1978

The Burger Court and the Fourth Amendment

Larry Yackle
Boston University School of Law

Kansas Law Review

THE BURGER COURT AND THE FOURTH AMENDMENT

*Larry W. Yackle**

TABLE OF CONTENTS

In his 1974 Holmes Lectures, Anthony Amsterdam likened the Supreme Court in search and seizure cases to a committee "attempting to draft a horse by placing very short lines on a very large drawing board at irregular intervals during which the membership of the committee constantly changes."[1] On that perception of the matter he cautioned against precipitous criticism when the completed draft resembles a camel. That advice, in my judgment, is reliable only in part. On the one hand, only the most arrogant of armchair critics would not concede that the Court's work is as difficult as it is important. Faced with enormous complexity in search and seizure cases, inscrutable history, and imponderable competing interests, the Court is, to use another metaphor, like Dr. Johnson's dog, whose trick was to walk on its hind legs. It is not that it performs well. The wonder is that it performs at all.[2]

On the other hand, there is much in Professor Amsterdam's description that is misleading. For the men who have come to the Court in the last eight years have not only failed to draft an identifiable horse. They have given up the drafting task

---

* Associate Professor of Law, University of Alabama. A.B. 1968, J.D. 1973, University of Kansas; LL.M. 1974, Harvard University. Research for this Article was supported by The University of Alabama Graduate School Summer Faculty Research Fellowship Program.

[1] Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 350 (1974).

[2] I J. BOSWELL, THE LIFE OF SAMUEL JOHNSON 280 (entry of 31 July 1763) (R. Ingpen ed. 1925).

entirely. The thesis of this paper is that in a flurry of decisions the Burger Court[3] has destroyed what little structure search and seizure doctrine had achieved and replaced it with a fact-oriented, elastic, case by case approach to the recurring conflict between citizen and police. The Court's examination of search and seizure questions is by its very nature unprincipled and unpredictable. It resembles in many respects the "fundamental fairness" approach to the fourteenth amendment taken by the Court prior to the Warren era, and like that approach it strikes the balance between the individual and state power decidedly in favor of the latter.

This is blunt language. It seems to me the occasion calls for it. I believe that the Burger Court is well advanced on a campaign to curtail the protections for individual liberty offered by the provisions of the Constitution pertaining to search and seizure, and my effort in this paper to identify the major theme of that campaign is not tempered by an outsized appreciation for the difficulty of the Court's task. In a real sense, the task has been abandoned. There are times when prudence and discretion counsel caution and restraint, times when the Court should be applauded for what it does right rather than condemned for what it does wrong.[4] But given the evidence accumulating in the reports, this is not such a time for search and seizure. This is a time for alarm.

At the outset, I must beg indulgence—for an abbreviated survey of the history of search and seizure in Anglo-American law. I know of no fair way to approach the Burger Court's decisions that does not place them in historical and analytic perspective. To be understood they must be contrasted with the early cases and the work of the Warren Court, and compared with the decisions falling between those two periods—when the Roosevelt appointees allied with Justice Frankfurter resisted those allied with Justice Black and applied a murky, toothless standard of review to cases governed by the fourteenth amendment. Next, I will take up the three major theoretical and practical problems encountered in search and seizure cases. I will sketch the Court's attempts to deal with these problems in earlier times and examine the performance of the Burger Court in the last few years. In a final Section, I will suggest some of the considerations that may lie behind the Burger Court's departures in the search and seizure field and contend that none of the possibilities that come to mind justifies the position the Court has taken.

[3] No bright line can be drawn, of course, between what may be called the Warren and Burger Courts. Some of the Warren Court holdovers, Justices Black and White in particular, generally found allies in the newcomers to the Court after the October 1968 Term, Chief Justice Warren's last. *See* L. LEVY, AGAINST THE LAW 37, 42 (1974). In addition, the Nixon appointees came to the Court only in stages, leading to what Justice Douglas once described as the usual period of "unsettlement" while the Court groped for its new identity. Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735, 736 (1949). The new Chief Justice hardly assumed intellectual command of the Court when he took his chair in the fall of 1969, but he soon began to affect the Court's handling of criminal procedure cases—teaming with Justices Black and White in an assault on the very premises of the Warren Court's analysis. *E.g.*, United States v. Harris, 403 U.S. 573 (1971) (opinion of Burger, C.J.); Vale v. Louisiana, 399 U.S. 30, 36 (1970) (Black, J., dissenting); Chambers v. Maroney, 399 U.S. 42 (1970) (opinion of White, J.). With the arrival of Justice Blackmun in 1970, followed by Justices Powell and Rehnquist in 1972, the reconstituted Court's different slant on search and seizure issues was apparent. In a bitter dissent from the Court's disposition of United States v. Martinez-Fuerte, 428 U.S. 543 (1976), delivered on the last day of the 1975 Term, Justice Brennan lamented that "[t]oday's decision is the ninth this Term marking the continuing evisceration of Fourth Amendment protections against unreasonable searches and seizures." *Id.* at 567. In the course of my discussion of these developments, I will ascribe responsibility for decisions to the Burger Court whenever they exhibit the analytical approach that was urged by Chief Justice Burger and Justices Black and White in 1970 and 1971, and came to flower thereafter with the coming of the additional Nixon appointees.

[4] *E.g.*, Yackle, *The Burger Court, "State Action," and Congressional Enforcement of the Civil War Amendments*, 27 ALA. L. REV. 479 (1975).

I. A SYNOPSIS OF FOURTH AMENDMENT HISTORY

With the possible exception of Hugo Black,[5] the Justices who have held seats on the post-1937 Court have, perhaps without saying so, rejected out of hand the notion that in interpreting the Constitution they should place themselves "as nearly as possible in the condition of the men who framed the instrument."[6] No one seriously contends these days that the Court *can* recreate the conditions of 1791, ascertain the "intent of the framers," and resolve the case at hand consistent with the "original understanding."[7] Those times are lost forever, and even if it were possible to poll the signers of the Bill of Rights it is most unlikely that they would speak with one voice.[8] Indeed, no one seriously contends that the Court should even attempt to decide twentieth century cases by reference only to the hopes and desires of eighteenth century men.[9] I do not offer what follows, then, to build an argument or win a point on the basis of history alone. It is merely a point of departure—the one chosen by the Court itself in virtually every field of constitutional adjudication.[10]

A. The Framing of the Fourth Amendment

After forty years, Nelson Lasson's little book remains the principal authority on the history of the fourth amendment.[11] His treatment of the available sources reveals what one might have expected—that we Americans hardly fashioned our protections against unreasonable search and seizure from whole cloth. Nor, for that matter,

---

[5] In his 1968 Carpentier Lectures, Justice Black quoted with approval the language that appears at the end of the sentence in the text. H. BLACK, A CONSTITUTIONAL FAITH 8 (1968). His most noteworthy opinions were spiced with biting criticism of the Court's attempt to "adapt the Constitution to new times." *Id.* at 21. *See, e.g.*, Katz v. United States, 389 U.S. 347, 364 (1967) (Black, J., dissenting) (insisting that electronic surveillance is little more than sophisticated eavesdropping—which the framers might have explicitly prohibited in the fourth amendment if they had intended the Constitution to speak to it). Nevertheless, Black's jurisprudence was never so rigid as his rhetoric, and the record hardly warrants the charge that he had a "limitless ability to persuade himself that truth, history, wisdom, and the exact words of the Constitution were on his side and governed by his opinions, which did little more than declare what the fundamental law is." LEVY, *supra* note 3, at 36-37. Charles Reich's description of Black's views is, in my judgment, a far more accurate appraisal:

> By "faithful adherence" Black has demanded adherence to the spirit and objectives of the Bill of Rights, rather than to any particular interpretation of its provisions. His approach is functional in nature. He asks what a given provision of the Bill of Rights was designed to accomplish—what evils it was intended to prevent. Then he seeks to give the provision a meaning which will, in a contemporary setting, accomplish the same general purposes and prevent the same kinds of evils. Thus he interprets the Bill of Rights in the same way in which the Court has often interpreted the enumerated powers in the Constitution.

Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 733 (1963) (citations omitted). Inasmuch as this "functional" analysis focuses upon the values the framers sought to protect with the Bill of Rights and attempts to safeguard those same values from new and then-unimagined threats, it is certainly more appealing than the rigid historicism that at times flavored Black's opinions. Nevertheless, it still falls considerably short of a thoroughgoing, intellectually satisfying approach to search and seizure problems. A discussion of further, necessary refinements—and Justice Black's ultimate failure to grasp them—must be put off for now. *See* Landynski, *In Search of Justice Black's Fourth Amendment*, 45 FORDHAM L. REV. 453 (1976); text at note 368 *infra*. Suffice it to say here that Black's understanding of the Constitution and the role of the Court in interpreting it was not so wooden as at times it seemed. His contributions to the growth of individual liberty in other fields are well known; perhaps he can be forgiven for "nodding" in search and seizure cases. *See* L. HAND, THE BILL OF RIGHTS 58-59 (1958).

[6] *Ex parte* Bain, 121 U.S. 1, 12 (1887).

[7] *See* Amsterdam, *supra* note 1, at 397-401.

[8] T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 12-15 (1969).

[9] United States v. Chadwick, 433 U.S. 1 (1977). *See* Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976). *See also* J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 19-20 (1966).

[10] *See* C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969).

[11] N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937).

was the notion that "a man's house is his castle"[12] born in the breasts of Englishmen, whose ideas of liberty the colonists embraced as readily as they condemned taxation without representation.[13] Attention must turn, nevertheless, to England where for four hundred years Crown and Parliament assumed and abused the power to authorize broad ranging searches and seizures, and where opposition to such practices culminated in the judicial decisions that inspired libertarian thought on this side of the Atlantic. Legislation affecting search and seizure in England dates from the first half of the fourteenth century, when both private and official customs searches were authorized in the sea ports.[14] Later, organized tradesmen were permitted to conduct searches to enforce their trade regulations.[15] In the sixteenth century the Tudor and Stuart campaigns against seditious libel employed the general warrant, mingling the historical antecedents of the fourth and first amendments.[16] The Stationers Company was chartered in 1557, and ten years later Star Chamber issued the first of its ordinances authorizing the Company to "open all packs and trunks of papers and books brought into the country, to search in any warehouse, shop, or any other place . . . , to seize the books printed contrary to law . . . ."[17] For decades thereafter Star Chamber, together with High Commission and the Privy Council itself, used the general warrant with abandon in the persecution of religious and other dissenters.[18]

Even as the Crown and Parliament went their way, employing the general warrant in aid of their needs of the moment, the courts of common law were fashioning more restrictive doctrine. There was some debate on the matter at the time. Lord Coke relied on Magna Carta for the view that a warrant could not issue for the search of a house even for a felon or for stolen goods,[19] while Chief Justice Hale maintained that such warrants were lawful so long as they were issued by a magistrate, supported by a sworn statement of cause, and limited to a particular place to be searched and particular things to be seized.[20] Disclaiming the practices of justices of the peace who often executed their own warrants, acting as both judicial and executive officers, Hale insisted that the issuance of a warrant was a "judicial act," to be undertaken by a magistrate on the basis of another's sworn allegations.[21] His views, of course, eventually found their way to the colonies, to the declarations of rights in several states, and ultimately to the fourth amendment.[22]

The development of search and seizure doctrine by the common law courts thus conflicted with the practices of both King and Parliament, and in the very nature of things confrontation was inevitable. It came in the *North Briton* cases,[23] named

---

[12] Semayne's Case, 77 Eng. Rep. 194 (K.B. 1604).

[13] It seems probable that, on the contrary, Lord Coke's epigram was founded on the Roman maxim: *Nemo de domo sua extrahi debet.* M. RADIN, ROMAN LAW 475 n.28 (1927).

[14] LASSON, *supra* note 11, at 23.

[15] *Id.* at 24.

[16] LANDYNSKI, *supra* note 9, at 20-21.

[17] LASSON, *supra* note 11, at 25. *See* F. SIEBERT, FREEDOM OF THE PRESS IN ENGLAND (1952).

[18] LANDYNSKI, *supra* note 9, at 22-24; LASSON, *supra* note 11, at 25-34.

[19] IV E. COKE, THE INSTITUTES OF THE LAWS OF ENGLAND 176-77 (London 1797). Coke's position, described by Lasson as "ambiguous," was that a justice of the peace was a creature of Parliament, which had no power to authorize a search in light of the thirty-ninth chapter of Magna Carta. Evidently, however, Coke approved a forced entry after the fugitive had been indicted.

[20] II M. HALE, THE HISTORY OF THE PLEAS OF THE CROWN 149-50 (1st Am. ed. Philadelphia 1847).

[21] LANDYNSKI, *supra* note 9, at 27.

[22] HALE, *supra* note 20, at 150.

[23] Money v. Leach, 97 Eng. Rep. 1050 (K.B. 1765); Huckle v. Money, 95 Eng. Rep. 768 (K.B. 1763);

for John Wilkes' series of pamphlets that appeared on the streets of London shortly after George III assumed the throne.[24] The Secretary of State, Lord Halifax, issued general warrants for the arrest of those responsible and the seizure of their papers, and in short order his messengers ransacked the printers' houses and broke open their chests looking for anyone and anything connected with the scurrilous pamphlets. It soon became apparent, however, that Halifax had misjudged the judges. The printers hauled the messengers into court, and Chief Justice Pratt, then a relatively obscure jurist but later declared a "zealous supporter of English liberty by law,"[25] instructed the jury that "[t]o enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour."[26] So charged, the jury returned a judgment for the plaintiffs, and Pratt sustained it on all counts.[27]

The stage was set for *Entick v. Carrington*,[28] the most celebrated English precedent in search and seizure lore.[29] The *Entick* warrant differed from those involved in the *North Briton* cases in that it specifically named John Entick, the editor of the *Monitor*, and designated the place to be searched. If it was specific as to person and place, however, it was general as to the items to be seized. Emboldened by the success Wilkes and the others had achieved, Entick sued the messengers in

---

Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763). The description of these cases in the text follows LASSON, *supra* note 11, at 43-47, and LANDYNSKI, *supra* note 9, at 28-29. Similar accounts appear in II T. MAY, CONSTITUTIONAL HISTORY OF ENGLAND 124-29 (1912), and Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 362-64 (1921). *See also* T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE STATES OF THE AMERICAN UNION 299-308 (2d ed. Boston 1871); F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 410 (1926). The issue whether general warrants were valid was joined less well on a few earlier occasions. In 1662, Parliament enacted the Licensing Act, which provided for "powers of search as broad as any ever granted by Star Chamber decree," another statute creating writs of assistance as an enforcement tool, and a third establishing open-ended powers of search in daylight hours for the collection of the "hearth money" tax. LASSON, *supra* note 11, at 37. When, in 1679, Charles II found it impolitic to call a Parliament to renew the Licensing Act, he asked the 12 judges of England whether the common law would permit him to regulate the press in the same way —absent statute. The 12, led by Chief Justice Scroggs, gave the King the opinion he wanted, and he immediately issued a proclamation against libelous publications, together with general warrants for the enforcement of his decree. Lasson notes that while this first meeting of the common law and the general warrant in libel proved fruitless, in the end Scroggs suffered for his failure to take a stronger position. One of the articles of impeachment brought against him by the House of Commons in 1680 specifically condemned his issuance of general warrants. *Id.* at 38. After the Revolution, the "hearth money" tax—including its search provisions—was abolished, and in succeeding years taxation measures containing broad powers of search were the subject of debate whenever they were offered in Parliament. Lasson attributes the failure of Walpole's Excise System to opposition to its search provisions and mentions William Pitt's condemnation of the general warrant in the course of his speech against the Cider Tax. *Id.* at 40-42.

[24] *See* C. WESTON, ENGLISH CONSTITUTIONAL THEORY AND THE HOUSE OF LORDS 149-50 (1965). Wilkes' vigorous opposition to the Halifax warrant and other excesses of royal power won the admiration of English commoners who rallied to support him for Parliament again and again in the face of repeated expulsions. M. KNAPPEN, CONSTITUTIONAL AND LEGAL HISTORY OF ENGLAND 486-87 (1964). In the end, he had become a "popular idol," who in his correspondence with Otis and others connected the "strands of rebellion at home and in the colonies." Ogg, *Builders of the Republic*, in 8 THE PAGEANT OF AMERICA 78 (R. Gabriel ed. 1927).

[25] This description of Pratt was penned by Dr. Johnson for a portrait that later hung in public houses all over England. LASSON, *supra* note 11, at 46, *citing* E. Foss, JUDGES OF ENGLAND 536 (1870) *and* III W. LECKY, HISTORY OF ENGLAND IN THE EIGHTEENTH CENTURY 79-80 (1882).

[26] Huckle v. Money, 95 Eng. Rep. 768, 769 (K.B. 1763).

[27] The Crown appealed Pratt's ruling to King's Bench, where Chief Justice Mansfield affirmed—holding only that the messengers had exceeded even their general warrant by arresting persons not connected with the publication of the *North Briton*. In dicta, however, all the judges sitting condemned what Halifax had done. Money v. Leach, 97 Eng. Rep. 1050 (K.B. 1765).

[28] 19 Howell's State Trials 1030, 95 Eng. Rep. 807 (K.B. 1765).

[29] The term is Amsterdam's. Amsterdam, *supra* note 1, at 356. It fits. Having once heard it, I am compelled to use it.

trespass for the seizure of his papers. The declaration stated that Nathan Carrington and three other messengers had searched through Entick's house for four hours, breaking through doors and into locked boxes, chests, and drawers. And they had "pried into and examined all the private papers . . . of the plaintiff . . . whereby the secret affairs . . . of the plaintiff became wrongfully discovered and made public."[30] In the end, they had carried away hundreds of printed pamphlets and charts.

Chief Justice Pratt, now Lord Camden, rendered an opinion he considered "of the utmost consequence to the public" as well as to the parties.[31] Coming to the question whether the warrant was valid and thus a fair defense to the claim,[32] he said that if the warrant were upheld "the secret cabinets and bureaus of every subject in this kingdom" would be "thrown open to the search and inspection of a messenger" whenever seditious libel was suspected.[33] Couched that way, the issue could hardly be decided against the plaintiff. It was not. While the lengthy opinion obscured the narrow ground of decision, it appears that the necessary and sufficient basis for rejecting the messengers' defense was the absence of authoritative precedent for such a warrant. If Lord Camden was clear on nothing else, he was explicit that "[i]f it is law, it will be found in our books. If it is not to be found there, it is not law."[34]

Laying aside nice distinctions between *ratio decidendi* and dictum, the opinion in *Entick* contained much else to guide, or misguide, its American readers. First, the court made it plain that the common—fast becoming the constitutional—law of England protected the individual from unjustified intrusions upon property.[35] The papers seized from Entick were "the owner's goods and chattels" and their seizure demanded explanation on pain of a judgment for damages.[36] Second, the court intimated that privacy, too, might be protected. While stopping short of embracing the theory suggested by Entick's declaration—that the messengers had committed an independent trespass by prying into his secret affairs and making them public—the court allowed that private papers are an individual's "dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection."[37]

---

[30] 19 Howell's State Trials at 1030.

[31] *Id.* at 1042.

[32] The court first disposed of the messengers' contention that they and Halifax were immune from liability under a statute prohibiting suit by a plaintiff such as Entick unless he first demanded to see the warrant they relied upon and was refused. *Id.* at 1046-53.

[33] *Id.* at 1063.

[34] *Id.* at 1066. It is plain that Lord Camden did not consider Scroggs' opinion delivered to Charles II worthy of more than passing note and summary rejection:

> Can the twelve judges extrajudicially make a thing law to bind the kingdom by a declaration, that such is their opinion?—I say No.—It is a matter of impeachment for any judge to affirm it. There must be an antecedent principle or authority, from whence this opinion may be fairly collected; otherwise the opinion is null, and nothing but ignorance can excuse the judge that subscribed it. Out of this doctrine sprang the famous general search warrant, that was condemned by the House of Commons; and it was not unreasonable to suppose, that the form of it was settled by the twelve judges that subscribed the opinion.

Id. at 1071. *See* note 23 *supra.*

[35] Reflecting the common law's preoccupation with property rights, or perhaps merely fusing individual liberty with the institution of private property, the court said:

> The great end, for which men entered into society, was to secure their property. That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole . . . . By the laws of England, every invasion of private property, be it every so minute, is a trespass.

19 Howell's State Trials at 1066.

[36] *Id.*

[37] *Id.* *See* text at note 30 *supra.*

Accordingly, while conceding that "the eye by the laws of England cannot be guilty of a trespass," the court agreed that "where private papers are removed . . . the secret nature of those goods will be an aggravation of the trespass."[38] It seems that the messengers in *Entick* had not only to answer for breaking into the plaintiff's house and rifling his drawers, but for "bruising the grass" within his close; and not only for "treading upon the soil," but for aggravating the trespass by exposing the "secret nature" of his papers to the public eye.[39]

As might be expected, the defendants contended that the Halifax warrant in this libel case was not really so far removed from the common practice of issuing warrants for stolen goods. In response, the court all but rejected the premise of the argument, commenting that the issuance of warrants even for stolen goods had only "crept into the law by imperceptible practice,"[40] that Coke had questioned the validity of that practice,[41] and that in any event warrants for stolen goods had always been more specific than the warrant issued for *all* this plaintiff's papers.[42] The analogy the court did accept, however, seemed to blur a search for evidence with the already developed privilege against self-incrimination:[43]

> It is very certain, that the law obligeth no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it should seem, that search for evidence is disallowed upon the same principle. There too the innocent would be confounded with the guilty.[44]

It was this pithy passage that troubled the American Supreme Court, perhaps more than any other, in the years to follow.[45]

Still, Lord Camden was not finished. As though to anticipate every argument raised against him, he specifically rejected the contention that this warrant must be approved in order to facilitate the enforcement of the libel laws:

> Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by discovering evidence. I wish some cases had been shewn, where the law forceth evidence out of the owner's custody by process. . . .
>
> In the criminal law such a proceeding was never heard of; and yet there are some crimes, such for instance as murder, rape, robbery, and house-breaking, to

---

[38] 19 Howell's State Trials at 1066.

[39] *Id.*

[40] *Id.* at 1067.

[41] *Id.* *See* note 19 and accompanying text *supra.*

[42] Tracing Hale's views somewhat but also adding further restraints, the court had it that even in the "singular" case of searches for stolen goods rather stringent safeguards had been established.

> There must be a full charge upon oath of a theft committed.—The owner must swear that the goods are lodged in such a place.—He must attend at the execution of the warrant to shew them to the officer, who must see that they answer the description.—And, lastly, the owner must abide the event at his peril: for if the goods are not found, he is a trespasser; and the officer being an innocent person, will be always a ready and convenient witness against him.

19 Howell's State Trials at 1067. It appears that in Lord Camden's view warrants for stolen goods must not only be based on evidence and a particular description of the place to be searched and the things to be seized, but they must in fact lead to the stolen things identified by the complainant.

[43] By 1765, when *Entick* was decided, the inquisitorial method of trial used by Star Chamber and High Commission before the Long Parliament had long since been swept from English criminal procedure. John Lilburne had left his mark and died more than a century earlier. *See generally* L. LEVY, ORIGINS OF THE FIFTH AMENDMENT (1968) [hereinafter cited as ORIGINS].

[44] 19 Howell's State Trials at 1073.

[45] *See* notes 258-88 and accompanying text *infra.*

> say nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-search in these cases to help forward the conviction.
>
> Whether this proceedeth from the gentleness of the law towards criminals, or from a consideration that such power would be more pernicious to the innocent than useful to the public, I will not say.[46]

With a note of sarcasm, then, the court acknowledged that the law might restrict the powers of law enforcement authorities not only to ensure fair and reliable prosecutions, but to safeguard the extraneous interests of wholly innocent people.[47]

The popular reading of contemporaneous events in the colonies credits James Otis' spirited oratory with gathering public opposition to general searches.[48] Beginning at least by 1755, the superior court in Boston issued writs of assistance, which directed constables and other law enforcement officers to accompany customs officials when they conducted searches for smuggled goods.[49] The commissions of the customs officials actually conferred the power to search, but that power was circumscribed by the requirement that searches could be undertaken only in the presence of a constable. The courts, which controlled the constables, thus controlled customs searches by issuing writs of assistance as they saw fit.[50] In practice, the writs were issued freely at the request of customs officials. The writs were in general form and valid for the life of the reigning sovereign. In effect, they granted customs officials a roving commission to search when and where they pleased, so long as they were accompanied by a constable whose duty was to maintain the peace as they searched.[51] In 1761 enforcement of the smuggling laws was stepped up, just as the writs needed renewal after the death of George II. Otis levelled a devastating attack upon them, citing precedent back to Magna Carta just as did his English counterparts.[52] In

---

[46] 19 Howell's State Trials at 1073.

[47] LASSON, *supra* note 11, at 48-50. After *Entick*, the scene of the debate over general warrants in England shifted to Parliament where William Pitt led the assault. In 1766, the House of Commons declared such warrants to be unlawful in libel cases, but other attempts to outlaw general warrants for the arrest of persons and for the seizure of papers proved unsuccessful, particularly in the House of Lords. It was in the course of these debates that Pitt made his eloquent and classic plea for the "privilege of house":

> The poorest man may, in his cottage, bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England may not enter; all his force dares not cross the threshold of the ruined tenement.

Id.

