marks the emergence of a new model of criminal appellate review. Whereas the traditional model saw the Court as a protector of an individual defendant's rights against unconstitutional state action, the new model installs the Court as champion of the "rights" of good citizens in their fight against lower court decisions favoring bad citizens. This interest in the "rights" of the law-abiding has manifested itself in two discrete ways. First, the court has been increasingly willing to ignore principles of judicial restraint if selecting a particular case for review will serve to correct a lower court's failure to consider adequately the rights of "good citizens." Second, in its 1982 Term criminal decisions, the Court seemed most reluctant to come to the aid of any defendant who sought constitutional protection from a position in which no "good citizen" would ever be found.

The "victims' rights movement" has been very effective in reminding the judiciary that the interests of victims, witnesses, and the law-abiding have been overlooked for too long. Precisely how these considerations should interface with the constitutional rights of defendants, however, remains unclear.¹¹⁶ The Bill of Rights specifically guarantees certain rights to citizens who are accused of criminal conduct; the "rights" of the law-abiding to be protected from criminals are, on the other hand, much more amorphous and arguably not based on the Constitution at all. No court, especially the United States Supreme Court, can allow a concern for victims, however well-intentioned, to become an excuse for overlooking the specific constitutional rights that often happen to be guaranteed to "bad citizens." The Court must recall that its decision in a particular case concerning even the "shabb[iest]"¹¹⁷ of defendants will define thereafter the rights that belong to all citizens. Justice Walter V. Schaefer once commented on the advantage of courts of review in criminal cases: "The more remote the court, the easier it is to consider the case in terms of a hypothetical defendant accused of crime, instead of a particular man whose guilt has been established."¹¹⁸ The

¹¹⁶ See *Morris v. Slappy*, 103 S. Ct. at 1617-18.

¹¹⁷ *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

¹¹⁸ Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 7 (1956).

Supreme Court appears to have completely reversed this perspective during the 1982 Term.

In closing, the Court would be well advised to recall Justice Frankfurter's admonition thirty-four years ago: "The impact of a sordid little case is apt to obscure the implications of the generalization to which the case gives rise."¹¹⁹ In its rush to promote "rational law enforcement,"¹²⁰ the Court cannot forget that constitutional rights belong to all citizens—the "bad" as well as the "good."

¹¹⁹ *United States v. Rabinowitz*, 339 U.S. at 68 (Frankfurter, J., dissenting).

¹²⁰ *Florida v. Casal*, 103 S. Ct. at 3102 (Burger, C.J., concurring).