[48] *Id.* at 58-61. For a new description of the colonists' views and practices regarding personal privacy see D. FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND (1972).

[49] There is some evidence that customs officials in Massachusetts originally conducted general searches without the aid of official sanction, and when that proved unsettling to the colonists the Governor issued writs himself. Before long, even that practice seemed troublesome, and the task was turned over to the courts. It was in 1755 that Charles Paxton, the Surveyor of the Port of Boston, obtained his first writ from the Superior Court. LASSON, *supra* note 11, at 55-56.

[50] Despite Lasson's contention that, at least in England, customs officials had no authority to search based solely on their commissions, *id.* at 55, and that the writs of assistance "empowered" them to conduct searches, *id.* at 54, the description in the text states the better view. It is drawn from Dickerson, *Writs of Assistance as a Cause of the Revolution*, in THE ERA OF THE AMERICAN REVOLUTION 40, 43-46 (R. Morris ed. 1939). At the very least, Dickerson's explanation accounts for the name of the hated writs. It seems plausible that something called a writ *of assistance* did not itself empower the customs officials to search, but only authorized them to prevail upon constables for help in maintaining order as they searched. *See* LANDYNSKI, *supra* note 9, at 32 n.53. *But see* Gray, *What are Writs of Assistance?*, in J. QUINCY, REPORTS OF CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at *Appendix IA* 395 (Boston 1865).

[51] Dickerson, *supra* note 50, at 45-46.

[52] LANDYNSKI, *supra* note 9, at 33-34. The argument in *Paxton's Case* was in two parts and roughly reported in J. QUINCY, REPORTS OF THE CASES ARGUED AND ADJUDGED IN THE SUPERIOR COURT OF JUDICATURE OF THE PROVINCE OF MASSACHUSETTS BAY BETWEEN 1761 AND 1772, at 51-57 (Boston 1865),

Adams' telling fifty years later, Otis' speech could have been no more moving. "Then and there," said Adams, "was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the Child Independence was born."[53]

By the time of the Constitutional Convention, seven states had constitutional provisions concerning search and seizure, ranging from the simple prohibition on general warrants in Virginia[54] to the more elaborate formulation in Massachusetts.[55] The Bill of Rights, of course, was not part of the original Constitution and in fact was drafted later only in response to anti-Federalist criticism.[56] Madison's list of proposals, containing a provision on search and seizure, was sent to a Committee of Eleven for consideration, and three weeks later the Committee returned with the following language: "The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized."[57] From the floor, Gerry managed to alter the draft to read "[t]he right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures."[58]

---

and in II C. ADAMS, THE WORKS OF JOHN ADAMS 521-25 (1856). Dickerson contends that Otis primarily attacked the *form* of the warrant with the argument that it unlawfully recited that the Superior Court of Massachusetts Bay had assumed the jurisdiction of all three common law courts in England, and that it failed to restrict searches to a particular time. Dickerson, *supra* note 50, at 46-47. Less charitably, it has been suggested that Otis had no real interest in the merits at all, but made the argument only out of pique that Thomas Hutchinson, rather than his father, had been appointed to the Superior Court to hear the case. *See* Gray, *Writs of Assistance granted in Massachusetts Bay in the Reign of George II,* in QUINCY, *supra* at *Appendix IB* 411 (mentioning but disputing the charge).

[53] Letter from John Adams to William Tudor (March 29, 1817), *quoted in* Fraenkel, *supra* note 23, at 365. *See* 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 192-94 (1971). Adams' appraisal almost certainly exaggerated the effect of Otis' efforts. Otis' speech, however eloquent, was delivered to a panel of judges in a small room in Boston. It was not reported in the newspapers at the time, and certainly the colonies to the south could not have been influenced greatly by it. Dickerson, *supra* note 50, at 42-43. I mean to denigrate neither Otis' argument nor its contribution to American constitutional law. Both were remarkable. Professor Corwin has, for example, cited Otis' use of Dr. Bonham's Case, 77 Eng. Rep. 646 (K.B. 1610), as perhaps the earliest assertion in the colonies of the principle of judicial review of legislative action. E. CORWIN, LIBERTY AGAINST GOVERNMENT 39 (1948). *See generally* Davis v. United States, 328 U.S. 582, 603-04 (1946) (Frankfurter, J., dissenting); W. TUDOR, LIFE OF JAMES OTIS 58-87 (1823).

[54] Section 10 of the Virginia Declaration of Rights, *reprinted in* SCHWARTZ, *supra* note 53, at 235, appeared to speak only to general warrants:

> The general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offense is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

[55] Section 14 of the Massachusetts Declaration of Rights of 1780, *reprinted in* SCHWARTZ, *supra* note 53, at 342, provided:

> Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws.

[56] Leonard Levy has put it best.

> Considering its immediate background, our precious Bill of Rights was in the main the chance result of certain Federalists' having been reluctantly forced to capitalize for their own cause the propaganda that had been originated in vain by the anti-Federalists for ulterior purposes. Thus the party that had first opposed a Bill of Rights inadvertently wound up with the responsibility for its framing and ratification, while the party that had at first professedly wanted it discovered too late that its framing and ratification were not only embarrassing but inexpedient.

L. LEVY, LEGACY OF SUPPRESSION 233 (1960). *See* Nolan, *The Constitution of the United States and the First Ten Amendments,* 4 NOTRE DAME LAW. 308 (1929).

[57] LASSON, *supra* note 11, at 101.

[58] *Id.*

Then, Benson objected to the words "by warrants issuing" and proposed that they be replaced with "and no warrant shall issue."[59] That proposal was overwhelmingly defeated, but when the final draft of the Bill of Rights emerged from the Committee of Three, which had been assigned to arrange the provisions in the proper order and was chaired by Benson, the very language the House had rejected was in place. It was that language that stayed with the amendment in the Senate and throughout the ratification process.[60]

B. The Development of Search and Seizure Doctrine in the Supreme Court

The Court's development of search and seizure case law began slowly.[61] Early on, Chief Justice Marshall held that arrest warrants, like search warrants, must be supported by probable cause,[62] but it was fifty years later before the Court took more fourth amendment cases, then holding that the fourth amendment did not protect against the actions of state officials[63] and that in any event it applied only in criminal cases.[64] Late in the nineteenth century, however, a dictum in the *Jackson* case[65] assumed that "letters and sealed packages" placed in the mail were personal papers protected by the fourth amendment and thus could be opened only under a warrant "as is required when papers are subjected to search in one's own household."[66] Then, in the *Boyd* case[67] a few years later, the Court took the even more dramatic step of applying the fourth amendment to a subpoena duces tecum. The Boyds were charged with having imported a quantity of structural glass without paying the duty, and in order to prove its case—and justify confiscating the glass—the Government obtained an order from the trial court requiring the Boyds to produce an invoice concerning the transaction. Writing for the Court, Justice Bradley allowed that the constitutional question raised was "not only an important one in the deter-

---

[59] *Id., quoting* 1 ANNALS OF CONGRESS 783 (Gales & Seaton eds. 1834) (remarks in the House Judiciary Committee on Aug. 24, 1789).

[60] Fraenkel, *supra* note 23, at 366 n.30. *See* Warden v. Hayden, 387 U.S. 294, 316-17 (1967) (Douglas, J., dissenting).

[61] Landynski suggests that the reason is easy enough to identify. The Congress did not exercise its criminal jurisdiction extensively in the nineteenth century; the Court was not even given appellate jurisdiction of criminal cases until 1891. LANDYNSKI, *supra* note 9, at 49. Yet that explanation is hardly satisfying. Prior to its adoption of the exclusionary rule in Weeks v. United States, 232 U.S. 383 (1914), the Court would have had no occasion to deal with the validity of a search or seizure in a criminal case. Moreover, the Court's habeas corpus jurisdiction had been established since 1789 and certainly provided a vehicle for fourth amendment decisions. *E.g., Ex parte* Buford, 7 U.S. (3 Cranch) 448 (1806). At bottom, the explanation for the paucity of search and seizure cases in the early years must lie in the failure of ordinary, civil lawsuits for trespass or false imprisonment to reach the Court. Those matters, of course, rarely were pursued to the federal forum.

[62] *Ex parte* Buford, 7 U.S. (3 Cranch) 448 (1806).

[63] Smith v. Maryland, 59 U.S. (18 How.) 71, 76 (1855), *citing* Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 180 (1833).

[64] Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 285-86 (1855). The precise issue in the case was whether a distress warrant used to convey land was invalid because it had been issued without oath or affirmation. The Court summarily rejected the argument that the fourth amendment spoke to "civil proceedings for the recovery of debts." *Id.* Although the question whether the fourth amendment applies to intrusions for purposes other than a search for evidence of crime cropped up in later cases, *see* notes 202-39 and accompanying text *infra,* and, indeed, the issue still has not been resolved, the treatment in *Murray's Lessee* has, so far as I know, never been recalled for service by the Court. *See* note 71 *infra.*

[65] *Ex parte* Jackson, 96 U.S. 727 (1877).

[66] *Id.* at 733. Although the Court in *Jackson* rather clearly intended to speak of the fourth amendment, albeit in dictum, in Olmstead v. United States, 277 U.S. 438, 464 (1928), Chief Justice Taft suggested that any protection for the privacy of the mails derives from the statutes giving the government a monopoly in postal services.

[67] Boyd v. United States, 116 U.S. 616 (1886).

mination of the present case," but "a very grave question of constitutional law, involving the personal security, and privileges and immunities of the citizen . . . ."[68] While he acknowledged that the production order was "divested of many of the aggravating incidents of actual search and seizure,"[69] Justice Bradley nevertheless concluded that it could not be approved:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[70]

Approaching the case in that way, Bradley held that since the forfeiture proceeding was "quasi-criminal,"[71] and since the subpoena accomplished "the substantial object" of a physical search, the production order had to be measured against the fourth amendment.[72] Coming to the merits, he distinguished searches for stolen property, smuggled goods, and other contraband. In those cases, the owner of the goods or the government had a superior property interest in them, and officers could accordingly "keep them under observation" or "pursue and drag them from concealment."[73] In this case, in contrast, an attempt had been made to force from the Boyds their "private books and papers" as mere *evidence* of wrongdoing.[74] Going on, Bradley borrowed extensively from *Entick* in order to weave the fourth and fifth amendments together.[75] He was "unable to perceive that the seizure of a man's private books and papers to be used in evidence against him" was "substantially different from compelling him to be a witness against himself."[76] Accordingly, the production order violated both the ban on unreasonable search and seizure and the privilege against self-incrimination. Finally, Justice Bradley held that "the inspection by the district attorney of said invoice, when produced in obedience to said

---

[68] *Id.* at 618. More specifically, it was alleged that the Boyds had abused their special privilege to import an amount of glass without duty in order to replace glass sold to the government. To determine whether they had failed to pay the duty on more than the allotted amount, it was necessary to know how much glass had been included in a certain shipment of 29 cases. The district court's order required the Boyds to produce the invoice concerning that shipment.

[69] *Id.* at 635.

[70] *Id.*

[71] *Id.* at 634. Landynski suggests that in this holding the Court meant to distinguish *Murray's Lessee*. *See* note 64 and accompanying text *supra*. The Court did not, however, cite that case and distinguish it by name.

[72] 116 U.S. at 622.

[73] *Id.* at 624.

[74] Bradley's view—that the fourth amendment prohibited searches, even on a warrant, when the only object was the discovery of evidence rather than contraband—might have been tied back to *Entick*. That case, too, suggested that while warrants might issue for stolen or smuggled goods, they could not be used merely to gather evidence. *See* note 44 and accompanying text *supra*. The key passage in *Entick*, however, did not rely on any supposed superior property interest in the owner of goods or the government. That rationale was apparently original in *Boyd*. *See* notes 258-59 and accompanying text *infra*.

[75] 116 U.S. at 633. *See* note 44 and accompanying text *supra*.

[76] 116 U.S. at 633.

notice, and its admission in evidence by the court, were erroneous and unconstitutional proceedings."[77]

Boyd has been much criticized. It has been said that the constitutional questions might have been avoided altogether[78] and that, in any event, it was gratuitous overkill to hold that the production order violated both the fourth and the fifth amendments.[79] Other decisions have undermined the case,[80] and very recently it has been all but overruled.[81] Nevertheless, *Boyd* was the mainstay of search and seizure development for decades. Its impact on later decisions cannot be overestimated, or its lessons about the proper approach to constitutional protections for personal liberty too well learned.[82]

Two events dramatically increased the flow of search and seizure cases to the Supreme Court in the years following *Boyd*. One was the adoption of the exclusionary rule, and the other was the ratification of the eighteenth amendment. The movement toward a blanket rule that evidence seized by federal officers in an illegal search and seizure is inadmissible in a federal criminal trial was anything but smooth. Such a rule was suggested in *Boyd*,[83] but eighteen years later it was flatly rejected

---

[77] *Id.* at 638. There were no dissents in *Boyd*, but Justice Miller, joined by Chief Justice Waite, concurred separately. He would have disposed of the case on the fifth amendment and avoided Justice Bradley's innovative search and seizure discussion. Indeed, Justice Miller found not a "hint" of a search in the case. *Id.* at 640. He pointed out that the statute under which the trial court had acted did not authorize the seizure of the Boyds' invoice. It provided only that the court might require them to produce it in court to be examined by the prosecutor and perhaps introduced into evidence. All this, Justice Miller thought, could be accomplished without depriving the Boyds of custody. Finding neither a search nor a seizure in the case, and commenting that in any event the framers had been concerned only with prohibiting *unreasonable* searches on a general warrant, Justice Miller rejected Justice Bradley's fourth amendment analysis.

[78] Nelson, *Search and Seizure: Boyd v. United States*, 9 A.B.A.J. 773 (1923). The argument is that as part of its statutory scheme governing imports, the Congress had required the Boyds to supply the Government with certified copies of import invoices. The Boyds, however, had not complied with the statutory requirement; if they had, the authorities would have already had a copy of the invoice in question and would not have needed the production order. As it was, in requiring the Boyds to produce the original the trial court arguably obtained for the government no more information than should have been available earlier. Of course, given the Congress' broad power to regulate foreign commerce, there is no serious question that the statutory requirement that copies of invoices be made available to the authorities was valid.

[79] LANDYNSKI, *supra* note 9, at 58-59. Dean Wigmore pointed out that the histories of the two provisions were entirely different and that the *Boyd* Court's suggestion that they had been mingled in the minds of Englishmen and the colonists was simply incorrect. 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE § 2184, at 31 (3d ed. 1940). Professor Chafee observed that while the fifth amendment ordinarily has to do with compelling a suspect to "do something active," in search and seizure cases "he usually remains passive." Chafee, *The Progress of the Law*, 35 HARV. L. REV. 673, 697-98 (1922).

[80] *See, e.g.*, Hale v. Henkel, 201 U.S. 43, 72-73 (1906) (commenting that in cases following *Boyd* the fourth and fifth amendments had been treated as "quite distinct" and that the former had primarily to do with physical trespass); ICC v. Brimson, 154 U.S. 447 (1894) (approving a subpoena ordering witnesses before the ICC to produce documents relating to their testimony). Even as he declared that in 1930 most of the dicta in *Boyd* had matured into positive law, Professor Corwin acknowledged that the precise holding in the case could not survive the Court's more recent decisions indicating that the invoice would have been seizable as an instrumentality of the offense charged. Corwin, *The Supreme Court's Construction of the Self-Incrimination Clause*, 29 MICH. L. REV. 1, 19 (1930). The Court's subsequent refusal to extend the fifth amendment privilege to corporations, *e.g.*, Wilson v. United States, 221 U.S. 361 (1911); United States v. White, 322 U.S. 694 (1944), or partnerships, *e.g.*, Bellis v. United States, 417 U.S. 85 (1974), would also have required a different result. *See* Fisher v. United States, 425 U.S. 391, 408 (1976).

[81] United States v. Miller, 425 U.S. 435, 440 n.1 (1976). *See* notes 278-84 and accompanying text *infra*.

[82] Justice Brandeis, for example, proclaimed *Boyd* as "a case that will be remembered as long as civil liberty lives in the United States." Olmstead v. United States, 277 U.S. 438, 474 (1928) (dissenting opinion).

[83] *See* text at note 77 *supra*.

in the *Adams* case,[84] when the Court preferred the common law rule that "courts do not stop to inquire as to the means by which . . . evidence was obtained."[85] Then, in another turn about, the Court embraced the principle of exclusion in a series of cases beginning with *Weeks*.[86] In *Weeks*, the petitioner had been arrested without a warrant by a police officer while other officers conducted a warrantless search of his home. The officers seized various articles thought to be relevant to a charge of unlawful use of the mails and turned them over to a federal marshal.[87] Later, the marshal conducted his own warrantless search, seizing still more documentary evidence. Prior to trial, the petitioner moved for the return of everything taken from his house, but the trial court ordered the return only of those things not needed as evidence. Writing for a unanimous Court, Justice Day distinguished his own opinion in *Adams* on the tenuous ground that in the instant case the petitioner had filed his motion before trial and had thus given the trial court an opportunity to rule upon it without disrupting orderly procedures.[88] Then, relying on the *Boyd-Entick* proposition that the principles at hand reached "farther than the concrete form of the case then before the court, with its adventitious circumstances" and applied "to all invasions . . . of a man's home and the privacies of life,"[89] he said that the Court simply could not sanction the marshal's concededly unconstitutional actions.[90]

Narrowly stated, the holding in *Weeks* was that a criminal defendant's illegally seized property must be returned if the defendant makes a "seasonable application."[91] Although there was talk in the opinion of the impropriety of admitting such property into evidence, that issue was always tied to the trial court's refusal to order the return of the property before trial.[92] The case dealt, then, with the lawfulness of a failure to return illegally seized property to its owner rather than the use to which such property is put when not returned. In later cases, however, the Court made it clear that *Weeks* had been intended to have substantial impact on the gathering and use of evidence in federal prosecutions. In the *Silverthorne* case,[93] the Court held that a prosecutor could not avoid difficulty simply by copying unlawfully seized documents before returning them and introducing only the copies at trial. Justice Holmes declared that *Weeks* had not meant that all would be well if the government took two steps rather than one to get its evidence. The law was "not merely" that "evidence so acquired shall not be used before the Court but that it shall not

---

[84] Adams v. New York, 192 U.S. 585 (1904). Although *Adams* posed the question whether the fourteenth amendment spoke to the method by which state officers had obtained evidence used in a state criminal trial, the Court chose to leave that issue untouched and focused instead on the threshold question whether the lawfulness of the seizure should be considered in any case. *Id.* at 594.

[85] *Id.*

[86] Weeks v. United States, 232 U.S. 383 (1914).

[87] *Id.* at 386.

[88] Particularly in light of subsequent cases relaxing the "seasonable application" rule, Day's treatment of *Adams* was entirely inadequate. It is generally agreed that that case could not survive the Court's departure in *Weeks*, but that the Court simply had no taste for overruling it expressly. *See* People v. Defore, 242 N.Y. 13, 20, 150 N.E. 585, 587 (1926) (reading *Weeks* and subsequent cases to have rejected *Adams* sub silentio); J. MAGUIRE, EVIDENCE OF GUILT 233 & n.17 (1959); Comment, *Admissibility of Illegally Seized Evidence—The Federal Exclusionary Rule—A Historical Analysis*, 38 U. DET. L.J. 635 (1961).

[89] 232 U.S. at 391, *quoting* Boyd v. United States, 116 U.S. 616, 630 (1886).

[90] As Justice Day had it, "[t]o sanction such proceedings would be to affirm by judicial decision a manifest neglect if not an open defiance of the prohibitions of the Constitution." 232 U.S. at 394.

[91] *Id.* at 398.

[92] Justice Day's express holding was that the trial court had committed prejudicial error in "holding [the papers] and permitting their use upon the trial." *Id.*

[93] Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

be used at all."[94] Then, further extending *Weeks* and undermining *Adams,* the Court held in *Gouled*[95] that if a defendant does not know that the government has seized his or her property until it is introduced, a motion for return must be heard even then—irrespective of the delay occasioned by treatment of the collateral issue.[96] Accordingly, by the early 1920s the exclusionary rule had become a vehicle for raising search and seizure claims in a large percentage of the criminal cases coming before the federal courts.[97]

The second event that brought cases by the score to the Court was the adoption of Prohibition.[98] The Volstead Act was the most far-reaching criminal legislation ever enacted by the Congress. It sent a national police force into the field, charged with enforcing a law that was habitually violated in the privacy of one's home, office, or automobile.[99] To accomplish their virtually impossible task, federal agents resorted to search and seizure in a wide variety of circumstances. Those convicted often pursued their cases to the Supreme Court, urging that the evidence used against them at trial—usually contraband whiskey or paraphernalia used in its production—had been unlawfully seized. Accordingly, the Court was increasingly called upon to develop meaningful and workable standards for determining when and how the fourth amendment comes into play. In the *Hester* case,[100] Justice Holmes held that moonshine flung in desperation from a window and picked up outside by federal agents had been abandoned in the open fields and was thus unprotected by the Constitution.[101] In *Olmstead,*[102] Chief Justice Taft ruled that the petitioners' conviction for an elaborate unlawful conspiracy to import liquor was not invalid simply because federal agents had "seized" their conversations in a surreptitious wiretap. Not only had there been no physical trespass, but there had been no seizure of "effects" or "things" within the meaning of the fourth amendment.[103] In those cases

---

[94] *Id.* at 392.

[95] Gouled v. United States, 255 U.S. 298 (1921).

[96] *See also* Segurola v. United States, 275 U.S. 106 (1927); Amos v. United States, 255 U.S. 313 (1921) (recognizing a demand made after the jury had been sworn). For a description of the steady march toward a generally applicable exclusionary rule apart from its source in the requirement that illegally seized items be returned to their owner on request see Comment, *Search, Seizure, and the Fourth and Fifth Amendments,* 31 YALE L.J. 518 (1922) [hereinafter cited as *Search*].

[97] *Cf.* Hill, *Constitutional Remedies,* 69 COLUM. L. REV. 1109, 1150 n.177 (1969) (pointing out that prior to *Weeks* the only remedies for unlawful search and seizure had been civil suit, criminal prosecution of the offending officer, and self-help); Grant, *Constitutional Basis of the Rule Forbidding the Use of Illegally Seized Evidence,* 15 S. CAL. L. REV. 60, 60-61 (1941) (same).

[98] WIGMORE, *supra* note 79, at 10-11. *See* Atkinson, *Prohibition and the Doctrine of the Weeks Case,* 59 AM. L. REV. 728 (1925).

[99] *See* H. JOHNSTON, WHAT RIGHTS ARE LEFT 26 (1930); Wilson, *Attempts to Nullify the Fourth and Fifth Amendments to the Constitution,* 32 W. VA. L.Q. 128 (1925).

[100] Hester v. United States, 265 U.S. 57 (1924).

[101] This "open fields" exception to the scope of the fourth amendment was stated in a cryptic passage at the very end of the opinion:

> The only shadow of a ground for bringing up the case is drawn from the hypothesis that the examination of the vessels took place upon Hester's father's land. As to that, it is enough to say that, apart from the justification, the special protection accorded by the Fourth Amendment to the people in their "persons, houses, papers, and effects," is not extended to the open fields. The distinction between the latter and the house is as old as the common law.

Id. at 59, *citing* 4 W. BLACKSTONE, COMMENTARIES* 223, 225, 226.

[102] Olmstead v. United States, 277 U.S. 438 (1928).

[103] The Court's opinion dwelt at length upon the facts of the case. The petitioners had been convicted of maintaining a conspiracy "of amazing magnitude," involving at least 50 persons and several ships operating at various ports on the West Coast. The Court estimated that the conspiracy had sales of more than $2,000,000 a year. *Id.* at 455-56. In order to gather the evidence needed to prosecute such an important case, the Government had tapped telephone lines for "many months" and had listened to numerous

in which the fourth amendment was applicable, the Court found itself increasingly asked to fill out vague and ambiguous terms—such as "unreasonable" and "probable cause." Responding on the most fundamental level in *Nathanson,*[104] the Court held that a warrant to search for unlawfully imported liquor must rest upon a "statement of adequate supporting facts" rather than "a mere affirmation of suspicion and belief."[105] Inasmuch as many searches for illicit liquor were carried out without a warrant, the Court was called upon to determine the relationship between the two clauses of the fourth amendment and to explain the circumstances in which a warrantless search could be lawful. The automobile cases, principally *Carroll*[106] and *Husty,*[107] established the rule that the failure of federal agents to obtain a

---

conversations. *Id.* at 457. Still, the Court could find no bar in the fourth amendment. There had been no physical trespass and no seizure of "material things." *Id.* at 464.

> By the invention of the telephone, fifty years ago, and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the Amendment can not be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched.
>
> . . . .
>
> Congress may of course protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials, by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment.

Id. at 465-66. As part of the Communications Act of 1934, Congress did prohibit at least the publication of communications obtained by wiretapping. Ch. 652, § 605, 48 Stat. 1103 (codified at 47 U.S.C. § 605 (1970)). *See* Nardone v. United States, 302 U.S. 379 (1937) (holding that the statute applied to federal law enforcement authorities). The Crime Control Act of 1968 amended the Communications Act to permit some electronic surveillance—but only on a warrant issued by a magistrate. Pub. L. No. 90-351, § 802, 82 Stat. 212-23 (current version codified at 18 U.S.C. §§ 2510-2520 (1970)). *See* Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 418-20 (4th ed. 1974).

It was in dissent in *Olmstead,* of course, that Justice Brandeis contributed his warning that the fourth amendment should not be given "an unduly literal construction." 277 U.S. at 476. Citing *Boyd,* he reminded the Court that "[w]hen the Fourth and Fifth Amendments were adopted 'the form that evil had theretofore taken,' had been necessarily simple . . . . But 'time works changes, brings into existence new conditions and purposes.'" *Id.* at 473, *citing* 116 U.S. at 630. The electronic surveillance in *Olmstead* was only the beginning, according to Justice Brandeis. "Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home." 277 U.S. at 474. He insisted that the Court should interpret the fourth amendment to deal with the approaching technological revolution, lest the government become armed with espionage tools that made the writs of assistance "but puny instruments of tyranny and oppression" in comparison. *Id.* at 476. Finally, wholly apart from the constitutional issue, Justice Brandeis urged that the convictions be set aside because the wiretapping in the case had been conducted in violation of state law. While at the outset the unlawful wiretapping had been the criminal activity only of the individual officers, in this case the Government had attempted to take advantage of the fruits of that wrongdoing and had thus "assumed moral responsibility for the officers' crimes." *Id.* at 483. By permitting the Government to do just that, the majority had sanctioned those crimes. "The governing principle has long been settled," he said. "It is that a court will not redress a wrong when he who invokes its aid has unclean hands." *Id.* In conclusion, he delivered the language that made his *Olmstead* dissent famous:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the Government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.

Id. at 485.

[104] Nathanson v. United States, 290 U.S. 41 (1933).

[105] *Id.* at 46.

[106] Carroll v. United States, 267 U.S. 132 (1925).

[107] Husty v. United States, 282 U.S. 694 (1931).

warrant might be excused in exigent circumstances when seeking a warrant would frustrate the purpose of the search.[108] Finally, the whiskey cases called into question the fourth amendment standards governing searches incident to arrest. Here, too, the Court was hard at work developing guidelines, however inadequate. *Agnello,*[109] *Marron,*[110] *Go-Bart,*[111] and *Lefkowitz*[112] come to mind. In those "ill-starred prohibition cases,"[113] the Court began to fashion the principle that a search incident to arrest might extend beyond the suspect's person to the surrounding area.[114]

By the end of the Prohibition Era, the Court had begun to develop a body of search and seizure doctrine. It was flawed, of course, and worse. Indeed, it was in many respects unpredictable, self-contradictory and even unintelligible.[115] Yet, in its own way and time the Court was attempting to build a framework within which search and seizure cases might be decided with justice to the litigants and to the values underlying the fourth amendment. All this was going on, of course, as the Court reviewed federal criminal convictions to determine whether evidence introduced at trial should have been excluded under the *Weeks* rule. In state cases, on the other hand, the standard of review was "fundamental fairness" derived from the due process clause of the fourteenth amendment. The Court had held since *Twining*[116] that a state conviction could be set aside only if the accused was denied procedure "implicit in the concept of ordered liberty."[117] That standard was troublesome at best. Not only was it extraordinarily difficult to express, it was virtually impossible to apply with consistency. And slowly it lost ground to Justice Black's

---

[108] At the core of the cases was the proposition that an automobile was a mobile container that could be moved out of the jurisdiction while the agents took time to seek a warrant from a magistrate. Accordingly, it made sense, at least to the Supreme Court, to permit the agents to make their own determination of probable cause and to conduct a warrantless search on the spot—subject to review by a court when the defendants moved to suppress any evidence found. The Court's position won some praise, *e.g.*, Nelson, *supra* note 78, at 776, but a good deal of criticism, *e.g.*, Black, *A Critique of the Carroll Case,* 29 COLUM. L. REV. 1068 (1929).

[109] Agnello v. United States, 269 U.S. 20 (1925).

[110] Marron v. United States, 275 U.S. 192 (1927).

[111] Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931).

[112] United States v. Lefkowitz, 285 U.S. 452 (1932).

[113] F. BLACK, ILL-STARRED PROHIBITION CASES (1931).

[114] *See* notes 340-42, 348-49, 357-64 and accompanying text *infra.*

[115] *See* Grant, *Circumventing the Fourth Amendment,* 14 S. CAL. L. REV. 359 (1941) (complaining that so many exceptions to the exclusionary rule had been recognized that "any value it might otherwise have had" had been destroyed).

[116] Twining v. New Jersey, 211 U.S. 78 (1908). Of course, even before Justices Black and Douglas began pressing Black's incorporation theory in the 1940s, there had been occasional talk in the cases about applying the Bill of Rights to the states through the fourteenth amendment. *E.g.*, O'Neil v. Vermont, 144 U.S. 323, 370 (1892) (Harlan, J., dissenting). *See* Morrison, *Does the Fourteenth Amendment Incorporate the Bill of Rights?,* 2 STAN. L. REV. 140 (1949). But a majority on the Court had never taken that position seriously. *E.g.*, McElvaine v. Brush, 142 U.S. 155 (1891); Hurtado v. California, 110 U.S. 516 (1884); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

[117] Palko v. Connecticut, 302 U.S. 319, 325 (1937). *Palko* was perhaps the most interesting of the cases illustrating the growth of the incorporation idea. The case was cited both by those who consistently urged the flexible due process approach, *e.g.*, Adamson v. California, 332 U.S. 46, 59 (1947) (Frankfurter, J., concurring), and by Justice Black—who supposed the case to adopt the intermediate, "selective incorporation" approach. *E.g.*, Duncan v. Louisiana, 391 U.S. 145, 163-64 (1968) (Black, J., concurring). The basic case, however, was *Twining,* in which the Court said:

> [I]t is possible that some of the personal rights safeguarded by the first eight Amendments against National action may also be safeguarded against state action, because a denial of them would be a denial of due process of law . . . . If this is so, it is not because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law.

211 U.S. at 99.

incorporation theory.[118] *Wolf*[119] was a watershed in this process. Compromising in some measure with Justice Black, Justice Frankfurter acknowledged that "[t]he security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society."[120] Accordingly, he said, that interest was protected against state invasion by the due process clause. Nevertheless, to drive home his rejection of "jot-for-jot" incorporation,[121] he drew a distinction between the intrusion itself—which violated due process—and the use of illegally seized evidence at trial. The latter issue, he insisted, was a question "of a different order."[122] Since two-thirds of the states and the members of the Commonwealth did not find the exclusionary rule vital to liberty, he declined to force it upon Colorado.[123]

Wolf's dichotomy between right and remedy caused immediate difficulty. Frankfurter himself seemed unconcerned. In *Rochin*,[124] where California officers dragged the petitioner from his bed and forced him to regurgitate capsules of morphine, Justice Frankfurter abruptly upset the conviction, declaring that "the proceedings by which this conviction was obtained do more than offend some fastidious squeamishness . . . . This is conduct that shocks the conscience."[125] The police conduct had been not only bad, but shocking—so shocking, indeed, that the conviction that followed could not stand consistent with due process. That result was hardly objectionable, but the "shock the conscience" test Justice Frankfurter used to reach it, and his total neglect of *Wolf*,[126] confused even his colleagues. Two years later, in

---

[118] This is not the place for yet another labored description of the debate over incorporation that raged on the Court for 20 years before Justice Black finally had his way, albeit through the intellectually troubling process of "selective incorporation." *See* Monaghan, *Of "Liberty" and "Property"*, 62 CORNELL L. REV. 405 (1977). Materials on this most critical question in constitutional law are easy enough to find. *E.g.*, G. GUNTHER, CONSTITUTIONAL LAW 486-656 (9th ed. 1975); Comment, *The Adamson Case: A Study in Constitutional Technique*, 58 YALE L.J. 268 (1949).

[119] Wolf v. Colorado, 338 U.S. 25 (1949). The facts were not set out in the opinion, prompting speculation that the Court saw the case as raising only the dry and abstract question of incorporation, divorced from any significant concern for the fairness of the procedure in Colorado. *E.g.*, Perlman, *Due Process and the Admissibility of Evidence*, 64 HARV. L. REV. 1304 (1951). It is noteworthy that in other Frankfurter opinions handed down on the same day, the Court was not at all adverse to calling state police to account for coercive interrogation tactics. *See, e.g.*, Watts v. Indiana, 338 U.S. 49 (1949).

[120] 338 U.S. at 27. I do not read this language as some have to mean that "because the core of the fourth amendment is incorporated into the fourteenth, it is unconstitutional for state officers to search for and seize evidence in a manner which would violate the standard applicable to federal officers under the fourth amendment." Kohn, *Admissibility in Federal Court of Evidence Illegally Seized by State Officers*, 1959 WASH. U.L.Q. 229, 242. Indeed, given Justice Frankfurter's persistent opposition to "incorporation," it seems plain that he was trying to avoid precisely that implication. *See* Elkins v. United States, 364 U.S. 206, 237-40 (1960) (Frankfurter, J., dissenting). Of course, after Mapp v. Ohio, 367 U.S. 643 (1961), the Court openly assumed that the same standards governed federal officers subject to the fourth amendment and state officers subject to the fourteenth. Ker v. California, 374 U.S. 23, 30-31 (1963). Professor Amsterdam accepts the identity of the two standards as settled law. Amsterdam, *supra* note 1, at 440 n.23. But there is substantial evidence the matter is far from closed in the minds of the Justices now sitting. *See* note 668 and accompanying text *infra*.

[121] *See generally* Duncan v. Louisiana, 391 U.S. 145, 181 (1968) (Harlan, J., dissenting).

[122] 338 U.S. at 28.

[123] In conclusion Justice Frankfurter noted that, in his view at least, the exclusionary rule was not itself a part of even the fourth amendment, but rather arose by "judicial implication" in *Weeks*. In what was yet another expression of his dilemma between protecting individual privacy and maintaining the proper respect for federalism, he implied that Congress might abrogate the rule in federal cases or force it upon the states through the enforcement clause of the fourteenth amendment. *Id.* at 33. *See* Allen, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 10 (1950).

[124] Rochin v. California, 342 U.S. 165 (1952).

[125] *Id.* at 172.

[126] There was in Frankfurter's *Rochin* opinion no mention of *Wolf* whatever and certainly no mention of a dichotomy between the individual's constitutional protection from arbitrary intrusions upon privacy and property and the consequences of an unlawful intrusion. At the time, Professor Allen offered that

Irvine,[127] when other California officers trespassed repeatedly into the petitioners' bedroom to plant several bugs and listened to dozens of private conversations, a majority found *Wolf* rather than *Rochin* controlling. To be sure, the police had violated the due process clause by arbitrarily intruding into the petitioners' privacy;[128] but however aggravated their trespass, it did not follow that the evidence they obtained must be excluded from the trial. Justice Frankfurter dissented,[129] but the Court would not relent. The police had acted badly, but evidently not badly enough.[130]

Irvine, and cases like it, demonstrated to the entering Warren Court that the Frankfurter "flexible due process" standard was utterly unmanageable. Just as in the cases involving the right to counsel[131] and coerced confessions,[132] the new Justices ultimately rejected the flexible test in favor of the more precise standards developed under the fourth amendment in federal cases. The case, of course, was *Mapp*.[133] Writing for the plurality,[134] Justice Clark re-examined the experience of the states, now finding that more than half had adopted the exclusionary rule as the only effective protection against unreasonable search and seizure.[135] Moreover, in the time

---

in *Rochin* Frankfurter had wanted to avoid the "rigidities inherent in the privilege against self-incrimination" but could not make stomach-pumping "fit comfortably in the search and seizure category." Allen, *Due Process and State Criminal Procedures: Another Look*, 48 NW. L. REV. 16, 24-25 (1953).

[127] Irvine v. California, 347 U.S. 128 (1954).

[128] Indeed, Justice Jackson was so outraged at what had occurred in the case that he suggested that copies of the record be forwarded to the Attorney General for possible criminal prosecution. *Id.* at 137-38.

[129] He insisted that *Wolf* was simply inapplicable. This case, like *Rochin*, presented a fundamental fairness question under the due process clause, and the absence of physical coercion could not save the conviction. *Wolf*, on the other hand, had concerned only unreasonable search and seizure. *Id.* at 144.

[130] Justice Clark concurred bitterly in *Irvine*, indicating that if he had been on the Court for *Wolf* he would have voted for exclusion. *Id.* at 138. *But see* Breithaupt v. Abram, 352 U.S. 432 (1957) (opinion of the Court). That attitude, expressed by a new appointee not known for coddling criminals, suggested that even then *Wolf* was ripe for re-examination. McKay, *Mapp v. Ohio, The Exclusionary Rule and the Right of Privacy*, 15 ARIZ. L. REV. 327, 331 (1973). *See generally* Kamisar, *Wolf and Lustig Ten Years Later*, 43 MINN. L. REV. 1083 (1959) (surveying the difficulties left in *Wolf*'s wake).

[131] *Compare* Powell v. Alabama, 287 U.S. 45 (1932) *and* Betts v. Brady, 316 U.S. 455 (1942) *with* Gideon v. Wainwright, 372 U.S. 335 (1963) *and* Argersinger v. Hamlin, 407 U.S. 25 (1972).

[132] *Compare* Brown v. Mississippi, 297 U.S. 278 (1936) *and* Watts v. Indiana, 338 U.S. 49 (1949) *with* Malloy v. Hogan, 378 U.S. 1 (1964) *and* Miranda v. Arizona, 384 U.S. 436 (1966).

[133] Mapp v. Ohio, 367 U.S. 643 (1961).

[134] The case involved an unusually extensive and brutal search for a bombing suspect and evidence of gambling, during which officers broke down the door of a two-family dwelling, flashed what they claimed was a warrant, hand-cuffed the suspect and dragged her through the house as they searched, and ultimately seized only some allegedly obscene materials from a trunk in the basement. In the state courts, the principal issue had been whether a state statute making it an offense to knowingly possess obscene materials was consistent with the first amendment. *Id.* at 672-73 (Harlan, J., dissenting). *See also* Stanley v. Georgia, 394 U.S. 557 (1969). Only the amicus curiae urged the Court to treat the search question. 367 U.S. at 646 n.3 (opinion of the Court). Accordingly, the surprise decision uprooting *Wolf* found three Justices, Harlan, Frankfurter, and Whittaker, in dissent and one, Justice Stewart, declining to pass on the exclusionary rule issue. The deciding vote in *Mapp* was cast by Justice Black, who could find no exclusionary rule in the fourth amendment alone, *see id.* at 661 (Black, J., concurring), *citing* Wolf v. Colorado, 338 U.S. 25, 39-40 (1948) (Black, J., concurring), but now relied on *Boyd's* conjunction of the fourth and fifth amendments to impose the rule of exclusion in both federal and state cases. In an apparent nod to Justice Black, Justice Clark's opinion for the Court rested the rule in federal cases on both the fourth and fifth amendments and in state cases on the "intimate relation" between constitutional protections against "unconscionable invasions of privacy" and "convictions based upon coerced confessions." 367 U.S. at 656-57. In light of *Weeks'* reliance on the fourth amendment alone, the reference to the coerced confession and self-incrimination cases was troubling. It must be understood as yet another carry-over from the confusing blurring of safeguards against unreasonable search and seizure and self-incrimination begun in *Entick* and wedged into American constitutional law in *Boyd*. *See* notes 44, 75-76 and accompanying text *supra*.

[135] 367 U.S. at 651. The Court particularly cited California, the state from which the obnoxious *Rochin* and *Irvine* cases had come. Although the California court had long rejected the exclusionary rule, *e.g.*, People v. Gonzales, 20 Cal. 2d 165, 124 P.2d 44 (1942) (in bank), after *Wolf* the court had embraced it

since *Wolf*, the Court's decisions discarding the "silver platter doctrine,"[136] relaxing "standing" requirements,[137] and prohibiting federal officers from passing unlawfully seized evidence to state courts[138] had gradually come to look in the direction of uniformity between the federal and state systems. Finally, Justice Clark squarely rejected the distinction between right and remedy devised by Justice Frankfurter in *Wolf*, saying that at the time "the Court held in *Wolf* that the Amendment was applicable to the States" it was clear that "as to federal officers the Fourth Amendment included the exclusion of the evidence seized in violation of its provisions."[139] "Therefore," he said, "in extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary [that the exclusionary rule be recognized as] an essential ingredient of the right newly recognized by the *Wolf* case."[140]

Incorporation had prevailed. The Court had looked again at the experience of the states and this time seen a glass half full rather than a glass half empty.[141] It had pounded intervening precedents into line behind a new principle, and in the final moment had rewritten *Wolf* itself as a partially incorporationist decision in order to break the way for a holding that henceforth both state and federal cases would be controlled by the same search and seizure doctrine.[142] In cases decided through the 1960s, fourth and fourteenth amendment precedents were used interchangeably as the Warren Court simply assumed that the same standards governed both, and that when those standards were breached, the exclusionary rule came into

---

"because other remedies [had] completely failed to secure compliance with the constitutional provisions." People v. Cahan, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955) (in bank). *See* Paulsen, *Criminal Law Administration: The Zero Hour Was Coming*, 53 CAL. L. REV. 103 (1965) (suggesting that the court changed its position on the exclusionary rule in light of the deliberate violations of the Constitution by California police—even at the supervisory levels).

[136] Since *Weeks*, relying solely upon the fourth amendment, had said that the exclusionary rule would not apply to evidence seized by *state* officers, the Court at first held that so long as no federal officers had engaged in illegal conduct and the evidence used in a federal prosecution was merely delivered on a "silver platter" by state officers, the evidence was admissible. *See, e.g.*, Byars v. United States, 273 U.S. 28 (1926). However, in Elkins v. United States, 364 U.S. 206 (1960), the Court disapproved the doctrine on the ground that it caused friction between the federal and state systems when federal courts in exclusionary rule states received evidence seized unlawfully by state officers—evidence the state's own courts would not receive. *See* Broeder, *The Decline and Fall of Wolf v. Colorado*, 41 NEB. L. REV. 185 (1962).

[137] Jones v. United States, 362 U.S. 257 (1960) (recognizing standing in a suspect charged with a possessory offense or lawfully present at the time of the search). *See* notes 301-12 and accompanying text *infra*.

[138] Rea v. United States, 350 U.S. 214 (1956) (enjoining a federal officer from delivering illegally seized evidence to state authorities for use in a state which did not recognize the exclusionary rule). *See* Berman & Oberst, *Admissibility of Evidence Obtained by an Unconstitutional Search and Seizure—Federal Problems*, 55 Nw. L. REV. 525 (1960). *But see* Cleary v. Bolger, 371 U.S. 392 (1963) (declining to enjoin a state officer in similar circumstances).

[139] 367 U.S. at 655.

[140] *Id.* at 655-56.

[141] In dissent, Justice Harlan insisted that however many states *did* embrace the rule, what was important was that half of them did *not*. *Id.* at 680.

[142] *Compare* text at note 139 *supra with* note 120 and accompanying text *supra*. My statements in the text cover two notions that for purposes of analysis must at times be kept separate. On the one hand, there is the question whether the same rules govern searches and seizures carried out by federal and state officers. Notwithstanding Justice Frankfurter's objections, the Court held in *Ker* that the standards were indeed the same. *See* note 120 *supra*. Again, I have my doubts about whether the Burger Court sees the matter as settled, and I will return to the question later. *See* note 668 and accompanying text *infra*. On the other hand, there is the question whether the same consequences flow from a finding of unlawful conduct by federal and state officers. This is the precise issue decided in *Mapp*—in favor of the exclusionary rule as the only response to illegal search and seizure. *But see* notes 610-13, 617-19, 625-26 and accompanying text *infra*.

play as a matter of course.[143] The Burger Court inherited that frame of mind, and with few exceptions has continued to view search and seizure considerations as fungible goods to be pulled from fourth and fourteenth amendment decisions without distinction.[144] Yet, in taking precedents to identify considerations more than to state principles, the Burger Court has made important changes. While the effect of the Warren Court's imposition of uniformity upon the state and federal systems was to make over state criminal procedure to mirror the more structured federal process, the Burger Court has moved both systems back toward the standard applied to state cases when *Twining* was in flower.[145] Thus, while the Court contemplates that both state and federal cases will be judged by the same standard, more often than not, that standard is indistinguishable from the "fundamental fairness" minimum always required of the states under the fourteenth amendment.

II. THE PROBLEMS

Search and seizure cases present three major issues. First, there is the question of the scope of constitutional protection. The Court must define a "search" and a "seizure." It must determine the circumstances in which the fourth amendment comes into play and when that provision rather than some other is the appropriate benchmark against which to judge events. Second, there is the question of standards. Once it is decided that the fourth amendment applies, the Court must determine when it is violated. The Court must elaborate on what makes a search and seizure "unreasonable" and fill out other vague and ambiguous phrases. It must define "probable cause" and fix standards for "particularly describing the place to be searched, and the persons or things to be seized." Finally, there is the question of consequences. Having found that a search or seizure was unreasonable, the Court must determine what follows upon that conclusion.[146]

After *Boyd* and *Weeks,* the exclusionary rule provided a vehicle, and the Prohibition cases an opportunity, for the Court's attempts, however feeble and unsatisfactory in hindsight, to deal with these three overriding issues. There was a good faith attempt to draw Professor Amsterdam's horse. The going was hard. Every decision seemed to raise more search and seizure questions than it answered, and it was exceedingly difficult to formulate workable doctrine to guide the police and the lower courts. With the arrival of the imaginative Warren Court Justices, great strides were taken, but even the constitutional implications of the most common contacts between citizen and police evaded principled analysis in which the Court and the rest of us could place confidence.[147] Nevertheless, the attempt was

---

[143] *E.g.,* Chimel v. California, 395 U.S. 752 (1969) (finding it necessary to expressly overrule federal decisions in order to reach an inconsistent result in a state case).

[144] *E.g.,* Gustafson v. Florida, 414 U.S. 260 (1973) (upholding a search in a state case solely on the basis of a federal case decided on the same day).

[145] *See* notes 116-30 and accompanying text *supra.*

[146] Although I am not satisfied that the term "consequences" is a significant improvement, I do want to avoid calling this question one of "remedy." Our number is dwindling by the day and our views are hardly acceptable to the present Court, but there are some of us left who do not believe the exclusionary rule is merely one of several "remedies" for unconstitutional search and seizure. I for one do not embrace Justice Frankfurter's dichotomy between "right" and "remedy." Rather, I see the exclusionary rule as "part and parcel" of the underlying right. I will defend that thesis in a separate Section below.

[147] *E.g.,* Terry v. Ohio, 392 U.S. 1 (1968) (treating brief street encounters). *See* Coolidge v. New Hampshire, 403 U.S. 443, 490 (1971) (Harlan, J., concurring) (complaining that "the present state of uncertainty" as to the constitutional implications of "everyday" questions was "intolerable").

made, and in this Part some of the most important cases are surveyed. While I find these decisions dissatisfying in many respects, I set them out here not for criticism but to provide a contrast with the more recent work of the Nixon appointees. The Burger Court cases are, of course, my chief concern. I will come to them after laying the necessary foundation.

A. The Question of Scope

Scope, the threshold question, has troubled the Court more than any other. It has been treated in three related, but for purposes of organization separable, lines of cases. In the *Katz* case,[148] the Court grappled with the fundamental theoretical issues tied up in the fourth amendment's protection of privacy. That case, together with its precursors and successors, must be examined first. Next, we must examine the cases on the effect of the governmental purpose in conducting what appear to be "searches." Finally, we must complete the picture by treating the neglected question of the protection for property in the fourth amendment.[149]

1. The Fourth Amendment and Privacy

The best thinking on the scope of the fourth amendment has come from outside the Court, and the best of that from Anthony Amsterdam.[150] He identifies two models. On the one hand, the Court might choose a means-oriented approach that

---

[148] Katz v. United States, 389 U.S. 347 (1967).

[149] Two other "scope" questions come to mind. One is the effect of private actions that, if conducted by government officers, would violate the fourth amendment. The Court held in Burdeau v. McDowell, 256 U.S. 465 (1921), that for want of the requisite governmental responsibility, searches conducted by private persons are not controlled by the fourth amendment. That proposition is not so impregnable as it first may seem. For even if one takes the position that there is insufficient "governmental" or "state" action in the intrusion itself to invoke the Constitution, *but see* Note, *Seizures by Private Parties: Exclusion in Criminal Cases*, 19 STAN. L. REV. 608 (1967), the later acquisition of the intrusion's fruits by the police, *see* Note, *Private Searches and Seizures*, 90 HARV. L. REV. 463 (1976), or their ratification of the intrusion, *see* Black, *Burdeau v. McDowell—A Judicial Milepost on the Road to Absolutism*, 12 B.U. L. REV. 32 (1932), or even the use of the fruits at trial, *see* White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 221 n.107, may arguably implicate the authorities in the otherwise private search and seizure. While a relatively unobjectionable private search might not cause a great deal of difficulty, one that "shocks the conscience" and would violate even the due process clause if carried out by state officers is troubling indeed. *See* Burdeau v. McDowell, 256 U.S. at 477 (Brandeis, J., dissenting) (noting that the suspect's business had been burglarized and his safe blasted open to get at evidence handed over to the government). Both because a discussion of *Burdeau* would require a fair dip into the general "state action" literature and because I do not see that the effort would substantially further the defense of my thesis, I have decided not to treat the case or its issue in this Article.

The second "scope" question I will omit is the question of "consent" to what would otherwise constitute an unlawful search and seizure. While some authorities view consent as merely another exception to the warrant requirement, *see, e.g.*, United States v. Mapp, 476 F.2d 67, 76 (2d Cir. 1973), I consider Lloyd Weinreb's view that consent avoids the fourth amendment altogether more accurate. Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47 (1974). Here again, though, I do not see that a discussion of the decisions would serve my purpose. I hasten to say that I believe cases like United States v. Matlock, 415 U.S. 164 (1974) (resting the power of a third party to consent to a search on the suspect's assumption of that risk), only apply the "expectation of privacy" formula from *Katz* in another context—indeed, one not far removed from the "secret agent" cases. *See* notes 168, 176-87 and accompanying text *infra*. To be sure, the "totality of the circumstances" test established in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), for ordinary consent cases tracks the "reasonableness" or, I think more accurately, the "fundamental fairness" standard of review that is now applied by the Burger Court in most fourth amendment cases. Witness the third-degree methods disapproved by Judge Celebrezze in United States v. Mayes, 552 F.2d 729 (6th Cir. 1977). I do not, then, find the cases on consent, or for that matter private search and seizure, to undercut my thesis. I have only concluded that a discussion of them would unduly lengthen an already overlong paper without introducing more useful illustrations than those I have chosen to set forth.

[150] Amsterdam, *supra* note 1.

invokes the fourth amendment in any case in which the police conduct under review resembles the general searches carried out by the Halifax messengers.[151] This alternative has the flavor of the historical approach I have said the Court, and everybody else, has rejected.[152] But the means-oriented model is not so crabbed as all that. It uses the historical evidence only to identify the paradigm government action with which the fourth amendment is concerned. Faced with a case in the mid-twentieth century, it does not ask if the framers "intended" to cover this case, but rather whether what the police did looks like what the customs officials did in Boston Harbor.[153] The root idea is that however the fourth amendment is read, it surely must be read to control the paradigm case.[154] From there, the Court can only inch forward in the fashion of the common law, expanding the reach of the fourth amendment by strained analogy and loose adherence to precedent. The individual rarely wins in such a regime. Witness *Hester,*[155] in which the Court declined to hold federal agents accountable under the fourth amendment when they seized moonshine that had been "abandoned" in the "open fields" just outside the suspect's window, and *Olmstead,*[156] in which the Court saw no fourth amendment problem in wiretapping that involved no physical trespass into a building and no seizure of "material things."[157] On the other hand, the Court might adopt a value-oriented model that finds in the historical materials only a description of the values the fourth amendment protects. The *Jackson*[158] and *Boyd*[159] cases come to mind. The "searches" and "seizures" in those cases hardly approached the storming of John Entick's house, but the Court applied the fourth amendment because the same "substantial purpose" had been achieved.[160] Said another way, irrespective of the character of the official actions in *Jackson* and *Boyd,* values protected by the fourth amendment were at stake in both of those cases, and that amendment was necessarily brought into service to perform its assigned function.

On another level, the Court must choose between what Amsterdam calls the atomistic and regulatory models.[161] Does the fourth amendment establish a sphere surrounding the individual—one that resembles an atom—and forbid government entry except by a specified process?[162] Or does the fourth amendment regulate government in its dealings with all of us, holding every contact the police have with the public to a previously prescribed standard? The regulatory model cuts against the grain, of course. The constitutional protections for personal liberty with which we are most familiar generally perceive confrontations with government from the

---

[151] I am borrowing here not only from Professor Amsterdam but from a useful elaboration on his work in Stone, *The Scope of the Fourth Amendment: Privacy and the Police Use of Spies, Secret Agents, and Informers,* 1976 AM. B. FOUNDATION RESEARCH J. 1193.

[152] *See* notes 5-10 and accompanying text *supra.*

[153] *See* notes 49-51 *supra.*

[154] Amsterdam, *supra* note 1, at 363; Stone, *supra* note 151, at 1199.

[155] *See* notes 100-01 and accompanying text *supra.*

[156] *See* notes 102-03 and accompanying text *supra.*

[157] 277 U.S. at 464. *See also* Goldman v. United States, 316 U.S. 129 (1942).

[158] *See* notes 65-66 and accompanying text *supra.*

[159] *See* notes 67-82 and accompanying text *supra.*

[160] 116 U.S. at 635.

[161] Amsterdam, *supra* note 1, at 367. While Professor Amsterdam understands these second-order models as having to do with the question whether the fourth amendment is violated rather than whether it applies at all, it seems to me that the Court's choice between them is so fundamental that it must affect the full range of fourth amendment issues. The choice goes to the very conception of the amendment. I have to consider it a matter of scope.

[162] Of course, neither Professor Amsterdam nor I conceive of this atom of liberty to be spatial.

standpoint of the *individual* and fix the limits of governmental interference with the *individual's* liberty. The notion that the fourth amendment is somehow different, that it views the individual's contacts with authority from the standpoint of *government* and lays down generally applicable standards of police conduct in relation to everyone, rings off key on first hearing. Nevertheless, the fourth amendment clearly states that it is the right of the *people* that is to be secure,[163] and aside from a built-in hesitancy to embrace innovative theoretical inventions, there is no good reason why it must be read to limit only intrusions into atoms of liberty rather than to regulate the conduct of government generally.

If they were understood in private, these theoretical difficulties were hardly acknowledged in the Court's early opinions. That accounts, I suppose, for the evident inconsistency between cases like *Boyd* and *Olmstead*.[164] At first, the Warren Court, too, worried over the supposed requirement that a fourth amendment claim arise from a physical trespass,[165] and in the "secret agent" cases[166] the Court was frankly at sea in its attempts to explain its judgments.[167] Then, in the *Katz* case,[168] the Court rejected the physical trespass prerequisite, overruled *Olmstead* on that issue and on its holding that conversations were not "effects," and finally made the necessary theoretical choices. By applying the fourth amendment to a bug fixed to the outside of a public phone booth, and by holding that it protected "the privacy upon which [the individual] justifiably relied,"[169] the Court plainly adopted the value-

---

[163] Amsterdam, *supra* note 1, at 367.

[164] In *Olmstead*, the Court made feeble attempts to distinguish *Boyd* and circumscribe *Jackson*, but it is clear that Chief Justice Taft had an altogether different view of the fourth amendment from that employed in the earlier cases. *See* Stone, *supra* note 151, at 1200. *But see* Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 961-63 (1977) [hereinafter cited as *Formalism*] (contending that the reasoning if not the result in *Olmstead* was similar to the formalism that had influenced *Boyd*).

[165] *E.g.*, Clinton v. Virginia, 377 U.S. 158 (1964) (per curiam); Silverman v. United States, 365 U.S. 505 (1961).

[166] Osborn v. United States, 385 U.S. 323 (1966); Hoffa v. United States, 385 U.S. 293 (1966); Lewis v. United States, 385 U.S. 206 (1966); Lopez v. United States, 373 U.S. 427 (1963); On Lee v. United States, 343 U.S. 747 (1952). The cases had to do with the applicability of the fourth amendment to informers who had or gained the confidence of suspects and heard incriminating statements, some of which were simultaneously heard by agents using electronic devices or recorded for later use at trial. The Court held in all the cases that the fourth amendment did not apply. *See* Dix, *Undercover Investigations and Police Rulemaking*, 53 TEX. L. REV. 203 (1975).

[167] The Court was sharply split in all the cases. In On Lee v. United States, 343 U.S. 747 (1952), the vote was 5-4. Justice Frankfurter and Justice Douglas would have overruled *Olmstead* and reversed on a fourth amendment ground, Justice Burton would have reconciled *Olmstead* and reversed, and Justice Black would have used the supervisory power to upset the conviction. *Lopez* was decided by a vote of 6-3, but the sixth vote came from Chief Justice Warren, who managed to distinguish *On Lee*. In *Lopez*, Justice Brennan's dissent, joined by Justices Douglas and Goldberg, would have applied the fourth amendment to any case involving electronic surveillance. In the 1966 trilogy of cases, the Court was again split, with the majority emphasizing the facts of each case and playing down *On Lee* and *Lopez*, precedents one would have expected to control the new cases. Individual Justices weaved in and out of the majority, apparently on the basis of how outrageous the government's conduct had been in each. *E.g.*, Hoffa v. United States, 385 U.S. 293, 314-15 (1966) (Warren, C.J., dissenting) (explaining his votes to affirm in *Lewis* and *Osborn* but to reverse in *Hoffa*). Only in *Osborn* were the Justices in substantial agreement. In that case, Justice Stewart focused on the warrants the officers had obtained, albeit belatedly, and insisted that the conviction could be confirmed consistent with Justice Brennan's *Lopez* dissent. Even then, Justice Douglas dissented on the theory that all electronic surveillance is unconstitutional as a general search. 385 U.S. at 340. *Accord, The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40, 187 (1961).

[168] Katz v. United States, 389 U.S. 347 (1967).

[169] *Id.* at 353. In hindsight, it may be said that *Katz* confirmed more propositions than it introduced. Four years earlier, in Wong Sun v. United States, 371 U.S. 471 (1963), the Court had excluded a verbal statement from a trial because it had been obtained in violation of the fourth amendment. Earlier in the 1966 Term, the Court had loosed the fourth amendment's ties to property law concepts in Warden v. Hayden, 387 U.S. 294 (1967), and commented in Berger v. New York, 388 U.S. 41, 63 (1967), that the

oriented and atomistic models.[170] Henceforth, or so it seemed, the police would have the fourth amendment to contend with in any case in which they presumed to intrude upon an individual's enclave of privacy—the fundamental value protected against unreasonable search and seizure.[171]

Katz was a fair start. It might have been a more limited decision[172] but purposefully reached for higher theoretical ground while using language sufficiently nebulous to leave "room for retreat."[173] The difficulty is that the Burger Court was left to build the structure for which *Katz* was only the groundwork. The new appointees seem not to have recognized the work to be done. Instead of elaborating on the values protected by the fourth amendment and building doctrine to see that those values are indeed protected, the Burger Court has confused the situation by vainly attempting to accommodate means-oriented precedents in a post-*Katz* world. Two examples will suffice.

In the *White* case,[174] federal officers had once again wired an informant for sound, recorded his conversations with a suspect, and introduced the recording at trial.[175]

---

fruits of unlawful electronic surveillance would be excluded. Indeed, Justice Douglas' concurring opinion in *Berger* proclaimed the death of *Olmstead*. 388 U.S. at 64. *See generally* United States v. White, 401 U.S. 745, 768 (1971) (Harlan, J., dissenting).

[170] Professor Amsterdam does not need *Katz* to conclude that the atomistic model has been adopted. The "standing" cases, which permit a litigant to complain only of an interference with his or her *own* privacy or property, reflect an unwillingness to view the fourth amendment as a general regulation of the police. Amsterdam, however, contends that "a regulatory view of the fourth amendment need not imply universal standing to invoke the exclusionary rule; it may well permit distinctions between persons who are and persons who are not permitted to suppress unconstitutionally obtained evidence." Amsterdam, *supra* note 1, at 369. Amsterdam does not explain his position, but I take him to mean that the Court might validly distinguish, as did Justice Frankfurter in *Wolf*, between right and remedy—and while finding a violation of the fourth amendment in some intrusions nevertheless decline to apply the exclusionary rule as a "remedy" for the violation. In this view, the application or not of the exclusionary rule depends upon its utility as a deterrent to further unlawful police action, and it may be unnecessary to apply the rule to every case in order to enjoy its maximum deterrent effect. *See* Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. PA. L. REV. 378 (1964) [hereinafter cited as *Section 2255*]. With all due respect to the man whose ideas I rely heavily upon in these pages, I think this understanding of the issues is in error. If the Court were to adopt the regulatory view of the fourth amendment, I should have thought the standing cases would no longer be tenable. The Court would not be concerned that any particular person's enclave of liberty is infringed but presumably would permit anyone to bring to light police misconduct at large—the evil the regulatory model identifies. It will not do to embrace a strained distinction between right and remedy in search and seizure cases, to insist that the only ground for the exclusionary rule as a remedy is deterrence, and thus to contend that it need not be brought to bear in every case to have that effect. I will treat the difficulties with the right-remedy dichotomy and the deterrence rationale below. *See* notes 572-645 and accompanying text *infra*. Suffice it to say here that if deterrence is, indeed, the purpose of the rule, then it would still seem that the Court would not care who it is who brings police excesses to its attention.

[171] I shall not attempt here to develop a definition of privacy that goes beyond already existing works that focus upon the individual's control over personal information. *See generally* C. FRIED, AN ANATOMY OF VALUES (1970); Parker, *A Definition of Privacy*, 27 RUTGERS L. REV. 275 (1974).

[172] Justice Harlan attempted in his concurring opinion to restrict it to a holding that a person in a public phone booth has standing to object to a search of the booth, which in turn can be accomplished without intruding into the booth's air space. 389 U.S. at 360-61.

[173] Kitch, *Katz v. United States: The Limits of the Fourth Amendment*, 1968 SUP. CT. REV. 133, 138. I would include among those vague and ambiguous phrases Justice Stewart's comment that the fourth amendment "protects people, not places." 389 U.S. at 351.

[174] United States v. White, 401 U.S. 745 (1971).

[175] The conversations were also overheard, without the aid of a radio receiver, by an agent hiding in the informant's kitchen. Since no evidence from that agent was introduced at trial, the Court did not consider whether mere eavesdropping, as opposed to electronic surveillance, makes a constitutional difference after *Katz*. In view of the Court's holding on the recordings, however, it seems clear that the Court would approve eavesdropping with the consent of the informant and unaided by an electronic device. If anything, that intrusion is less objectionable. Lopez v. United States, 373 U.S. 427, 452 (1963) (Brennan, J., dissenting) (distinguishing the risk that a person takes in talking to an "unbugged" and a "bugged" informant). *See* KAMISAR, LAFAVE & ISRAEL, *supra* note 103, at 466.

The case was on all fours with *On Lee*,[176] the first of the "secret agent" cases and the most vulnerable of the line.[177] *Katz* itself had apparently left *On Lee* intact,[178] but since *On Lee* had relied upon the trespass rationale and had found no fourth amendment issue whatever in the use of a "bugged" agent in the privacy of the suspect's office, it was ripe for reconsideration.[179] *On Lee* had been a means-oriented decision; it should have been doomed,[180] but it was not. Justice White, writing for a plurality that included the new Chief Justice and Justice Blackmun,[181] began well enough. He rejected the proposal that the application of the fourth amendment should turn upon the subjective expectations of the suspect. "Our problem," he said, "is what expectations of privacy are constitutionally 'justifiable'—what expectations the Fourth Amendment will protect . . . ."[182] But then he withdrew it all. In place of analysis, in place of a forthright attempt to resolve the problem as stated, he offered ipse dixit. Simply put, he said, "the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent."[183] If "one contemplating illegal activities" risks a damning conversation with a friend, "the risk is his."[184] In a real sense, the Court came to the brink of deciding what the fourth amendment protects and then backed off again, saying, in effect, that whatever it protects, it doesn't protect this.[185]

---

[176] On Lee v. United States, 343 U.S. 747 (1952). *See* United States v. White, 401 U.S. 745, 750 (1971) (opinion of the Court) (commenting that *On Lee* "involved facts very similar to the case before us"); *id.* at 773 (Harlan, J., dissenting) (declaring that the two cases were "virtually identical").

[177] *See* note 167 *supra*. *On Lee* had been cited in Justice Harlan's opinion for the Court in *Lopez*, but even then it was apparent that none of the Justices felt comfortable in relying heavily upon it. The 1966 cases studiously avoided that, and in *Osborn*, the only one of the three involving electronic surveillance, the Court emphasized that the officers had obtained a warrant. Dissenting in *White*, Justice Harlan dwelt at length on the Court's delicate treatment of *On Lee* and concluded that *Lopez* had declined to reaffirm that case and that no case since then had given a "breath of life" to its reasoning. 401 U.S. at 777.

[178] 389 U.S. at 363 (White, J., concurring).

[179] Indeed, the circuit court had explicitly held that *On Lee* was no longer good law. United States v. White, 405 F.2d 838, 847-48 (7th Cir. 1969). *See* note 177 *supra*.

[180] In the very language from *On Lee* seized upon by Justice White, that Court's approach came through: " 'It would be a dubious service to the genuine liberties protected by the Fourth Amendment to make them bedfellows with spurious liberties improvised by farfetched analogies which would liken eavesdropping on a conversation, with the connivance of one of the parties, to an unreasonable seizure.' " United States v. White, 401 U.S. 745, 750 (1971), *quoting* On Lee v. United States, 343 U.S. 747, 753-54 (1952).

[181] Justice White's opinion for the Court had only four votes—his own and those of the Chief Justice, Justice Blackmun, and Justice Stewart, who had written the Court's opinion in *Katz*. Justice Black concurred in the judgment on the basis of his continuing view that eavesdropping, with or without the aid of an electronic device, does not constitute a search and seizure. Katz v. United States, 389 U.S. 347, 364 (1967) (Black, J., dissenting). Justice Brennan also concurred, but only on the alternative ground, also cited by the Court, that *Katz* was not retroactive. He emphasized, however, that he could no longer support *On Lee*. 401 U.S. at 756. Justices Douglas and Harlan dissented.

[182] 401 U.S. at 752.

[183] *Id.*

[184] *Id.*

[185] Aside from the obvious governmental action issue that would be presented, the Court would face serious practical difficulties if it were to hold that by using evidence brought to them voluntarily by a previously unknown informant, the police somehow ratify whatever the informant did to obtain the information and therefore become responsible for that conduct. Justice White is quite correct that criminal investigation would take on a decidedly different character if the police were unable to take advantage of information about crime supplied by the citizenry. But his conclusion that undercover agents the police *send* to obtain information from suspects must be treated in the same way is an extraordinary *non sequitur*. Friends who become agents are one thing, but agents who become friends are quite another. I cannot improve upon Geoffrey Stone's thorough treatment of the "secret agent" cases, including *White*. Stone, *supra* note 151. In my judgment, none of the Court's decisions, not even *Osborn* where warrants were obtained on the basis of information supplied by an undercover agent, can stand after *Katz*. *See* Cioffi v. United States, 419 U.S. 917 (1974) (Douglas, J., dissenting). Shortly after *On Lee*, John Frank wrote: "If carrying a secret broadcasting device into a man's place of business or home is not the trespass Lord Coke had in mind, then the concept of trespass needs to catch up with twentieth century scientific

White, of course, was an early case, and I should pick my second example from the Burger Court's more recent work. In the *Santana* case,[186] an undercover agent had arranged to purchase heroin from McCafferty and for that purpose the two drove at McCafferty's direction to Mom Santana's house. McCafferty took the officer's money, went into the house, and returned with the heroin. When she offered it to the officer two blocks from the house, he stopped the car and arrested her. As other officers gathered around, McCafferty said that Mom Santana had the money used in the purchase. The officers returned to the house immediately and found Mom Santana standing in the doorway with a brown paper bag in her hand. They jumped out of the car, shouting "police" and displaying their badges. Mom Santana retreated into the house, but the officers followed and arrested her in the vestibule. After stating the facts in little more detail than I have here, Justice Rehnquist disposed of the constitutional issues in four paragraphs. As though to dispel the thought that he would decide the case on the basis of property law notions, he first conceded that at common law the threshold of Santana's house would have been considered private.[187] Then he said this:

> [I]t is nonetheless clear that under the cases interpreting the Fourth Amendment Santana was in a "public" place. She was not in an area where she had any expectation of privacy. "What a person knowingly exposes to the public, even in his own house or office, is not a subject of Fourth Amendment protection." *Katz v. United States* . . . . She was not merely visible to the public but as exposed to public view, speech, hearing and touch as if she had been standing completely outside her house. *Hester v. United States* . . . .[188]

---

ingenuity." Frank, *The United States Supreme Court: 1951-52,* 20 U. CHI. L. REV. 1, 37 (1952). For my part, he might have omitted reference to broadcasting devices and found the fourth amendment applicable to secret agents, "bugged" or "unbugged."

[186] United States v. Santana, 427 U.S. 38 (1976).

[187] *Id.* at 42.

[188] *Id.* (citations omitted). Reliance on *Hester* was doubly troubling. Not only was Justice Holmes' opinion in that case based on common law, but it was based on common law misconceived. Recall that federal agents seized broken moonshine bottles thrown from a window of a house. Justice Holmes' first thought was that they had been abandoned, and the truth is that alone would have been enough to distinguish *Hester* in *Santana. Cf.* Rogers, *The Fourth Amendment and Evidence Obtained by a Government Agent's Trespass,* 42 NEB. L. REV. 166, 170 (1962) (also observing that the house and surrounding land in *Hester* had been owned by the suspect's *father*). Laying the abandonment theory aside, however, Justice Holmes turned to the argument that the bottles had been taken by trespassing on private land and responded in two brief sentences: "[T]he special protection accorded by the Fourth Amendment . . . is not extended to the open fields. The distinction between the latter and the house is as old as the common law." 265 U.S. at 59. His only citation was to Blackstone's treatment of common law burglary, defined in part as unlawful entry of a dwelling house or other building within the curtilage. *Id., citing* 4 W. BLACKSTONE, COMMENTARIES* 223-25. Justice Holmes' reasoning is obscure, but it appears he meant either that no trespass had occurred unless the agents intruded not only into the curtilage but the house itself, or that the petitioner had managed to throw the bottles over the curtilage surrounding the house and into the open fields beyond. The first possibility is bad property law, and the second bad guesswork. Those recent cases attempting to accommodate *Hester* as a viable precedent have uniformly held that the protected curtilage extends well away from the dwelling. *E.g.,* Saihen v. Bensinger, 546 F.2d 1292 (7th Cir. 1976) (adopting 75 yards as a benchmark).

I confess the opinion in *Hester* puzzles me, but however that may be and whatever Holmes was actually trying to say, the Burger Court has chosen to read *Hester* with *Katz* as authority for the view that a physical trespass upon private property is simply irrelevant to the fourth amendment inquiry—at least so long as the police do not pass the threshold uninvited. *But see* United States v. Shima, 545 F.2d 1026 (5th Cir. 1977) (upholding an entry to collect contraband seen through a window). That is an extraordinary fate for an opinion that on its face relied only upon the common law. *See* United States v. Freie, 545 F.2d 1217, 1223 (9th Cir. 1976) (reading *Hester* no longer to have "independent meaning" but only to indicate that one has no expectation of privacy in open fields); Moylan, *The Fourth Amendment Inapplicable vs. The Fourth Amendment Satisfied: The Neglected Threshold of "So What?",* 1977 S. ILL. U. L.J. 75, 82-92 (seeing more value in the continued life of *Hester* than my less-experienced eye can find).

Hester, of course, was clearly a means-oriented case, its "open fields" rationale intended to rebut, in that case, the petitioner's argument that the agents who picked up the broken bottles of whiskey just outside the house had committed the sort of trespass of which the Halifax messengers had been guilty. I daresay that the Court's use of that case in 1976 to propose that a citizen has no expectation of privacy in the threshold of his or her home is nothing short of startling.[189]

In recent cases, the Court has looked not for the individual's "justifiable" but for his or her "reasonable" or "legitimate" expectation of privacy.[190] The difference is more than semantical. The latter phrases invite reference not to the Constitution itself, to "what expectations the Fourth Amendment will protect,"[191] but rather to what expectations contemporary Americans in fact have.[192] It is as though the fourth amendment only mirrors existing understandings, protecting privacy more or less as expectations that privacy be protected rise and fall. The Court seems not to recognize that our expectations depend in the first instance not only upon history and tradition but upon a knowledge that the fourth amendment is in place. There is a certain chicken-and-egg quality in the opinions that is at war with the notion of a written Constitution, which guarantees some identifiable measure of privacy to us all and does not lose its potency with the ebb and flow of community opinion. If the fourth amendment is only to reflect our expectations, the result can only be that

---

[189] Justice Marshall argued in dissent that Justice Rehnquist's opinion for the Court in *Santana* held at most that the police can enter private property to make a seizure if the object of that seizure is out of doors and in plain view from outside the property line. 427 U.S. at 46-47. *Cf.* Cady v. Dombrowski, 413 U.S. 433, 449-50 (1973) (expressly leaving open the question whether the search of an automobile in an "open field" requires a warrant). *Santana* itself involved a suspect who was almost, but not quite, safely within her home. The Court did not hold, however, that something or someone inside a house but still open to view from outside, say through an open door or window, is therefore subject to seizure. That was clear, at least to Justice Marshall, since the Court relied on the "hot pursuit" exception to the fourth amendment warrant requirement in approving the police entry into the house to arrest Santana in the vestibule. If Marshall is correct, we have not yet reached the point where we must close our blinds lest the police take our immodesty as an invitation to pay a house call. *But see* United States v. Shima, 545 F.2d 1026 (5th Cir. 1977) (approving a warrantless entry to seize illicit drugs seen through a window). On the other hand, it seems there is nothing to prevent the police from keeping watch and hoping to see something useful.

[190] *E.g.,* United States v. Dionisio, 410 U.S. 1, 14 (1973) (using the term "reasonable"); Couch v. United States, 409 U.S. 322, 336 (1973) (referring to a "legitimate" expectation). Professor Amsterdam identifies Terry v. Ohio, 392 U.S. 1 (1968), as the first case to use the different language. That, of course, was an opinion by Chief Justice Warren and can hardly be ascribed to the Nixon appointees. Nevertheless, *Terry* marked a departure from prior arrest doctrine that has been pursued with vigor by the Burger Court. In retrospect, it may be said that the *Terry* Court's rephrasing of *Katz* may have contributed to a relaxation of fourth amendment protection that has been exacerbated in more recent decisions.

[191] *See* text at note 182 *supra.*

[192] Concurring in *Katz,* Justice Harlan first took the view that the fourth amendment protects only an individual's actual, subjective expectation of privacy—and then only in circumstances in which that expectation is recognized by society as reasonable. 389 U.S. at 361. The difficulty with any emphasis upon subjective expectations is readily apparent. If the individual's subjective expectation is thought to control, then an extraordinarily naive person would seem to have greater fourth amendment protection than his or her more realistic fellows. The cynic would perhaps have very little protection at all. Justice Harlan's suggestion that the fourth amendment comes into play only when the expectation is *both* real and reasonable resolved the problem at both ends of the personality scale, but in doing so it eliminated the necessity of taking subjective expectations into account. In any case, the fourth amendment could not on his reasoning be invoked unless the individual's expectation conformed to community standards of reasonableness. In due time, Harlan saw his error and repented in his dissent in *White.* Indeed, he went on to acknowledge the even more troublesome problem with tying the application of the fourth amendment to objective, community expectations rather than finding an answer to the question of the amendment's scope in an interpretation of the Constitution itself. *See* note 193 *infra.*

constitutional protection for privacy will deteriorate proportionately as we read opinions like *White* and *Santana* and our expectations of privacy fade . . . and fade.[193]

No matter. We have been told in rapid succession that we have no expectation of privacy when we turn our private papers over to an accountant,[194] when we record our financial transactions on personal checks,[195] or when we appear before a grand jury to give testimony[196] and voice[197] or handwriting[198] exemplars. How it is that the Court has arrived at these conclusions the opinions do not say. That is to be expected, however, for there is no more amorphous standard in our law than "reasonableness."[199] The Court does no more than examine each case on its facts and judge as best it can. The inquiry is unprincipled. It is not unlike the very similar groping for "fundamental fairness" in the due process cases of the *Twining* era.[200] The Court pulls the facts and considerations together, weighs and balances them in some fashion, and then decides. It decides; it does not analyze. When in criminal cases one of its considerations is inevitably the demands of the society for order, the balance is usually struck in favor of government and against the accused. In retrospect, the *Katz* Court's freeing of the fourth amendment from the means-oriented model has actually disserved individual liberty. The truth is that the

---

[193] Professor Amsterdam has made the point. Amsterdam, *supra* note 1, at 384. Justice Harlan drew the obvious conclusion:

> The analysis must, in my view, transcend the search for subjective expectations or legal attribution of assumptions of risk. Our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present.
>
> Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks without examining the desirability of saddling them upon society.

United States v. White, 401 U.S. 745, 786 (Harlan, J., dissenting). The Burger Court's apparent rejection of the argument opens the door to untold difficulties. Still to be resolved, for example, is the extent to which government can restrict expectations of privacy legislatively—in much the same way it limits the application of the due process clause by failing to create threshold liberty or property interests. *E.g.*, United States v. Riley, 554 F.2d 1282 (4th Cir. 1977) (holding that there is no expectation of privacy in fourth-class mail because an obscure Postal Service regulation provides that the sender "consents" to warrantless inspection). *See* Bishop v. Wood, 426 U.S. 341 (1976). Similarly, it is unclear whether the individual's manifestation of subjective expectations can somehow *extend* fourth amendment protections. *Compare* Couch v. United States, 409 U.S. 322 (1973) (Marshall, J., dissenting) (proposing that a manifestation be considered) *with* United States v. Chadwick, 97 S. Ct. 2476 (1977) (taking such evidence into account).

[194] Couch v. United States, 409 U.S. 322 (1973). Specifically, Justice Powell held for the Court that "there can be little expectation of privacy where records are handed to an accountant, knowing that mandatory disclosure of much of the information therein is required in an income tax return." *Id.* at 335. In United States v. Miller, 425 U.S. 435 (1976), the facts were somewhat different. There, the petitioner claimed an expectation of privacy in checks and bank statements produced by his bank in response to a subpoena duces tecum. Justice Brennan insisted that *Couch* was distinguishable, because the petitioner in *Miller* had not delivered the statements to the bank knowing that it would disclose them to the government. The duty to disclose arose only later in response to process. *Id.* at 447 n.1 (Brennan, J., dissenting). Since the majority did not seize upon that distinction, it seems safe to conclude that the critical fact in both *Couch* and *Miller* was that the petitioner had parted with possession of papers and thus assumed the risk that they would come into the hands of the authorities. Indeed, Justice Powell's opinion for the Court in *Miller* heavily relied upon *White* and the other "secret agent" cases. *See* notes 174-85 *supra*.

[195] United States v. Miller, 425 U.S. 435 (1976); California Bankers Ass'n v. Shultz, 416 U.S. 21 (1974).

[196] United States v. Dionisio, 410 U.S. 1 (1973).

[197] *Id.*

[198] United States v. Mara, 410 U.S. 19 (1973).

[199] As Justice Marshall put it in a different context: "Of course, the Fourth Amendment test is reasonableness, but in determining whether a search is reasonable, this Court is not free merely to balance, in a totally ad hoc fashion, any number of subjective factors." Wyman v. James, 400 U.S. 309, 341 (1971) (Marshall, J., dissenting). *See also* Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329 (1973).

[200] *See* notes 116-30 and accompanying text *supra*.

Burger Court has used the *Katz* approach, reduced to a formula that ill-suits its theoretical innovations, to restrict rather than to expand the scope of constitutional protection against unreasonable search and seizure. So far as I know, the Court's use of the *reasonable* or *legitimate* expectation formula has not once resulted in the application of the fourth amendment to circumstances in which there was any doubt on that threshold question. The Court's record is, to put it mildly, remarkable. At a time when technological advances have made over our relatively simple lives, thrusting each of us into a mysterious maze of machinery that tracks our every move on a computer tape and poses in the process new and ever greater threats to individual privacy, the Burger Court approaches the fourth amendment in the most niggardly fashion. The words of caution set forth in the *Boyd* case have been relegated to dissent.[201]

2. The Fourth Amendment and Governmental Purpose

In another series of cases touching upon the scope of the fourth amendment, the Court has asked whether the identification of governmental action as a "search" or "seizure" may depend upon the purpose for which the action is taken. It has been argued on occasion that the fourth amendment is concerned only with circumscribing law enforcement authorities in their investigation of criminal actvity and that an intrusion upon an individual's privacy or property does not implicate the amendment unless it is undertaken for the purpose of gathering evidence of crime. There was one early case on the point,[202] but the first significant treatment came in Justice Frankfurter's opinion for the Court in the *Frank* case.[203] A Baltimore city ordinance provided that a health inspector who had "cause to suspect" that a nuisance existed in any building could demand entry for purposes of inspection, and anyone refusing such entry could be punished with a fine of twenty dollars. Justice Frankfurter allowed that the petitioner's attack on the ordinance raised an issue under the due

---

[201] *Compare* text at note 70 *supra with* California Bankers Ass'n v. Shultz, 416 U.S. 21, 94 (1974) (Marshall, J., dissenting). At the risk of reading into the Burger Court's post-*Katz* decisions more than is really there, I must say that they seem to reflect a growing insensitivity to the effect governmental snooping can have on human behavior. A parade of horribles comes to mind: police officers peering through windows and doors, at times with the aid of flashlights, binoculars, or more sophisticated devices; perching on fire escapes, patroling community hallways, and listening through thin apartment walls; and inspecting the hoods of cars, the soles of shoes, and the serial numbers of anything from rifles to radioes. *See* KAMISAR, LAFAVE & ISRAEL, *supra* note 103, at 210-13. Is there no "reasonable" or "legitimate" expectation of privacy in these cases? To answer in the negative is to propose that they involve no "search" within the meaning of the fourth amendment. Yet, if the police are not searching, what, pray tell, are they doing? Recently, the Court dismissed for want of a substantial federal question when a petitioner complained that the police had spied on him in a public toilet. Piatak v. Ohio, 42 U.S.L.W. 3685, *appeal dismissed,* 419 U.S. 810 (1974). I daresay that most people will soon change their habits drastically if they find that they can expect no privacy in places apparently designed to ensure just that. Going on, what of surveillance in buildings and on the public streets? I will acknowledge that some forms of unlawful conduct would be discouraged if a camera were to be trained on Harvard Square and the fact were advertised. Yet, at the same time, entirely lawful, though perhaps embarrassing or unpopular, activity would also be affected. Passers-by would hesitate to stop at the "dirty book" counter, to acknowledge an unpopular friend, or to pause to hitch up their pants. Public cameras encourage private ones, and before long we will have even more of them staring at us in banks, department stores, and restaurants. Make no mistake. I recognize that to some extent the effect upon the individual can be kept to a minimum. Cameras can be used only to monitor behavior and not to record it for future reference, and on occasion due notice can be afforded—giving at least the appearance of permitting those who object to avoid the intrusion. Finally, I acknowledge that in time we may become accustomed to surveillance and less troubled by it. On the other hand, perhaps that is precisely the point. We may get used to it when there are very good and ancient reasons for resisting.

[202] *See* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855).

[203] Frank v. Maryland, 359 U.S. 360 (1959).

process clause of the fourteenth amendment and that a consideration of the fourth amendment, particularly its history, was relevant to the question.[204] He appraised the events in England and the colonies leading to *Entick* there and Otis' speeches here and settled upon the language in *Entick*, repeated and relied upon in *Boyd*, connecting the constitutional protection against unreasonable search and seizure with the privilege against self-incrimination.[205] He maintained that the fourth amendment's general protection for personal privacy was "intimately related" to "self-protection: the right to resist unauthorized entry *which has as its design the securing of information . . . which may be used to effect a further deprivation of life or liberty or property.*"[206] The "great battle," he said, had been waged not merely to gain protection from intrusions, but to gain protection from intrusions in search of evidence of crime.[207] Returning to his due process analysis, he concluded that the Baltimore health inspections fell at the "periphery" of interests safeguarded by the due process clause, and in light of the apparent reasonableness of the intrusion in the case[208] and the long history of such practices in Maryland,[209] he found no constitutional violation in the petitioner's conviction.

Writing in the period between *Wolf* and *Mapp*, Justice Frankfurter tried desperately in *Frank* to hold his ground against the incorporationists in dissent.[210] His opinion was ambiguous, and purposefully so.[211] The result was extraordinary—a fourteenth amendment decision approving a warrantless intrusion built upon a tenuous reading of historical materials merging the fourth and fifth amendments. His purpose was clear. He saw no real unfairness in the Baltimore inspections and wanted to avoid federal intervention upsetting what had been going on for two hundred years. But for the incorporationists he might simply have balanced the considerations under the due process rubric and approved the Baltimore scheme, but in response to them he found it necessary to delve into fourth amendment precedents. The confusion of the fourth and fifth amendments was no more than a convenient vehicle for preventing the fourth amendment from disturbing the re-

---

[204] The precise bearing of the fourth amendment was, of course, left obscure. Justice Frankfurter relied upon his own language from the *Wolf* case. *See* note 120 and accompanying text *supra*.

[205] *See* notes 44, 74-77 and accompanying text *supra*.

[206] 359 U.S. at 365 (emphasis added).

[207] *Id.*

[208] On the facts, the punishment of the petitioner for refusing a warrantless inspection hardly pulled at the heartstrings. The statute did not authorize a forcible entry but only provided for a fine for wrongful refusal—and then only if the inspector had "cause to suspect" that a nuisance existed. In the *Frank* case, an inspector had found a large pile of straw, trash, and rodent feces behind the petitioner's house and requested entry to examine the premises for rats. He obtained a warrant for the petitioner's arrest only after giving him two opportunities to comply with the demand. *Id.* at 361.

[209] Frankfurter was careful to acknowledge that the fourth and fourteenth amendments were not necessarily limited in their protection of privacy to the circumstances that gave rise to the fourth amendment in 1791. *Id.* at 365-66. On the other hand, he noted that the search and seizure provision of the Maryland constitution had stood next to administrative inspection schemes in Maryland for 200 years, and no one had thought that the two were in conflict. *Id.* at 366-72.

[210] Justice Douglas wrote the dissent for himself, Chief Justice Warren, and Justices Black and Brennan. As might be expected, Justice Douglas cited *Wolf* for the exaggerated proposition that the "Due Process Clause of the Fourteenth Amendment enjoins upon the States the guarantee of privacy embodied in the Fourth Amendment." *Id.* at 374. While he conceded that there was still some question about the exclusionary rule, he admitted no doubt that the substantive protection for privacy offered by the two amendments was the same.

[211] Justice Whittaker, who later dissented with Frankfurter in *Mapp*, felt compelled to attach a separate opinion insisting that Frankfurter's opinion here held only that the "*core* of the Fourth Amendment prohibiting unreasonable searches applies to the States through the Due Process Clause of the Fourteenth Amendment." *Id.* at 373 (emphasis added).

sult he had reached under the due process clause. His history was manufactured, of course. To be sure, he identified a link between the fourth and fifth amendments in *Boyd*'s heavy use of *Entick* language,[212] but his suggestion that the connection somehow narrowed the scope of the fourth amendment to that of the fifth simply could not be sustained.[213] *Boyd* itself had been a civil forfeiture case, and it was easy enough for Justice Douglas in dissent to point out instances in the historical materials in which the practices associated with the fourth amendment had led only to civil sanctions.[214] It came as no surprise, then, when a few years later the Court expressly overruled *Frank* in the *Camara* and *See* cases.[215] Writing for the Court in *Camara,* Justice White rejected out of hand *Frank*'s "remarkable premise" that "the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."[216]

At least for the time being, the *Camara* decision scotched the idea that the fourth amendment is limited to criminal cases. Yet, what it granted the individual with one hand it took back in large measure with the other. In a second part of his opinion for the Court, Justice White declared that the ordinary concomitant of the application of the fourth amendment—the requirement of a warrant issued upon probable cause to believe that evidence of crime will be found—has no meaningful place in administrative inspection cases.[217] Accordingly, he held that warrants for inspections would be required but that they could be supported by a "flexible" notion of probable cause—described in the opinion as a finding that "reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling."[218] Thus the Court ultimately held that while the fourth amendment applies, it does not impose the same standards upon administrative inspections as upon searches for evidence of crime.[219] Going on, the Court allowed in *Camara*

---

[212] In *Entick,* Lord Camden was of course speaking only of the English common law protections against unreasonable search and seizure and self-incrimination, but in *Boyd* the Court relied on the same language in interpreting provisions of the United States Bill of Rights. *See* notes 75-76 and accompanying text *supra.*

[213] By its express terms, the fifth amendment protects the individual from being compelled to be a witness against himself "in any *criminal* case." *See* ORIGINS, *supra* note 43, at 432-37 (reviewing the drafting process that resulted in the limitation).

[214] 359 U.S. at 377-79. *See* Barrett, *Personal Rights, Property Rights and the Fourth Amendment,* 1960 SUP. CT. REV. 46; Comment, *State Health Inspections and "Unreasonable Search": The Frank Exclusion of Civil Searches,* 44 MINN. L. REV. 513, 520-27 [hereinafter cited as *Health Inspections*].

[215] Camara v. Municipal Court, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967). The question had been further examined in two intervening cases, but neither had overruled *Frank. See* Eaton v. Price, 364 U.S. 263 (1960) (affirming a lower court's reliance upon *Frank* but only by an equally divided court); Abel v. United States, 362 U.S. 217 (1960) (failing to reach the question for want of proper objection below).

[216] 387 U.S. at 530. The Court acknowledged that *Frank* might have been distinguished on its facts. The Baltimore ordinance allowed inspections only upon "cause to suspect," a standard the inspector in *Frank* surely met, while the San Francisco provision involved in *Camara* established no such standard. Yet the Court found it appropriate to re-examine *Frank*'s basic holding in order to lay to rest the doubts that had arisen about it. *See* District of Columbia v. Little, 178 F.2d 13, 16-17 (D.C. Cir. 1949) (opinion of Prettyman, J.) (labeling the proposition that only criminal suspects are entitled to fourth amendment protection a "fantastic absurdity"). *See also* Eaton v. Price, 364 U.S. 263 (1960) (opinion of Brennan, J.). In this connection, it is only fair to mention that the Court's membership had changed since *Frank.* Justice Frankfurter had been succeeded by Justice Goldberg, who in turn had been succeeded by Justice Fortas. Justice White had succeeded Justice Whittaker. When those two votes joined the votes of the *Frank* dissenters, the Frankfurter view was left supported by only a minority, composed of Justices Clark, Harlan, and Stewart, who had voted with Frankfurter in *Frank* and then dissented in *Camara* and *See.* Justice White's majority opinions in the new cases relied heavily upon the analysis of the *Frank* dissenters.

[217] 387 U.S. at 534-35.

[218] *Id.* at 538.

[219] In dissent, Justice Clark commented with some amusement that in finding the ordinary probable cause standard inapplicable, Justice White relied on the same arguments that had led Justice Frankfurter

that even this different sort of warrant would not be necessary in emergency situations or when the house-holder consents to an inspection.[220] The Court imposed a similar warrant requirement in *See,* the companion case involving a commercial business, but then commented in closing that its opinion should not be read to imply that business premises may not be inspected in more circumstances than private homes or to question "such accepted regulatory techniques as licensing programs which require inspections prior to operating a business or marketing a product."[221]

Entering upon this state of affairs, the Burger Court has largely ignored the basic holdings in *Camara* and *See* and proceeded to expand upon the exceptions to the warrant requirement those cases allowed. *Biswell*[222] comes to mind. In that case, a Treasury agent made a surprise visit to a pawnbroker, federally licensed to deal in sporting weapons, and demanded to see his storeroom. The agent had no warrant, but he displayed a copy of a federal statute authorizing warrantless inspections during business hours. The pawnbroker acquiesced, the agent inspected, and two unlicensed rifles were seized. Writing for the Court, Justice White distinguished his own opinion in *See,* where he said there had been no occasion to deal with long-standing federal licensing schemes for the regulation of commerce in which the government is vitally concerned.[223] In any event, he said, the inspections necessary to meaningfully regulate the firearms industry could not be circumscribed by a warrant requirement. Unlike the building code inspections in *See,* the inspections carried out here must be "unannounced, even frequent," and a warrant requirement "could easily frustrate" the enforcement scheme.[224]

If the Court's use of the "licensing" exception ends in *Biswell* with the approval of warrantless inspections in the firearms industry, perhaps the demonstrable slippage in fourth amendment protection will be slight. In an increasingly complex society, we must expect that businesses that pose extraordinary dangers to the public will be subjected to stringent controls, and inspections of business premises may be no great price to pay.[225] But it seems the Court is preparing in the *Barlow*'s case[226] to extend the "licensing" exception to inspections pursuant to the Occupational Safety and Health Act. Inspections by OSHA agents are not limited to industries traditionally subjected to heavy regulation because of their special danger or importance

---

to conclude that a warrant was unnecessary. In a real sense, the White opinion in *Camara* departed in no great way from *Frank;* in each case the standard was reasonableness though White preferred to call his reasonableness a flexible sort of probable cause. *See* Note, *Area Search Warrants in Border Zones: Almeida-Sanchez and Camara,* 84 YALE L.J. 355, 370 (1974). Justice Clark in *See* insisted that, of the two, the *Frank* approach was far superior, retaining as it had the integrity of the probable cause standard in criminal investigations. 387 U.S. at 547. Speaking to the supposed unfairness of punishing an individual for refusing entry to an inspector whose authority to search was in doubt, Justice Clark offered that administrative warrants issued by the agency involved would serve the same purpose. *Id.* at 548. In that belief, he was evidently satisfied that he could distinguish the very peril that gave rise to the fourth amendment in the colonies—the issuance of general warrants by *administrative* officers. *See* note 49 and accompanying text *supra.*

[220] 387 U.S. at 539-40.

[221] 387 U.S. at 546.

[222] United States v. Biswell, 406 U.S. 311 (1972).

[223] *Id.* at 316-17.

[224] *Id.*

[225] I am aware that some whose sensitivity in search and seizure cases is unassailable find no significant threat to fourth amendment values in the OSHA case. *E.g.,* Letter from Kenneth Culp Davis to Joel M. Gora, American Civil Liberties Union (April 22, 1977).

[226] Barlow's, Inc. v. Usery, 424 F. Supp. 437 (D. Idaho 1976), *prob. juris. noted sub nom.* Marshall v. Barlow's Inc., 429 U.S. 1347 (1977).

but extend to any commercial employer subject to the Act—an estimated 4,100,000 business establishments.[227] If the Supreme Court upholds OSHA inspections, it will expand the exceptions to *Camara* and *See* to such an extent that it will be difficult to contend that the holdings in those cases retain any lasting significance.[228]

Narrowly stated, the cases do not hold that the fourth amendment does not apply at all in "licensing" cases but only that it imposes a diluted standard to them—"reasonableness."[229] Yet, neither the standard of review they employ nor the evil they seek to prevent bespeaks search and seizure analysis. The statutes or regulations upon which administrative inspections are based are to set forth information that informs the individual affected of the inspector's authority to search and the limits of the inspection he or she is to undertake. The evil, it appears, lies in failing to provide sufficient information to the individual in advance of the inspection, thus forcing him or her to choose between acquiescing in an entry of doubtful justification and risking prosecution for wrongful refusal.[230] If the state's scheme is to operate reasonably, if it is to be fair, then the inspection must be justified to the individual before the fact. Only then is it fair to punish the "one rebel a year"[231] who refuses to cooperate.[232] Again, it seems to me that the ultimate standard against which government's actions are judged is the "fundamental fairness" minimum associated with due process adjudication. The Court is not so concerned that the individual's privacy is invaded, so long as the government has a reasonable basis for its action and explains it to the individual before the fact.

I come away thinking that whatever the Court's statements on the issue, it resists the application of fourth amendment analysis to administrative inspections. Another familiar case illustrates the substitution of due process for search and seizure standards—in this case with more candor than the Court ordinarily exhibits. In *James*,[233] the welfare visit case, Justice Blackmun's opinion for the Court put the

---

[227] Rothstein & Rothstein, *Administrative Searches and Seizures: What Happened to Camara and See?*, 50 WASH. L. REV. 341, 366 (1975).

[228] *Id.* Of course, to the extent the *Camara* and *See* decisions themselves contemplated these very exceptions and to the extent their warrant requirements were intended only to serve adequate notice on the individual to be inspected in any event, it may be that those cases were overread from the outset. Promising a before-the-fact magisterial determination of the appropriateness of an intrusion into privacy, they may have delivered only one "reasonable" administrative scheme in place of another. *Accord*, LaFave, *Administrative Searches and the Fourth Amendment: The Camara and See Cases*, 1967 SUP. CT. REV. 1. *See* note 219 *supra;* note 230 and accompanying text *infra.*

[229] *But see* United States v. Biswell, 406 U.S. 311, 316 (1972) (commenting that "inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy").

[230] Indeed, this is the very evil Justice White dwelt upon in *Camara*. 387 U.S. at 532. *See* United States v. Chadwick, 433 U.S. 1, 17 n.1 (1977) (Blackmun, J., dissenting) (commenting that a search warrant for a home or office assures the occupants "that the officers have legal authority to conduct the search and defines the area to be searched and the objects to be seized"); South Dakota v. Opperman, 428 U.S. 364, 384 (1976) (Powell, J., concurring) (same).

[231] The reference comes from Justice Douglas' dissent in *Frank*. 359 U.S. at 384.

[232] None of the regulatory schemes in the cases authorized a forcible inspection over the individual's objection but rather some punishment for wrongful refusal. In a surprising opinion by Justice Douglas in Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), the Court disapproved a warrantless inspection of a federally licensed liquor dealer because it had been made forcibly without authorization in the statute. However, the Court supplied ample dicta to the effect that a warrantless search without force would have been valid. Recalling the common law seizures of stolen or smuggled goods hidden to avoid paying import duties, Justice Douglas plainly embraced the long-standing regulatory scheme involving liquor dealers, complete with its provision on warrantless inspections. In *Biswell*, Douglas dissented on the ground that the gun dealer's acquiescence had been the product of coercion not authorized by statute.

[233] Wyman v. James, 400 U.S. 309 (1971).

issue as "whether a beneficiary of the [AFDC program] may refuse a home visit by the caseworker without risking the termination of benefits."[234] That question, he said, could be answered without reference to *Camara*'s "protective attitude" toward privacy and the fourth amendment "for the seemingly obvious and simple reason that we are not concerned here with any search . . . in the Fourth Amendment meaning of that term."[235] In four short years, the Court had come full circle back to Justice Frankfurter's position in *Frank*. Even when Justice Blackmun assumed for purposes of decision that the welfare visit at issue possessed "some of the characteristics of a search in the traditional sense,"[236] he insisted that the only standard of review was "reasonableness."[237] The balance of the opinion then sifted through the competing individual and state interests, weighing them in the balance, and concluded that the home visits carried out in New York were reasonable and hence constitutional. If Barbara James thought otherwise, she was free to find some other way to support her infant son.[238] To my mind, the Court's fact-oriented approach to the case, which in the end held no more than that these particular visits under this particular statutory scheme were reasonable, is indistinguishable from Justice Frankfurter's approach in *Frank*. Ultimately, the Court simply concluded that the New York law sufficiently circumscribed the inspection to be carried out and justified it in advance to Ms. James. Accordingly, it was not fundamentally unfair to put her to the choice of acquiescing in the inspection or forfeiting benefits. The fourth amendment, it seems, was entirely irrelevant.[239]

---

[234] *Id.* at 310. This statement of the question presented makes clear what otherwise might not be from the opinions in the case. The petitioner's argument was actually the one that had *lost* in *Camara*—that the state could not intrude into the privacy of her home without a warrant issued upon probable cause to believe that evidence of crime would be found. She would not have been satisfied with the special sort of warrant devised in *Camara* to permit a reasonable administrative inspection when standards established under a regulatory statute are met. Of course, the Court's disposition of the case denied her even that.

[235] *Id.* at 317. It is noteworthy that Justice White, who concurred in the judgment, did decline to embrace this language. *Id.* at 326.

[236] *Id.* at 318.

[237] *Id., citing* Terry v. Ohio, 392 U.S. 1 (1968), *discussed in* notes 420-34 and accompanying text *infra.*

[238] Unlike the other cases just discussed, no criminal prosecution followed upon James' refusal to allow the home visit. *But see* Burt, *Forcing Protection on Children and Their Parents: The Impact of Wyman v. James,* 69 MICH. L. REV. 1259 (1971) (viewing *James* as essentially a child neglect case); Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority,* 80 YALE L.J. 1198, 1223-25 n.100 (1971) (insisting that criminal evidence was being sought). On the other hand, removal from the welfare roll was equally devastating to her, and in dissent Justice Marshall contended that the scope of the fourth amendment could hardly depend upon the "size of the club that the State wields against a resisting citizen." 400 U.S. at 340-41. *But see* Greenberg, *The Balance of Interests Theory and the Fourth Amendment: A Selective Analysis of Supreme Court Action Since Camara and See,* 61 CAL. L. REV. 1011, 1033 (1973) (concluding that under certain circumstances such visits are reasonable); Handler & Hollingsworth, *Stigma, Privacy, and Other Attitudes of Welfare Recipients,* 22 STAN. L. REV. 1, 9-12 (1969) (indicating that most welfare recipients may not object to home visits). The choice put to James understandably raised the specter of the "right-privilege distinction" the Court had long since disapproved. 400 U.S. at 328-29 (Douglas, J., dissenting), *citing* Sherbert v. Verner, 374 U.S. 398, 404 (1963); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 HARV. L. REV. 1439 (1968); Note, *Unconstitutional Conditions,* 73 HARV. L. REV. 1595 (1960). But the Court gave the matter no heed. Indeed, judging from more recent cases it appears that the reports of the distinction's death may have been premature. *E.g.,* Bishop v. Wood, 426 U.S. 341, 342-47 (1976); Arnett v. Kennedy, 416 U.S. 134 (1974). *See* Monaghan, *supra* note 118; Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State,* 62 CORNELL L. REV. 445 (1977).

[239] The Court has not elaborated upon *James* so as to decide frankly whether it means to read the fourth amendment out of administrative inspections altogether—despite *Camara* and *See.* The automobile inspection cases might have provided an opportunity to do so, but the Court chose to leave the matter as it stood after *James. See, e.g.,* South Dakota v. Opperman, 428 U.S. 364 (1976) (commenting that the *Camara* and *See* warrant requirement has never been extended to automobile inspections but employing a fourth amendment "reasonableness" standard of review); Cady v. Dombrowski, 413 U.S. 433 (1973)

3. The Fourth Amendment and Property

a. Real Property

The trespass action at common law lay for interference with real or personal property in the plaintiff's possession, and it is plain enough that English courts developing the constitutional right against unreasonable search and seizure were concerned primarily with property interests.[240] In *Entick*, Lord Camden focused first upon the messengers' breach of the close for the purpose of conducting a "search" and then upon their "seizure" of "goods and chattels."[241] Indeed, he treated any supposed intrusion upon privacy as merely an aggravating circumstance justifying the substantial judgment in the case.[242] In this country, at least until recently, the Supreme Court's treatment of fourth amendment questions reflected the same concern for property rights. Early on, the Court wrestled with trespass *ab initio* and similar common law niceties in determining whether an intrusion upon an individual's premises was constitutional.[243] Even after *Hester* eliminated all but the curtilage from constitutional protection the Court insisted for years that the fourth amendment could not be violated without a physical trespass into a "constitutionally protected area."[244] When, however, the Court departed from the means-oriented approach to the fourth amendment, it began to lose interest in trespass as the key to search and seizure issues. To be sure, even in *Katz* the Court acknowledged that the fourth amendment does not translate into a "general constitutional 'right to privacy'" and that "its protections go further, and often have nothing to do with privacy at all."[245] Nevertheless, the Court's adoption of the value-oriented model in an egalitarian age augered a steady movement away from property notions and toward an emphasis upon privacy.

On the face of it, the Court's posture is unremarkable. I have already acknowledged *Katz'* considerable advance over the means-oriented model, and it goes without saying that in the age of electronic surveillance it would make little sense to insist that the law of search and seizure is still to turn on unsophisticated common law notions about what constitutes a trespass. At least since the 1937 realignment of the Court, we have tended to expect protection for personal liberty from the Bill

---

(failing to reach the question whether an inspection for the protection of the public as opposed to a search for evidence of crime is to be measured against the fourth amendment). Last Term, in Whalen v. Roe, 429 U.S. 589, 604 n.32 (1977), and again in Ingraham v. Wright, 430 U.S. 651, 673 n.42 (1977), the Court insisted that the "principal concern" of the fourth amendment "is with intrusions on privacy in the course of criminal investigations." Some light may be thrown on the issue shortly, when the Court decides in Michigan v. Tyler, 399 Mich. 564, 250 N.W.2d 467, *cert. granted*, 98 S. Ct. 50 (1977), whether a warrantless examination of the scene of a fire to determine its cause is valid. Further down the road, the Court will have to face the related questions raised when the police rush onto private property under the so-called "emergency doctrine," *see* Bacigal, *The Emergency Exception to the Fourth Amendment*, 9 U. RICH. L. REV. 249 (1975), or conduct technical inspections of the scene of a crime. *E.g.*, United States v. Young, 553 F.2d 1132 (8th Cir. 1977).

[240] Barrett, *supra* note 214.

[241] 19 Howell's State Trials at 1063-66. *See* notes 28-47 and accompanying text *supra*.

[242] *See* notes 37-39 and accompanying text *supra*.

[243] *E.g.*, McGuire v. United States, 273 U.S. 95 (1927) (rejecting the *ab initio* doctrine).

[244] *E.g.*, Berger v. New York, 388 U.S. 41, 57 (1967); Silverman v. United States, 365 U.S. 505, 510 (1961).

[245] Katz v. United States, 389 U.S. 347, 350 (1967). Justice Stewart, who wrote for the Court in *Katz* but had dissented with Justice Black in Griswold v. Connecticut, 381 U.S. 479 (1965), cited as his principal authority for the passage in the text Black's separate dissent in *Griswold:* "The average man would very likely not have his feelings soothed any more by having his property seized openly than by having it seized privately and by stealth." 381 U.S. at 509 (Black, J., dissenting).

of Rights rather than safeguards for the "property" and "economic liberty" that were the favorites of the old Court.[246] Accordingly, it is altogether proper that the Court should find personal privacy to be the chief value protected by the fourth amendment. I hold no brief against all that. Yet, I do believe that if the fourth amendment has in the past protected more than privacy, there is certainly no reason to eliminate that dimension of it from modern case law. While I, too, place a high value on personal privacy and my ire is aroused most in search and seizure cases when government trenches upon that privacy, I would not discard fourth amendment protection for property simply because in the middle of the twentieth century property rights seem relatively less valuable than personal liberty. For one thing, the distinction between liberty and property has never been clear;[247] for another, I will concede my own preference for expanded rather than contracted safeguards for individual interests of all kinds in the modern industrial state.

For my part, it makes perfectly good sense for the Court to discard the trappings of common law trespass only to the extent they diminish the individual's protection from governmental intrusions. I would read *Katz* to hold only that a physical trespass is no longer *necessary* to implicate the fourth amendment. I would not read that case to mean that trespass is not *sufficient* to bring it into play. It is one thing to say that in an electronic age the values protected by the fourth amendment can be threatened without a physical trespass, but it is quite another to say, for that reason, that trespass is *irrelevant* to the fourth amendment inquiry. I will concede that my view is a sort of ratchet theory—the individual's protection from governmental power is permitted to move in only one direction. But in light of the seemingly inexorable march toward greater regimentation in the American society, I have no apology to make to reason and sound judgment.

I would go a step further. If the Court is uncomfortable with fourth amendment precedents that emphasize property rights, or if it is hesitant to build upon those precedents now that *Katz* has focused attention elsewhere, I would invite the Court to re-examine the "property rights" cases and identify in them a *sub rosa* attempt to protect privacy—the very personal liberty in which the Court is now most interested. It is not too much to suggest that the evil the trespass action sought to remedy was an interference with the tenant's quiet enjoyment of land and, in turn, that quiet enjoyment is not far removed from our modern notion of privacy. By defending the tenant's close and making the trespasser liable for so much as bending the grass on the tenant's side, the trespass action operated as a prophylactic. It halted the interloper at the fringes of the tenant's preserve and avoided the intrusion upon privacy that would accompany a closer approach.[248]

Unfortunately, in my view, the Burger Court has failed to take the path plainly open to it. Instead, its most recent decisions seem to assume that *Katz* decided

[246] *See* GUNTHER, *supra* note 118, at 592-96.

[247] *See* Reich, *The New Property*, 73 YALE L.J. 733 (1964).

[248] I suggest this possible reading of the trespass cases but I do not propose to defend it here. It may be that on examination the thesis that trespass at common law had much to do with what we now call privacy cannot be successfully defended. Perhaps the action only protected the individual's critical stake in land, the life-giver in the Middle Ages, and had nothing at all to do with protecting quiet enjoyment. Nevertheless, *Entick*'s familiar insistence that merely treading upon one's soil was an offense suggests more was at work in the cases than the protection of property from one's ambitious neighbor. In any event, the Supreme Court is certainly free to find what values it will lurking beneath the surface of precedents. I daresay that reading the English trespass cases to speak to privacy would not be the most imaginative use of historical materials the Court has undertaken.

precisely what I would deny—that physical trespass is entirely irrelevant to the fourth amendment. I have already mentioned *Santana*,[249] in which police officers parked their car in front of the suspect's home and, seeing her standing in the threshold, rushed immediately upon her property and, indeed, into the house itself. Since the Court found that the threshold was a "public place" and that standing in it the suspect had no *Katz* expectation of privacy, it evidently found it unnecessary even to comment on the breach of the close.[250] Similarly, Justice Douglas' surprising opinion for the Court in *Western Alfalfa*[251] relied on *Hester* to approve a health inspector's observation of smoke coming from a corporation's chimneys while standing in the yard near the plant. It was apparently unimportant whether a trespass to real estate had occurred so long as the Court was satisfied that "the invasion of privacy" was "abstract or theoretical."[252] *Katz'* severance of the historical tie between physical trespass and the fourth amendment has evidently called into question all that went before.[253] Whatever protection one's real property may have claimed before 1967 now appears to be open for re-examination.[254]

[249] United States v. Santana, 427 U.S. 38 (1976). *See* notes 186-89 and accompanying text *supra*.

[250] *See also* Mancusi v. DeForte, 392 U.S. 364 (1968) (emphasizing the suspect's expectation of privacy when the only question was standing and his presence at the time of the search should have sufficed without further comment). The Court has not yet firmly decided whether the police can validly enter a private dwelling without a warrant for the purpose of making an arrest upon probable cause. *See* note 406 and accompanying text *infra*. If the Court should give an affirmative answer, I suspect there will be a place for citation to *Katz* and *Hester* in the opinion.

[251] Air Pollution Variance Bd. v. Western Alfalfa Corp., 416 U.S. 861 (1974).

[252] *Id.* at 865. I should say, however, that I do not read *Western Alfalfa* to be of a piece with *Santana*. While I am far from pleased that *Hester* was relied upon, it does seem to me that the "open fields" rationale put forward in that case fits *Western Alfalfa* much better than the facts with which Justice Holmes worked. For one thing, the inspector viewed smoke plumes that "anyone in the city who was near the plant could see in the sky." *Id.* at 865. The happenstance that he was standing in the corporation's yard rather than across the street seems a less than satisfactory basis for condemning his action. Then, too, the case involved a corporation, whose fourth amendment rights are more closely circumscribed than those of individuals. United States v. Morton Salt Co., 338 U.S. 632, 651-52 (1950); Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946). Finally, the Court came to no firm conclusion in *Western Alfalfa*. It was altogether unclear why the lower court had set aside the Board's cease and desist order based upon the inspector's report. On the record, it seemed that the court had relied on a procedural due process theory, finding the hearing the company was afforded inadequate because the company was not given notice that the inspector's report would be used and there was no opportunity to put on rebuttal evidence. Even if the inspection had been found to violate the fourth amendment, it was unclear what effect such a holding would have had on the proceeding. *Cf.* United States v. Janis, 428 U.S. 433 (1976) (holding the exclusionary rule inapplicable in a civil tax assessment case). At bottom, the Supreme Court's discussion of the fourth amendment issue appears to have been largely advisory and the result attributable perhaps to Justice Douglas' well known concern for the environment. *See, e.g.*, Sierra Club v. Morton, 405 U.S. 727, 741 (1972) (dissenting opinion).

[253] Dissenting in the most analytical of the standing cases, Alderman v. United States, 394 U.S. 165, 191 (1969), Justice Harlan contended that the owner of the premises from which the conversations of others are seized by electronic surveillance does not have standing to contest the lawfulness of the surveillance:

> [T]he entire theoretical basis of standing law must be reconsidered in the area of conversational privacy. For we have not buried *Olmstead*, so far as it dealt with the substance of Fourth Amendment rights, only to give it new life in the law of standing. Instead, we should reject traditional property concepts entirely, and reinterpret standing law in the light of the substantive principles developed in *Katz*.

On first blush, Justice Harlan's position seems unremarkable. It is hardly my purpose to resurrect *Olmstead* and the *requirement* of a physical trespass before the fourth amendment is implicated. On the other hand, Justice Harlan's position understands trespass to be *irrelevant*. That, it seems to me, is a different matter. Federal agents apparently had physically entered the premises to install the listening devices used to record third-party conversations. I am at a loss to understand how that entry was consistent with the fourth amendment, irrespective of what the officers did after they crossed the threshold. It may be that Justice Harlan meant in his opinion to say only that the home owner should not be permitted to suppress conversations in which he did not participate—that he should be denied the benefit of the exclusionary rule because none of his own property was taken from the house when it was unlawfully entered. If that was his argument, it may have been only another attempt to pare down the exclusionary rule as the consequence of a violation of the fourth amendment. *See* note 611 and accompanying text *infra*. On the other hand, if he meant to say frankly that after *Katz* a physical trespass is irrelevant to the fourth amendment,

b. Personal Property

The fourth amendment speaks not only to "searches" of "houses" but to "seizures" of "papers" and "effects." And one would expect it to regulate governmental confiscation of personal property whether or not the seizure is accompanied by an intrusion upon real estate or personal privacy.[255] That, in any event, was the assumption of the early decisions. Indeed, *Weeks* fashioned the exclusionary rule from the action in replevin—permitting the individual to regain possession of a chattel after a wrongful taking.[256] I view the fourth amendment's protection for personal property in much the same way that I view its protection for real property. On the one hand, I hardly want to dismiss safeguards for chattels merely because they seem on balance to be less important than privacy. On the other hand, if privacy is to be the focus, I can find ample evidence that in its protection for personal property the fourth amendment ultimately protects privacy. Again, safeguards for property operate as a prophylactic. Judge Hand said it a half century ago: "[L]imitations upon the fruit to be gathered tend to limit the quest itself . . . ."[257] To the extent the fourth amendment denies government the power to seize some items, it surely must have the effect of restricting its power to search, that is, to invade individual privacy. The early cases seemed to embrace this thesis, however inartfully. In more recent decisions, however, beginning to be sure before the Nixon appointees took their places but gaining new strength in the Terms since, the Court has departed markedly from it. Four illustrations will suffice—the cases on the mere evidence rule, the seizure of writings, the plain view doctrine, and finally those on the individual's standing to raise a fourth amendment claim based on a possessory interest in the thing seized.

In *Entick*, Lord Camden asserted that "the law obligeth no man to accuse himself" because the burden would fall "upon the innocent as well as the guilty" and that "search for evidence is disallowed on the same principle."[258] Interpreting that

---

his argument not only loosed the Constitution from the common law concern for private property but ignored the serious intrusion upon privacy occasioned by a physical entry. For whether or not the home owner had standing to challenge the "seizure" of third-party conversations, denying him standing to challenge the physical entry of his home would have left him powerless to attack what I can only characterize as a search. To be sure, the agents in *Alderman* took no property from the house, but they most certainly intruded upon the owner's preserve. From the style and arrangement of his furniture, the quality of clothing in his closet, and the quantity of food in his refrigerator they obtained information about him that he had preferred to keep private. The point need not be belabored. The Harlan position in *Alderman*, albeit a dissenting view and not repeated so far as I know in later decisions, illustrates how the Court can restrict the reach of the fourth amendment even as it protects privacy by insisting that all remaining trappings of property law be lopped off and forgotten. *Compare* United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977) (disapproving entry upon private premises to plant bugs without sufficient judicial supervision) *with* United States v. Johnson, 561 F.2d 832 (D.C. Cir. 1977) (en banc) (refusing to consider a "technical trespass" in deciding whether the police enfringed upon suspects' reasonable expectation of privacy by approaching a house at night and peering through a basement window). *See also* United States v. Anderson, 552 F.2d 1296 (8th Cir. 1977) (finding a reasonable expectation of privacy in the area around a house but approving an intrusion into it for the "legitimate" purpose of finding the occupant to question him about a theft).

[254] *See* Dutile, *Some Observations on the Supreme Court's Use of Property Concepts in Resolving Fourth Amendment Problems*, 21 CATH. L. REV. 1, 4-13 (1971) (proposing that the primacy of property law notions in fourth amendment analysis be retained and that the use of electronic devices as an aid to hearing or seeing be considered a trespass).

[255] *See, e.g.*, Zap v. United States, 328 U.S. 624, 632 (1946) (Frankfurter, J., dissenting); Davis v. United States, 328 U.S. 582, 612 (1946) (Frankfurter, J., dissenting).

[256] Grant, *supra* note 115, at 365-66. *See* notes 86-97 and accompanying text *supra*.

[257] United States v. Poller, 43 F.2d 911, 914 (2d Cir. 1930).

[258] 19 Howell's State Trials at 1073.

language in *Boyd*, the American Supreme Court read into the fourth amendment the common law of replevin—that government can seize chattels and resist their return only if it has a superior property interest in the things seized.[259] The "mere evidence rule" was born. While stolen or smuggled goods and contraband could be seized—because government or the true owner could assert a superior right to them—an individual's private property was his or her own and could not be seized even as evidence of crime.[260] Later cases, notably *Gouled*,[261] reworked the rule into its familiar form—that only fruits, instrumentalities, or contraband could be seized with or without a warrant.[262] Commentators criticized the rule,[263] trial judges did their best to circumvent it,[264] and in the end the Court discarded it—announcing in *Hayden*[265] that "[t]he premise that property interests control the right of the Government to search and seize has been discredited."[266] So long, said Justice Brennan for the Court, as there is "a nexus—automatically provided in the case of fruits, instrumentalities or contraband—between the item to be seized and criminal behavior," it may be lawfully taken for use as evidence.[267] Speaking directly to the

[259] *See* notes 40-42 and accompanying text *supra*. *See Health Inspections, supra* note 214, at 526 n.51. Of course, the *Entick* language might have been read as an attempt to distinguish roughly between searches of criminals and innocent people—validating the one, though with some hesitation in *Entick*, and condemning the other. Searches for stolen goods, on the one hand, are by definition carried out only against thieves; searches for mere evidence of crime, on the other, may affect innocent people wrongly suspected. *See* TAYLOR, *supra* note 8, at 52-53. In the relative simplicity of the times in which Lord Camden wrote it may not have seemed so obvious that guilt could be determined only after a trial, and we must recall his observation that anyone whose search for stolen goods was unsuccessful was liable for damages. Still, in our own day the literal interpretation is entirely unsatisfactory. For whether or not the guilty could be so easily distinguished from the innocent in 1765, it is safe to say that modern search and seizure doctrine, such as it is, contemplates that the success of a search bears no necessary relation to its validity.

[260] *Boyd* included in its list of seizable items those writings government requires business people to keep for inspection under reasonable regulatory statutes and goods subject to forfeiture under the tax laws or to execution under a writ of attachment. 116 U.S. at 623-24. *See* Davis v. United States, 328 U.S. 582, 595-96 (1946) (Frankfurter, J., dissenting) (elaborating on the difference between "private" papers which can never be seized and "public" papers which can be seized in a properly safeguarded search—because "the public has an interest other than that which they may serve as evidence"). *But see* G.M. Leasing Corp. v. United States, 429 U.S. 338, 356 (1977) (rejecting any dicta in *Boyd* purporting to exclude all invasions of privacy "in furtherance of tax collection" from the reach of the fourth amendment). *See also* Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 285-86 (1855), *discussed in* note 64 *supra*.

[261] Gouled v. United States, 255 U.S. 298 (1921). *See also* United States v. Rabinowitz, 339 U.S. 56, 64 n.6 (1950); Harris v. United States, 331 U.S. 145, 154 (1947); United States v. Lefkowitz, 285 U.S. 452, 464-66 (1932).

[262] *See* Comment, *Types of Property Seizable Under the Fourth Amendment*, 23 U.C.L.A. L. REV. 963 (1976). It was not always clear why the government's interest in these items was superior to that of the defendant. As to stolen goods, the government could assert a superior right through the true owner, but when that person was unknown or unavailable the vicarious property interest argument seemed to break down. As to the instrumentalities of crime, there were two theories. First, it was contended that instrumentalities could be seized on the common law theory that things used in the perpetration of crime were forfeited to the state. *See* Kaplan, *Search and Seizure: A No-Man's Land in the Criminal Law*, 49 CAL. L. REV. 474, 475 (1961). Second, *Gouled* suggested that they could be seized in order to prevent their use in further crimes. 255 U.S. at 309. *Cf.* Coolidge v. New Hampshire, 403 U.S. 443, 471 (1971) (referring to objects "dangerous to themselves"). Contraband, of course, was the most defensible of the categories. For by legislating away the individual's right to hold a thing in his or her possession, the government easily enough obtained authority to assert a superior interest in it. *But see* Warden v. Hayden, 387 U.S. 294, 306 n.11 (1967) (labeling the superior property interest analysis a "fiction").

[263] *E.g.*, Chafee, *supra* note 79; Comment, *Limitations on Seizure of "Evidentiary" Objects—A Rule in Search of a Reason*, 20 U. CHI. L. REV. 319 (1953) [hereinafter cited as *Limitations*]; *Search, supra* note 96, at 522.

[264] *Limitations, supra* note 263.

[265] Warden v. Hayden, 387 U.S. 294 (1967).

[266] *Id.* at 304.

[267] *Id.* at 307. For my part, I have never been clear on how fruits, instrumentalities, or even contraband are so easily identifiable. The problem is a real one. I will take it up again shortly. *See* notes 313-19, 325-32 and accompanying text *infra*.

argument that government's power of search would be limited by denying it authority to seize mere evidence, Justice Brennan responded, following John Kaplan, that "privacy 'would be just as well served by a restriction on search to the even-numbered days of the month. . . . And it would have the extra advantage of avoiding hair-splitting questions . . . .' "[268]

The demise of the mere evidence rule drew immediate attention to *Boyd*'s alternative reading of the key passage from *Entick*—that the fourth amendment right against unreasonable search and seizure and the fifth amendment privilege against self-incrimination were somehow linked in a "mystical bond"[269] and together vouchsafed objects of evidentiary value, particularly private papers, from governmental inspection.[270] In the early cases, the law of search and seizure had been viewed as the "product of the interplay of"[271] two constitutional provisions rather than the mandate of one. As recently as *Mapp*, the Court had relied on both amendments to fasten the exclusionary rule upon the states.[272] Yet, when *Schmerber*[273] distinguished testimonial from other kinds of evidence and limited the reach of the fifth amendment privilege to the former,[274] the link between the two amendments began to crumble. *Schmerber* itself explicitly acknowledged that writings were testimonial and thus protected,[275] but even that concession to the fifth amendment was troubling. For while *Entick* had condemned the "paper-search,"[276] the language of the fourth amendment clearly contemplated that "papers" might be seized, and dicta in several cases made it plain that there is "no special sanctity" in documents.[277]

---

[268] 387 U.S. at 309, *quoting* Kaplan, *supra* note 262, at 479. With deference both to the Court and Professor Kaplan, I must say that answer was less than satisfying. For one thing, it assumed what had not really been decided until *Hayden*—that the fourth amendment offers no significant protection for property rights. For another, I should have thought that the Court would see an analogy to its decisions on standing, the fruit of the poisonous tree, and the use of illegally seized evidence to impeach trial testimony. *See* notes 611-13 and accompanying text *infra*. In all those cases the Court finds convenient justifications for suspending the exclusionary rule. If we assume, as I later will not, that the only basis for applying the rule is the deterrence of illegal police action, then it is arguable that the Court need not apply it at every opportunity but only in enough cases to ensure the survival of its deterrent effect. Professor Amsterdam pointed out some time ago that, if that is indeed what the Court is about, the various exceptions to the rule's application are no more rational than a system in which the rule is applied only half the time—to cases chosen at random. He offered that the Court might as well flip a coin in every case and apply the exclusionary rule only when it comes up "heads." *Section 2255*, *supra* note 170. The Court, of course, has rejected Amsterdam's tongue-in-cheek suggestion and retained the established exceptions to the application of the rule. I daresay that in *Hayden* Justice Brennan had just as much reason to embrace Judge Hand's suggestion for retaining the mere evidence rule—even if it *was* no more rational than Kaplan's proposal. Indeed, inasmuch as the mere evidence rule operated to enhance rather than diminish the individual's constitutional protection, there was even more reason to retain it.

[269] LANDYNSKI, *supra* note 9, at 58.

[270] *See* notes 75-77 and accompanying text *supra*.

[271] Davis v. United States, 328 U.S. 582, 587 (1946). *See, e.g.*, United States v. Lefkowitz, 285 U.S. 452 (1932); Agnello v. United States, 269 U.S. 20 (1925). The rule that the mere use of illegally seized evidence at trial violated the fifth amendment was, however, criticized rather early. *See, e.g.*, Chafee, *supra* note 79; Kohn, *supra* note 120.

[272] *See* note 134 *supra*.

[273] Schmerber v. California, 384 U.S. 757 (1966).

[274] The distinction drawn—between communications on the one hand and "real or physical evidence" on the other—was taken in principal part from WIGMORE, *supra* note 79, at § 2263. While the Court insisted that its opinion was "not to be understood as adopting the Wigmore formulation," 384 U.S. at 763 n.7, there was little to choose between the two. *Id.* at 774 (Black, J., dissenting).

[275] 384 U.S. at 763-64.

[276] *See* text at note 46 *supra*.

[277] Gouled v. United States, 255 U.S. 298, 309 (1921). *Accord*, Nelson, *supra* note 78, at 775. *See Ex parte* Jackson, 96 U.S. 727, 733 (1877) (commenting that papers in the mail can be opened and inspected under a warrant "as is required when papers are subjected to search in one's own household"). *See also* Abel v. United States, 362 U.S. 217 (1960); Marron v. United States, 275 U.S. 192 (1927).

In two recent cases, the Burger Court has come to grips with the problem—and discarded the prohibition against forcing the production of private papers.[278] The essence of the holding in *Fisher*[279] was that the fifth amendment is violated only if "testimony" and "compulsion" are conjoined. While an individual's private papers are clearly testimonial, so long as they are prepared voluntarily and not compelled by government process until later there is no fifth amendment application.[280] Similarly, while a production order is clearly "compulsion," so long as the order does not compel oral testimony or require the individual to "repeat, or affirm the truth of the contents of the documents sought,"[281] no present "testimony" is involved, and again the fifth amendment offers no relief. As a result, the Court is now prepared to recognize a fifth amendment claim only if the defendant can show some further testimony tied up in his or her response to a production order—as when the existence or authenticity of the documents sought can be proven only by the defendant's compliance with the order. In such a case, production under the compulsion of the order involves implicit testimony confirming the existence or authenticity of the document produced.[282] The holding in *Fisher* all but decided the issue in *Andresen*,[283] in which agents searched the defendant's law offices for documentary evidence. Finding no present compulsion to invoke the fifth amendment and a sufficient warrant to satisfy the fourth, the Court approved the agents' action and the use of the documents at trial.[284]

To be sure, the Court's dissolution of the questionable tie between the fourth and fifth amendments bears the mark of analytical clarity—something all too often missing from recent decisions. As yet it is too early to say whether the apparent separation of the fifth amendment from privacy concerns will substantially diminish the individual's protection from subpoenas duces tecum for private papers.[285] To my

---

[278] Andresen v. Maryland, 427 U.S. 463 (1976); Fisher v. United States, 425 U.S. 391 (1976).

[279] Fisher v. United States, 425 U.S. 391 (1976).

[280] The facts in *Fisher* itself were slightly different. The documents involved were tax records prepared not by the defendant but by his accountant, and they were subpoenaed not from the defendant but from his attorney to whom the defendant had delivered them for purposes of receiving legal advice. The Court first decided that, based on Couch v. United States, 409 U.S. 322 (1973), the defendant could not assert the fifth amendment privilege as to documents not in his possession. The Court acknowledged, however, that the attorney-client privilege would entitle the lawyer to assert any privilege the defendant might have claimed if the papers had remained in his custody. That posed the question whether the defendant might have resisted the subpoena for his accountant's documents. In deciding that question, the Court made it plain that its decision would not change in a case in which the papers involved were prepared by the defendant himself. 425 U.S. at 410 n.11.

[281] 425 U.S. at 409. In prior cases, the Court had recognized that the fifth amendment might be invoked by responses to subpoenas. *E.g.*, Schmerber v. California, 384 U.S. 757, 763-64 (1966).

[282] 425 U.S. at 410. *See also* Curcio v. United States, 354 U.S. 118, 125 (1957) (commenting that a "custodian's act of producing books or records in response to a subpoena *duces tecum* is itself a representation that the documents produced are those demanded by the subpoena"); United States v. Beattie, 522 F.2d 267 (2d Cir. 1975). The Court took as its essential thesis Justice Holmes' comment that "[a] party is privileged from producing the evidence but not from its production." Johnson v. United States, 228 U.S. 457, 458 (1913).

[283] Andresen v. Maryland, 427 U.S. 463 (1976).

[284] A review of the cases just prior to *Andresen* reveals that most lower courts had already concluded that, notwithstanding *Boyd*, documents could be the subject of a search. *Compare* Shaffer v. Wilson, 523 F.2d 175 (10th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976); United States v. Murray, 492 F.2d 178 (9th Cir. 1973); Taylor v. Minnesota, 466 F.2d 1119 (8th Cir. 1972), *cert. denied*, 410 U.S. 956 (1973) *with* Hill v. Philpott, 445 F.2d 144 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971). *See* Comment, *A Paper Chase: The Search and Seizure of Personal Business Records*, 43 BROOKLYN L. REV. 489 (1977); Comment, *The Protection of Privacy by the Privilege Against Self-Incrimination: A Doctrine Laid to Rest?*, 59 IOWA L. REV. 1336 (1974).

[285] Concurring in the judgment in *Fisher*, Justice Marshall wondered aloud whether the Court's new approach might not protect genuinely private writings as well as the *Boyd* analysis:

mind, however, the critical questions are only just presented. Now that the Court has disposed of the troubling fifth amendment dimension of the problem, it must deal with the even more perplexing fourth amendment issue. Until now, doctrinal confusion has managed to protect the individual's private writings and with them the value we Americans place upon reducing our innermost thoughts to paper.[286] If, after discarding the fifth amendment confusion in the cases, the Court is unwilling to reinforce fourth amendment safeguards for journals, diaries, and embarrassing love letters, we are on the verge of official intrusions upon privacy heretofore unknown to the American scheme.[287] Even if the leather-bound Bible on the mantel can somehow be considered evidence, its warrantless seizure under *Hayden* and the recent cases would pose the gravest constitutional issue. We will live in a world different from the one we know if we become afraid to record our hopes and memories on paper, but must hold them in our heads as best we can—lest they be opened to the public view by a police officer who bundles them off to the station to be used as evidence in a criminal prosecution.[288]

The effect of the demise of the mere evidence rule and the severance of self-incrimination concerns from seizures of writings is nowhere clearer than in the "plain view" cases. At least since *Harris*,[289] the Court has held that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence."[290] There are limits, of course. The Court said in *Coolidge*[291] that the officer must have some prior justification for being in position to see the evidence in plain view and, at least as to objects "not contraband nor stolen nor dangerous in themselves," he or she must come upon it inadvertently.[292] Two understandings of the plain view doctrine have

---

> Indeed, there would appear to be a precise inverse relationship between the private nature of the document and the permissibility of assuming its existence. Therefore, under the Court's theory, the admission through production that one's diary, letters, prior tax returns, personally maintained financial records, or cancelled checks exist would ordinarily provide substantial testimony. The incriminating nature of such an admission is clear, for while it may not be criminal to keep a diary, or write letters or checks, the admission that one does and that those documents are still available may quickly—or simultaneously—lead to incriminating evidence . . . . Thus, in practice, the Court's approach should still focus upon the private nature of the papers subpoenaed and protect those about which *Boyd* and its progeny were most concerned.

425 U.S. at 433. *See also* Couch v. United States, 409 U.S. 322, 350 (1973) (Marshall, J., dissenting) (setting forth his own approach to the problem).

[286] *See* Fisher v. United States, 425 U.S. 391, 420 (1976) (Brennan, J., concurring) (suggesting that "[t]he ability to think private thoughts" would be "curtailed through fear that those thoughts . . . would become the subjects of criminal sanctions however invalidly imposed").

[287] I daresay that, despite the *Boyd* doctrine, while the Court has approved a good many governmental inspections of private documents over the years, it has never approved official intrusions upon these *most* private writings. *See* TAYLOR, *supra* note 8, at 64-71; ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 210.3(2) (1975) (prohibiting the seizure of personal diaries, letters, or other writings of similar confidential nature). *Compare* United States v. Bennett, 409 F.2d 888 (2d Cir. 1969) (approving the seizure of a letter) *with* United States v. Boyette, 299 F.2d 92 (4th Cir. 1962) (disapproving the seizure of a diary). In *Fisher*, the Court declined to treat the "[s]pecial problems of privacy which might be presented by subpoena of a personal diary." 425 U.S. at 401 n.7.

[288] Of course, it matters little whether the writings are incriminating or not. So long as the police go through them in search of evidence, the intrusion upon privacy is the same. *See* TAYLOR, *supra* note 8, at 67.

[289] Harris v. United States, 390 U.S. 234 (1968) (permitting the seizure of a registration card found inside the door of a car the officer was securing for impoundment).

[290] *Id.* at 236. *Harris* purported only to apply a "settled" rule, but the cases cited hardly supported it. Judge Moylan has identified clearer precursors, but he concludes that *Harris* was the first to use the plain view rationale in "explicit terms." Moylan, *The Plain View Doctrine: Unexpected Child of the Great "Search Incident" Geography Battle*, 26 MERCER L. REV. 1047, 1068 (1975).

[291] Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plurality opinion for the Court).

[292] *Id.* at 471.

emerged. On the one hand, the doctrine may have to do with the threshold question of scope. The Court may be saying that if evidence is plainly visible it follows that its owner or possessor can have no reasonable expectation of privacy in it and, accordingly, it may be seized without a "search" within the meaning of the fourth amendment.[293] This is to read the *Katz* concentration upon "searches" and privacy to have swallowed up any remaining concern for property, leaving chattels of evidentiary value subject to "seizure" without interference from the fourth amendment.[294] On the other hand, the doctrine may come into play only after the fourth amendment is invoked. It may speak to the further question whether, given that the fourth amendment applies, it is violated—usually because the evidence is seized without a warrant. The weight of authority accepts the second position.[295] Judge Moylan,[296] for example, insists that *Katz* has not done completely away with the concept of a "constitutionally protected area."[297] To him, the plain view cases hold only that once the police have justifiably intruded into such an area and inadvertently come upon identifiable evidence, they will be excused from risking loss of the evidence by delaying a seizure until a warrant is obtained. If, however, there is no initial intrusion into a protected area the plain view doctrine is inapplicable.[298]

On either reading of the cases, it is clear that the fourth amendment provides precious little protection for personal property. If we take the first approach, it may not even be significant whether the evidence to be seized is in a public or private place or whether the officer who observes it is standing on public or private ground. In any case, it would be open to the Court to find no *Katz* expectation of privacy and to permit seizure of evidence without invoking the fourth amendment.[299] Judge Moylan would not go so far. He would first distinguish between objects found within and without a protected area. Things found in public do not implicate the

---

[293] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976) (apparently viewing a visual inspection of the interior of an automobile as something other than a "search"); Cady v. Dombrowski, 413 U.S. 433, 449-50 (1973) (expressly leaving open the question whether the search of an automobile in an "open field" required a warrant); Coolidge v. New Hampshire, 403 U.S. 443, 509 (1971) (Black, J., dissenting) (insisting that when police officers took a car from a private drive "there was no search at all"); United States v. Lee, 274 U.S. 559, 563 (1927) (holding that officers who used a searchlight to observe contraband liquor on the deck of a boat had not conducted a "search on the high seas").

[294] This understanding of the direction the plain view analysis may be taking raises fundamental questions of definition. Prior to *Katz*, it was understood that trespass upon private property had something to do with a "search" within the meaning of the fourth amendment. After that case, perhaps we are no longer entitled to assume that a physical entry implicates the fourth amendment. Perhaps a "search" has been redefined as an intrusion into a reasonable expectation of privacy—something the individual may lack even in his or her own home. *See* text at note 188 *supra*. So long as the police do not need to disturb the premises or things upon it in order to see evidence in plain view, there simply is no "search," and the only fourth amendment standard in the case is that applicable to "seizures." *Compare* notes 240-54 and accompanying text *supra with* notes 255-88 and accompanying text *supra*. *See also* Landynski, *The Supreme Court's Search for Fourth Amendment Standards: The Extraordinary Case of Coolidge v. New Hampshire*, 45 CONN. B.J. 330, 336 n.22a (1971) (distinguishing "plain view" from "abandonment" and in the process confusing the fourth amendment standards for "searches" and "seizures").

[295] In *Coolidge*, for example, the Court referred to the plain view doctrine as one of several "exceptions to the warrant requirement." 403 U.S. at 464. *Accord*, United States v. Mapp, 476 F.2d 67, 76 (2d Cir. 1973) (including "plain view" in a list of "exceptions"), *cited in* South Dakota v. Opperman, 428 U.S. 364, 382 n.10 (1976) (Powell, J., concurring).

[296] Moylan, *supra* note 290.

[297] *Compare id.* at 1077 *with* Katz v. United States, 389 U.S. 347, 351 (1967) (characterizing as "misleading" the parties' statement of the question as whether the phone booth in which the suspect was standing was a "constitutionally protected area").

[298] *See* Brown v. State, 15 Md. App. 584, 292 A.2d 762 (Ct. Spec. App. 1972). *See also* Mascolo, *The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment*, 22 BUFFALO L. REV. 419, 423-24 (1973).

[299] *See* cases discussed in notes 249-54 and accompanying text *supra*.

plain view doctrine; things found in private do. As to the latter, if officers observe the object from outside they must have a warrant to cross the threshold and effect a seizure. If, however, they can justify entry on some other ground and they come upon identifiable evidence inadvertently, they can seize it without a warrant. This last situation, to Judge Moylan, is the paradigm plain view case.[300] The analysis is clean. It makes some sense, and it has the advantage of retaining some respect for private property even after *Katz*. Yet, set atop *Hayden*'s rejection of the mere evidence rule and the Burger Court decisions treating writings to some extent like other chattels, it only widens again the authority of government to interfere with personal property. Again, in failing to limit the fruits of the quest, the plain view doctrine fails to restrict its scope.

Coming finally to the standing cases, the Court has often said, at least in dictum, that a person who claims a possessory interest in a thing seized is entitled to contest the validity of the government's action under the fourth amendment.[301] The leading case is *Jeffers*,[302] in which the Court permitted the petitioner to suppress narcotics belonging to him but seized in an unlawful search of his aunts' hotel room. While that case has never been overruled, to the extent it rests on fourth amendment protection for personal property divorced from an invasion of the challenger's privacy, it may have difficulty surviving *Katz* and *Hayden*.[303] The Court suggested as much in *Brown*[304] when it denied standing to petitioners who were not on the premises at the time of the search, claimed no property interest in the premises, and were not charged with a possessory offense.[305] To be sure, the Court noted in passing that the petitioners had not alleged any "legitimate interest" in the things seized,[306] suggesting perhaps that if they had, their standing would have been acknowledged. In an accompanying footnote, however, the Court summarily rejected tardy claims of "constructive possession" and a property interest shared by a "partnership in crime."[307]

---

[300] Moylan, *supra* note 290, at 1069. To be sure, *Coolidge* itself can be cited for this proposition. The automobile seized from the driveway in that case had been visible to the officers from a position away from the suspect's property. Still, the Court's plurality would not permit the seizure. 403 U.S. at 472. Judge Moylan adds McDonald v. United States, 335 U.S. 451 (1948), and Taylor v. United States, 286 U.S. 1 (1932). *Cf.* Steele v. United States, 267 U.S. 498 (1925) (approving a seizure only after a warrant had been obtained). I sincerely hope that he is right—that the fragile plurality opinion in *Coolidge* states present law that *Katz* has not undermined the cases finding significance in a physical entry. *Accord*, Corwin, *supra* note 80, at 22. On the other hand, the increasing strength of Justice White, the principal dissenter in *Coolidge*, and the basic tenor of more recent Burger Court decisions give me pause. I notice, for example, that the District of Columbia Circuit has just held that a conceded "technical trespass" upon private property to glimpse unlawful activity through a basement window does not violate the fourth amendment. United States v. Johnson, 561 F.2d 832 (D.C. Cir. 1977) (en banc).

[301] *E.g.*, Jones v. United States, 362 U.S. 257, 261, 263 (1960).

[302] United States v. Jeffers, 342 U.S. 48 (1951).

[303] *See* notes 265-68 and accompanying text *supra*.

[304] Brown v. United States, 411 U.S. 223 (1973).

[305] *Id.* at 229. Any of the three allegations would have entitled the petitioners to raise the validity of the search under Jones v. United States, 362 U.S. 257 (1960) (recognizing standing in a person who possesses real property, is legitimately on the premises when the search is conducted, or is charged with a possessory offense involving the thing seized and would have to implicate himself or herself in crime in order to claim some interest in it). *Compare* United States v. Hunter, 550 F.2d 1066, 1073 (6th Cir. 1977) (reading *Brown* to dispose of any broad reading of the "automatic standing" rule of *Jones* and leaving "prosecutorial self-contradiction" as the only remaining ground) *and* Combs v. United States, 408 U.S. 224, 227 n.4 (1972) (recognizing the issue but failing to resolve it) *with* United States v. Edwards, 554 F.2d 1331, 1333-34 n.2 (5th Cir. 1977) (relying on "automatic standing" without extended discussion).

[306] 411 U.S. at 229.

[307] *Id.* at 230 n.4. While the Court acknowledged that these arguments had not been raised below

Given the ambiguity in *Brown,* it is unclear whether the Burger Court continues to recognize standing based solely on a property interest in the thing seized. On the other hand, if the *Lisk* case[308] from the Seventh Circuit is any guide, the answer may make little difference. Lisk had placed a bomb in the trunk of a co-defendant's car. It was stipulated that although he had no interest in the car he retained a proprietary interest in the bomb—including a right to its return. When federal agents unlawfully searched the car and seized the bomb, he insisted that he had standing to challenge its admission at trial. Writing for the circuit court, then-Judge Stevens reasoned that by virtue of his property interest in the bomb Lisk had standing to contest the seizure, but since he had no interest in the car he lacked standing to challenge the search that turned it up.[309] It was, as Stevens put it, as though the bomb had been found in plain view in a public place.[310] Reduced to contending that the bomb was neither fruits, instrumentalities or contraband, nor evidence of crime, Lisk was on sinking ground.[311] He had standing to contest the seizure, but on the

---

and thus were not properly before the Court, it took time to disparage both of them, rejecting the partnership theory because the petitioners' possession of stolen property had been "illegitimate" and the constructive possession theory because the "conspiracy" upon which it was based was a "doubtful" ground and because, in any event, the conspiracy as charged in the indictment had ended before the date of the seizure. I hesitate to infer the worst, but it may be that if the Burger Court continues to recognize a possessory interest in the thing seized as sufficient for standing, it may require more than an allegation of such an interest but perhaps the *fact* of *legitimate* possession as determined after adjudication. *Compare* United States v. Sacco, 436 F.2d 780, 784 (2d Cir.), *cert. denied,* 404 U.S. 834 (1971) (holding that the possessory interest must be *legitimate*) *and* United States v. Lester, 21 F.R.D. 376, 382 (W.D. Pa. 1957) (holding that the possessory interest must be *proved*) *with* Cotton v. United States, 371 F.2d 385, 391 (9th Cir. 1967) (holding that a *claim* of *illegitimate* interest is sufficient).

[308] United States v. Lisk, 522 F.2d 228 (7th Cir. 1975).

[309] *Id.* at 230. *See* Knox, *Some Thoughts on the Scope of the Fourth Amendment and Standing to Challenge Searches and Seizures,* 40 Mo. L. REV. 1 (1975) (elaborating upon but not departing significantly from the analysis in *Lisk*). On petition for rehearing, Stevens distinguished United States v. Jeffers, 342 U.S. 48 (1951), as involving a "regular invitee" with sufficient interest in the premises or a suspect who was himself the "target" of the search. 522 F.2d at 232-33. *See* Mancusi v. DeForte, 392 U.S. 364, 367-68 (1968) (appearing to cite *Jeffers* as involving a sufficient interest in the place searched); Grove, *Suppression of Illegally Obtained Evidence: The Standing Requirement On Its Last Leg,* 18 CATH. L. REV. 150, 171-72 (1968). The target theory was suggested by language in the *Jones* case:

> In order to qualify as a "person aggrieved by an unlawful search and seizure" one must have been a victim of a search or seizure, *one against whom the search was directed,* as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else.

Jones v. United States, 362 U.S. 257, 261 (1960) (emphasis added). The question is whether the italicized language establishes an independent basis for standing or merely restates in different words what it is to be the "victim of a search." *See* United States v. Potter, 419 F. Supp. 1151, 1157 (N.D. Ill. 1976). Thus far, the target theory has not fared well in the lower courts. *Compare* Mabra v. Gray, 518 F.2d 512, 514 (7th Cir. 1975) (another Stevens opinion reading the key language in *Jones* as merely an appositive) *with* United States v. Alewelt, 532 F.2d 1165, 1167-68 (7th Cir. 1976) (finding the target theory an independent basis for standing but only in cases in which the suspect also has a reasonable expectation of privacy in the security of the thing seized in the place where he or she left it) *and* United States v. Hunt, 505 F.2d 931, 941 (5th Cir. 1974) (ignoring the doctrine altogether), *cert. denied,* 421 U.S. 975 (1975).

[310] It was also, perhaps, as though the codefendant had consented to the search of his car. 522 F.2d at 230 n.5. *See* Frazier v. Cupp, 394 U.S. 731, 740 (1969) (the duffel bag case).

[311] *See* text at note 267 *supra.* One would have thought that Lisk's argument was somewhat stronger than the court allowed, however. For one thing, the bomb was described in the indictment as "a metal pipe approximately 18" in length and 1½" in diameter, crimped at each end with 2 electrical wires protruding from the center thereof, *and containing an explosive material.*" 522 F.2d at 229 n.1 (emphasis added). It seems plain that unless the officers conducted a dangerous inspection with a match at the scene, they could not have known at the time of seizure that the material in the pipe *was* explosive. Of course it was the explosive character of the material that transformed a worthless length of pipe into a "firearm" within the meaning of the applicable federal statute. Perhaps even more importantly, it is plain that in order to identify the object as a bomb, the police had to open it for examination—probably chemical testing at a laboratory. Yet there was no talk in the court's opinion of an arguably unlawful "search" of the pipe conducted after its lawful, as to Lisk, "seizure" from the car. 64 GEO. L.J. 1187, 1190 n.15 (1976). *Cf.* United States v. Chadwick, 433 U.S. 1 (1977) (holding that opening a locked container may invade the privacy of its owner).

merits there was little argument to be made. All the evidence is not in, but if Justice Stevens succeeds in persuading his new brethren that *Lisk* was correctly decided,[312] then the only conclusion to be drawn is that the fourth amendment's protection for personal property has been almost entirely collapsed into its protection for privacy.

My purpose in this Section is merely to demonstrate that the trend in search and seizure decisions is toward diminished protection for the individual. I should point out, however, that a different path is open to the Court, a path I would have the Court find anew even at the expense of overruling some of its recent decisions. At the outset, I will acknowledge that the mere evidence rule has been properly laid to rest. While I agree with the *Hayden* dissenters that the Court should not go out of its way to render broad rulings that restrict individual liberty,[313] the *Gouled* rule drew distinctions that can no longer be defended.[314] It was unworkable, and on that ground alone it was properly buried.[315] On the other hand, I would not in the name of practicality dismiss one unmanageable rule only to embrace another. That, in my judgment, is precisely what *Hayden* did when it held that any object of evidentiary value could be seized—so long as it was sufficiently related to criminal behavior—and then exempted fruits, instrumentalities, and contraband from the test.[316] If prior to *Hayden* it was so difficult to distinguish items in those three murky categories from mere evidence, I see no reason to think that the police will be any better able to do so now—as they set about their task of seizing fruits, instrumentalities, and contraband, which somehow "automatically"[317] identify themselves, while leaving undisturbed objects unrelated to crime.[318] To state the *Hayden* doctrine is to refute it. I would reject the untenable distinction between fruits, instrumentalities, and contraband on the one hand, and mere evidence on the other, but I would reject it in both its forms and require in every case that the police have probable cause to believe an object *is* evidence before it is seized.[319] The addition of writings to the chattels that can be seized makes this result all the more essential.

Of course, the Burger Court decisions on the seizure of writings must not be overread. At most, they deny that the testimonial character of documents protects them under the fifth amendment and hold that they may be obtained against the owner's will, in some cases through a subpoena and in others through a search on a warrant. The decisions most certainly do not say that writings are to be treated in precisely the same way as ordinary chattels, and in particular they do not say

---

[312] In the past, he has been remarkably successful in gaining acceptance in the Supreme Court for his work as a circuit judge. *See, e.g.*, Ingraham v. Wright, 430 U.S. 651, 679 n.47 (1970) (relying upon Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975), *modified en banc*, 545 F.2d 565 (7th Cir. 1976)); Elrod v. Burns, 427 U.S. 347, 350, 357 (1976) (relying upon Illinois State Employees Union v. Lewis, 473 F.2d 561 (7th Cir. 1972)).

[313] 387 U.S. at 310 (Fortas, J., dissenting).

[314] Kaplan, *supra* note 262. The best illustration of the Court's inability to cope with the mere evidence rule is Marron v. United States, 275 U.S. 192 (1927) (approving the seizure of business records on the theory that they were "part of the outfit or equipment actually used to commit the offense" of operating an illegal liquor business).

[315] *Accord*, TAYLOR, *supra* note 8, at 63-64.

[316] *See* text at note 267 *supra*.

[317] *Id.*

[318] *See* LaFave, *Warrantless Searches and the Supreme Court: Further Ventures into the Quagmire*, 8 CRIM. L. BULL. 9 (1972) [hereinafter cited as *Quagmire*]. To my mind, the problems raised in the "mass seizure" cases remain. *Compare* Von Cleef v. New Jersey, 395 U.S. 814 (1969) *with* Stanford v. Texas, 379 U.S. 476 (1965) *and* Kremen v. United States, 353 U.S. 346 (1957).

[319] *See, e.g.*, Shipman v. State, 291 Ala. 484, 282 So. 2d 700 (1973) (disapproving the seizure of an object in plain view on the ground that the officer had no reasonable cause to believe it was contraband).

that the plain view doctrine is to be applied to them.[320] The idea in the plain view exception is that the police can "seize" an object readily identifiable as evidence without obtaining a warrant for it. Nothing in the doctrine authorizes any sort of "search."[321] While the police may be able to identify ordinary chattels as evidence, I should have thought that any relationship between writings and criminal behavior could only be ascertained by inspection. If officers pause to read documents, I find the conclusion that they have conducted a "search" inescapable.[322] Accordingly, I hope the Court will limit the seizure of writings to circumstances in which a magistrate issues a subpoena or search warrant that particularly describes the documents to be delivered up or searched for and seized. In view of the extraordinary invasion of privacy occasioned by an inspection of documents,[323] any warrant issued for writ-

[320] I will concede that *Andresen* came close. In that case, the petitioner contended that the warrant that authorized the search of his law office was too broad and that in executing it the officers had seized documents tangential to the real estate fraud matter under investigation. The Court rejected both arguments. As to the warrant itself, the Court found that the "specific list" of documents was necessary to piece together the "jigsaw puzzle" of transactions relevant to the offense and that the addition of the words "together with other fruits, instrumentalities and evidence of crime at this [time] unknown" did not convert the list into a general warrant for rummaging through the petitioner's papers without direction. To save the warrant, the Court read the quoted language to refer only to the "crime" to which the specific list of documents related. Coming to the seizure of other papers, the Court found that the particular documents taken—relating to real estate lots other than the one involved in the alleged fraud—were nevertheless sufficiently tied to the offense under investigation to justify seizure. "In this case," said Justice Blackmun for the Court, "we conclude that the trained special investigators reasonably could have believed that the evidence specifically dealing with another lot . . . could be used to show petitioner's intent with respect to the Lot 13T transaction." 427 U.S. at 483. While *Andresen*'s summary treatment of the very real difficulties opened up by *Hayden* is troubling, it seems to me that the Court has not yet committed itself to treating paper searches like searches for other kinds of evidence. *But see* United States v. Griffin, 555 F.2d 1323 (5th Cir. 1977) (approving seizure of pharmaceutical records identified as evidence in the field); United States v. Prewitt, 553 F.2d 1082 (7th Cir. 1977) (permitting seizure of correspondence without "minute" identification in a warrant).

[321] *See* Moylan, *supra* note 290, at 1066 (tracing the origin of the doctrine to Justice Frankfurter's distinction in the "search incident" cases between the authority of the police to seize visible items at the scene of an arrest and a broader authority to search the premises). *Cf.* United States v. Woods, 560 F.2d 660, 667 (5th Cir. 1977) (Goldberg, J., dissenting) (insisting that the plain view doctrine could not justify opening a cabinet in order to expose evidence); United States v. Bertucci, 532 F.2d 1144, 1149 (7th Cir. 1976) (Swygert, J., dissenting) (contending that a flashlight inspection of cartons in the back seat of a car was itself a search unjustified by the plain view doctrine).

[322] *See* TAYLOR, *supra* note 8, at 67-68. The Justices who reached the fourth amendment question in Stanley v. Georgia, 394 U.S. 557 (1969), concluded that when officers set up the petitioner's camera and viewed his reels of film on the spot before seizing them they conducted an unlawful search. The reels of film were found in plain view, of course, but as Justice Stewart put it "the contents of the films could not be determined by mere inspection." *Id.* at 571. Said another way, without searching through the reels of film the officers could not identify them as evidence. The same analysis, I should have thought, applies in spades to writings. While some innocent documents will undoubtedly be read even in a closely supervised search for evidence named in a warrant, the reading of papers in any other circumstance would constitute an independent search—unjustified by anything in the plain view doctrine. *Cf.* South Dakota v. Opperman, 428 U.S. 364, 380 n.7 (1976) (Powell, J., concurring) (commenting that the Court's approval of an automobile inspection contemplated only the removal and storage of documents—without an examination of their contents). *But see* United States v. Pugh, 566 F.2d 626 (8th Cir. 1977) (approving a warrantless seizure of a book after an officer was able to read its one-word title in plain view).

[323] In *Andresen*, the Court acknowledged that there are "grave dangers inherent" in warrants authorizing searches for documents that are not presented when only physical objects "whose relevance is more easily ascertainable" are sought. In particular, the Court conceded that "some innocuous documents will be examined at least cursorily, in order to determine whether they are, in fact, among those papers authorized to be seized." 427 U.S. at 482 n.11. In light of these dangers the Court offered that officials responsible for paper searches "must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy." *Id.* From my point of view, the Court's diplomacy is admirable but probably ineffectual. Police officers "engaged in the often competitive enterprise of ferreting out crime," Johnson v. United States, 333 U.S. 10, 14 (1948), do not pause long to consider the privacy interests of suspects they sincerely believe to be society's enemies. The proposal in the text relies not upon the good faith and objectivity of the police but upon firm judicial supervision both before and after the intrusion. *Cf.* United States v. Drebin, 557 F.2d 1316 (9th Cir. 1977) (finding a documentary warrant invalid for want of sufficient particularity—but holding the admission of evidence seized under it to have been harmless error).

ings should closely circumscribe the authority of the police—on the order of warrants authorizing electronic surveillance.[324]

Coming to the plain view doctrine, I am concerned again about the ability of the police to identify even fruits, instrumentalities, and contraband as sufficiently related to criminal behavior to justify warrantless seizure. To meet the problem reasonably, without simply demanding a warrant in all cases, I would enlist the rule of inadvertence to new duty. While it is plain from *Coolidge* that the requirement that evidence be discovered inadvertently was designed to frustrate the "planned arrest,"[325] it seems to me that it can be made to serve another function as well.

---

[324] Again in *Andresen, see* 427 U.S. at 482 n.11, and in *Fisher* as well, *see* 425 U.S. at 400, the Court acknowledged the similarity of the concerns in subpoenas and searches for writings and electronic surveillance. *Cf.* Nixon v. Administrator of Gen. Servs., 433 U.S. 425 (1977) (analogizing the legislation involving Mr. Nixon's presidential papers to that regulating electronic surveillance). In both cases, government officers must read or listen to much that is innocent in order to identify anything that can be useful in the investigation and prosecution of crime. We recognize that in our stringent statutory controls of electronic snooping, and I would certainly take the same view of paper searches. *Compare* 18 U.S.C. §§ 2510-2520 (1970) (governing electronic surveillance) *with* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE §§ 220.5, 230.1(3) (1975) (mandating additional judicial supervision when documents are subject to search). For a different proposal see *Formalism, supra* note 164, at 988 (suggesting that the fourth and fifth amendments be read to "protect absolutely a core of personal communications"); Fisher v. United States, 425 U.S. 391, 414 (1976) (Brennan, J., concurring) (adopting a similar position).

[325] Justice Stewart expressly stated that the case involved a "*planned* warrantless seizure." 403 U.S. at 471 n.27 (emphasis in original). *See* Moylan, *supra* note 290, at 1083-84; *The Supreme Court, 1970 Term,* 85 HARV. L. REV. 3, 244-46 (1971) [hereinafter cited as *The Supreme Court*] (judging that the use of the power of arrest "for the ulterior purpose of gaining access to a person's house" to encounter evidence "seems at the heart of Justice Stewart's concern"). On the other hand, if the deterrence of "planned arrests" was in the Court's collective mind, it is difficult to understand why the rule of inadvertence was expressly made inapplicable to fruits, instrumentalities, and contraband—the very things the police might anticipate finding in the arrested person's home at the time of arrest. *See* text at note 292 *supra. Cf.* LaFave, *"Case-by-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma,* 1974 SUP. CT. REV. 127, 132 [hereinafter cited as *Dilemma*]. Those categories have more to do with the identification of objects as evidence than with initial police intrusions without probable cause to search. *See also* Coolidge v. New Hampshire, 403 U.S. 443, 507-09 (1971) (Black, J., dissenting) (reading the rule of inadvertence as a "check on the requirement of particular description in search warrants"); *id.* at 513 (White, J., dissenting) (asking rhetorically whether the Court meant to hold that before a person "is deprived of his possession or right to possession of his effects" a magistrate must "confirm that what the officer has legally seen . . . is actually contraband or criminal evidence"). To my mind, the lower courts have virtually gutted the rule of inadvertence by failing to recognize its application to the problem of identification and assuming simplistically that it is no more than a tool for getting at planned arrests. For example, in United States v. Cushnie, 488 F.2d 81 (5th Cir.), *cert. denied,* 419 U.S. 968 (1974), the Fifth Circuit upheld the plain view seizure of marijuana the police spotted in an open suitcase as they entered the suspect's hotel room to make an arrest for possession of marijuana. Of course, by reading *Coolidge* not to apply the rule of inadvertence to "contraband" the court might have avoided the issue altogether. Instead, the court assumed that the rule of inadvertence applied but held that a mere anticipation of finding drugs in the possession of a suspect arrested on drug charges was not enough to invalidate the seizure. Plainly, the court discounted the inadvertence issue as soon as it was assured that the police had not timed their entry in an effort to find contraband. Although *Cushnie* itself is hardly troubling, two later Fifth Circuit cases relying upon it are. In United States v. Worthington, 544 F.2d 1275 (5th Cir. 1977), the court summarily dismissed the inadvertence problem when Drug Enforcement Administration agents seized marijuana not from an open suitcase in a lighted hotel room, but from gunnysacks in the darkened rear compartment of a small airplane. While the agents testified, and the trial court found, that in their experience was the way marijuana was imported, I tend to doubt that it was all so clear that anything was amiss—before the sacks were pulled out and opened. Next, in United States v. Bolts, 558 F.2d 316 (5th Cir. 1977), the court relied on *Cushnie* and *Worthington* to approve the seizure of a passport—found in plain view on an open shelf in a suspect's den. At the time, the suspect had just been arrested and everyone was waiting for family members to arrive to take charge of his children after he was taken away. By no stretch of the imagination was the passport contraband, though perhaps it was an instrumentality of the suspect's alleged drug trafficking scheme. In any case, the arresting officers had known about it for months and might have obtained a magistrate's determination that, if found, it would *be* evidence. Disregarding the identification issue in large measure, the Fifth Circuit pronounced itself satisfied that the arresting officer could "grasp the significance" of the passport. There being no suggestion of a timed arrest, the seizure was approved.

There is some evidence that Justice Stewart in *Coolidge* was concerned about the identification issue. He mentioned in passing that in order to prevent the police from conducting an independent search of

I would have the requirement apply to any object seized by the police in the field, including fruits, instrumentalities, and contraband, and not named in a warrant nor previously identified as evidence by a magistrate. In the typical case in which the police suspect that an object related to crime will be found in a dwelling, several scenarios can be constructed. First, the police may have probable cause to believe both that the object will be found in the house and that it *is* evidence. In that situation, they will obtain a search warrant naming the object, and the plain view issue will not arise. Second, the police may have probable cause to believe the object will be found in the house but lack probable cause to believe it *is* evidence. In that case, they will seek a warrant from a magistrate but will be rudely surprised when he or she refuses to authorize a search—reasoning that even if a search is successful, its fruits will be worthless. If the police enter the house on some other justifiable basis and see the object in plain view, it cannot be seized. The magistrate has already determined that it is not sufficiently related to criminal behavior. Finally, the police may have probable cause to believe the object *is* evidence but lack probable cause to believe it will be found in the place they propose to search. The magistrate will refuse to issue a warrant, of course, but if he or she determines that, if found, the object would *be* evidence, we have a different case. Now if the police gain entry to the house by some other justifiable means and find the object there in plain view, I have no difficulty permitting them to seize it—even though they have not come upon it inadvertently but in fact anticipated finding it. After all, they have done all they can. They have sought a warrant for the search and failed to obtain it because their suspicion fell short of probable cause. Most importantly for my purposes here, they have not attempted to make the critical judgment whether the object *is* evidence themselves but have afforded a magistrate an opportunity to make that decision before the fact.

By applying the rule of inadvertence to any object seized, but suspending it when the police have in good faith obtained a magistrate's determination that, if found, the object would *be* evidence, the Court could reduce substantially the dangers the plain view doctrine otherwise presents. It would protect personal property that the police might mistake for evidence without the guidance of a magistrate, and it would provide added insurance that the police will not extend their search beyond what is permissible under the justification by which they gain entry—in anticipation of discovering further evidence in plain view.[326] My modest proposal partakes

objects to determine whether they are related to crime, extending "a general exploratory search from one object to another until something incriminating at last emerges," the plain view doctrine allows seizure only of things whose connection with crime is "immediately apparent." 403 U.S. at 466-67. Some lower courts have made that limitation part of a three-prong test, said to be derived from *Coolidge*. *E.g.*, United States v. Wilson, 524 F.2d 595, 598 (8th Cir. 1975), *cert. denied*, 424 U.S. 945 (1976): "In order to qualify for inclusion within the plain view exception it must be shown (1) that the initial intrusion which afforded the authorities the 'plain view' was lawful; (2) that the discovery of the evidence was inadvertent; and (3) that the incriminating nature of the evidence was 'immediately apparent.'" Inasmuch as I, too, find the identification problem in *Coolidge* of some importance, I hesitate to be critical. However, it does seem to me that cases such as *Wilson* take language out of context. Again, when Justice Stewart said that the incriminating character of objects must be "immediately apparent," he was addressing the question whether the police can be permitted to examine them closely in order to determine their value as evidence, or, what is worse, to move from object to object through a dwelling in the hope of ultimately turning up something that is incriminating. That issue is related to but different from the broader question whether the police can ever be trusted to identify evidence in the field and whether, if they cannot, a magistrate's assistance should be sought whenever possible. This is the problem I treat in the text.

[326] Again, I would have the fourth amendment's protection for personal property serve a prophylactic function. *See* text at note 257 *supra*.

of the familiar presumption in favor of magisterial supervision in search and seizure cases.[327] If, despite recent suggestions to the contrary,[328] the Court remains committed to the principle that the police should obtain a warrant for a search if there is time to get one before action is necessary, I see no reason to adopt a different rule for seizure. I propose no more than that if the police anticipate finding an object in plain view and there is time to obtain a magistrate's determination that it *is* evidence, then the police should seek that magisterial guidance before acting. It is only when there is no occasion for presenting the matter to a magistrate, that is, when the police come upon evidence inadvertently in the field, that a warrantless seizure is appropriate.[329]

Turning to the matter of standing, I would hold that a defendant in a criminal case always has sufficient stake in the outcome to challenge the method by which evidence against him or her was obtained.[330] Short of that, even if the Stevens position in *Lisk* is accepted for the moment and we assume that a person whose personal property is seized in an unlawful search of another's premises has standing only to contest the seizure, it seems to me that it should be open to argument not only that the object seized is not evidence of crime but that the police did not come upon it inadvertently.[331] Once again, I would not limit application of the rule of inadvertence to cases in which the defendant's privacy is breached. I consider it a rule that directly protects personal property from wrongful seizure and indirectly limits unjustified searches in anticipation of finding evidence in plain view. Of course, if

---

[327] *See* notes 347-49, 354-56 and accompanying text *infra*.

[328] *See* notes 403-10, 491, 494-522, 565-91 and accompanying text *infra*.

[329] I have in mind a future paper that will reject Judge Moylan's view that the rule of inadvertence is limited to cases in which the police cross some threshold of constitutional protection and propose its application at large even when the police gather evidence from public places. At bottom, my notion is that even when the police do not seize tangible objects they nevertheless seize "observations" of objects as they pass down the street. If they use those observations in some way—to get a warrant for further action from a magistrate or merely as the basis for testimony in court—the fourth amendment ought to play a role. *Cf.* Alderman v. United States, 394 U.S. 165, 177 (1969) (noting that the police may not testify later about something "seen" but not taken in an unlawful search). Of course, I would hardly insist that the police make their rounds with their eyes closed in order to avoid the unlawful seizure of observations, and if they spy evidence in a window sill I would permit them to use their observation in court. But if the observation is not come upon inadvertently, as for example when the police center upon a particular house in anticipation of observing evidence, then I would bring the rule of inadvertence to bear and prohibit them from making use of what they see until they have obtained a magistrate's determination that what they anticipate seeing *is* evidence. At a minimum, the proposal would tend to avoid stakeouts around the homes of the innocent and redirect them to the homes of the guilty—that is, to homes where the police anticipate finding evidence as determined by a magistrate. A thorough discussion of the implications of such a position must await a more appropriate forum. I will neither expand upon it nor defend it here.

[330] *See* note 640 *infra*.

[331] This use of the rule of inadvertence, which focuses upon the identification of objects seized *as evidence*, has something in common with the "target" theory of standing, which focuses upon the police purpose in conducting the search. *See* note 313 *supra*. In *Hayden*, when the mere evidence rule was abolished and the difficulty of identifying objects as evidence was first raised, the Court acknowledged that "in the case of 'mere evidence,' probable cause must be examined in terms of cause to believe that the evidence sought will aid" in the investigation. Accordingly, "consideration of police purposes will be required." 387 U.S. at 307. *Cf.* Matthews v. Correa, 135 F.2d 534 (2d Cir. 1943) (commenting that the "line between fruits of the crime itself and mere evidence thereof may be narrow; perhaps this turns more on the good faith of the search than the actual distinction between the matters turned up"). While, again, I would go further and permit any criminal defendant against whom evidence is introduced at trial to challenge the method by which it was obtained, I have no quarrel with the "target" theory as a less desirable alternative to what appears to be present law.

The *Lisk* case has recently come up for review again, this time on the very theory suggested in the text—that the seizure was not inadvertent. Unfortunately, the Seventh Circuit, like so many other courts, persists in confusing plain view with theories of search. Lisk has again been denied relief for want of a sufficient expectation of *privacy* in his friend's car. United States v. Lisk, 559 F.2d 1108 (7th Cir. 1977).

the police obtain a magistrate's determination that what they anticipate finding *is* evidence, then I would suspend the rule. In that case there is simply no argument against the seizure, divorced from the invasion of privacy that made it possible.[332]

It will be said that the lines I propose are just as unmanageable as those the Court has recently rejected. Even if that is true, I am not deterred. For I will freely admit a preference for complexity that enhances individual liberty over simplicity that despoils it. It will certainly be said that my emphasis upon property rights and the identification of things seized as evidence is overdone. Again I have a response. It seems to me that by requiring in most instances that things to be seized be particularly described in a warrant, the fourth amendment itself recognizes that the identification issue is critical. If officers in the field are left to exercise their own judgment their actions will tend toward the very general exploratory searches the framers abhored.[333] Furthermore, as Judge Hand observed,[334] even if the Court is now concerned only with the protection of reasonable expectations of privacy, search and seizure doctrine that limits the objects to be seized ultimately restricts the scope of the search and accordingly limits the governmental intrusion upon privacy. At bottom the point is the same. The Court simply must draw lines, however flawed. It must develop doctrine that fills out some recognizable fourth amendment structure. If it does not—if it relies entirely upon the *Katz* formula and reduces every question of the fourth amendment's scope to an unprincipled balancing test the outcome of which can never be predicted—then we have lost the ground we won in the incorporation battles twenty years ago. And we have lost it in search and seizure cases whether tried in state or federal court.[335]

B. The Question of Standards

The overriding issue regarding compliance with the fourth amendment is the relationship between its two clauses. The first, the reasonableness clause, states the ultimate standard—the right of the people to be secure against unreasonable searches and seizures. The second, the warrant clause, lays down guidelines for the issuance and form of warrants. Two principal views have emerged. One holds that the two clauses must be read separately. The first clause controls warrantless police action; the second comes into play only when the police obtain a warrant before acting.[336] On this view, the reasonableness clause is no more than a codification of the common

---

[332] The only possible argument in this situation is one built somehow from the due process or eminent domain clauses. I assume that the Court would find any seizure that does not violate the fourth amendment to be valid measured against other, less familiar standards. *Cf.* Gerstein v. Pugh, 420 U.S. 103, 125 n.27 (1975) (commenting that the fourth amendment has "always been thought to define the 'process that is due' for seizures of person or property" to the exclusion of other constitutional provisions).

[333] *See, e.g.,* Coolidge v. New Hampshire, 403 U.S. 443, 470-71 (1971) (plurality opinion); Von Cleef v. New Jersey, 395 U.S. 814 (1969).

[334] *See* text at note 257 *supra.*

[335] *See* notes 199-201 and accompanying text *supra.*

[336] TAYLOR, *supra* note 8, at 39. Another, similar view holds that the first clause controls cases in which the intrusion is for a purpose other than a search for evidence of crime—as in health inspections, inventories, and perhaps even searches incident to arrest. *See* White, *supra* note 149, at 178, 209. The warrant clause, then, governs criminal investigations. *Id.* at 178. *Cf.* notes 202-16 and accompanying text *supra* (examining the argument that the fourth amendment does not apply at all in cases in which the police are not pursuing evidence of crime). The obvious difficulty with lifting the warrant clause from "civil" search cases is the resulting incentive to conduct pretext inspections for the real purpose of discovering evidence. Professor White recognizes the problem and suggests that the practice might be discouraged by excluding from trial any evidence turned up in a warrantless inspection justified as "civil." *Id.* at 179.

law—taken for granted by the colonists who were concerned only with general warrants in fashioning the fourth amendment.[337] The argument is fueled by the original language of the amendment—which provided that "the right of the people shall not be violated *by* warrants issuing."[338] The implication, so the argument runs, is that the framers assumed that searches and seizures must be reasonable; they only proposed in the fourth amendment to prohibit executive officers from authorizing *un*reasonable actions in the teeth of the common law.[339] This view of the two clauses is illustrated by the Court's early attempts to fix the limits of searches incident to arrest. The key case is *Rabinowitz*,[340] in which the Court approved a contemporaneous search of the suspect's one-room office, his deck, his safe, and his file cabinets.[341] Said Justice Minton for the Court, "The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case."[342]

The other, competing view of the fourth amendment's two clauses holds that they must be read together. While the ultimate standard is indeed reasonableness, that term is to be defined in reference to the warrant clause. Thus, a search is per se unreasonable unless it is authorized by a warrant, except in certain exceptional situations in which the police have a good excuse for not obtaining a warrant before taking action.[343] This view rests upon the language of the fourth amendment as it was finally submitted to the states and ratified.[344] It reasons that the framers could hardly have intended to closely circumscribe warranted police action, but to leave warrantless action largely unimpeded. Accordingly, the guidelines established for warrants must apply to all intrusions upon privacy and property; adherence to them is what makes a search and seizure reasonable.[345] In addition, this view recognizes the colonists' distrust of warrants issued by executive officers and, accordingly, reads the fourth amendment to contemplate that warrants will be issued only by magistrates.[346] Thus, the argument embraces the principle of judicial supervision

---

[337] TAYLOR, *supra* note 8, at 38-39.

[338] *See* LASSON, *supra* note 11, at 101. *See also* text at note 57 *supra*.

[339] TAYLOR, *supra* note 8, at 41. An extreme variation of this view has it that the fourth amendment presents the police officer with a choice. The officer can choose to act without a warrant, but if a court later determines that his or her action was unreasonable, the officer can be liable for damages. On the other hand, the officer can choose to obtain a warrant before acting, in which event the requirements of the warrant clause govern. If a court later determines that the action was nevertheless unreasonable, the officer can raise the warrant as a defense. Of course, the messengers in *Entick*, *see* text at notes 40-47 *supra*, attempted to do just that and were unsuccessful. *See* notes 32-33 and accompanying text *supra*. Yet that warrant did not comply with accepted common law standards. It is argued that if it had, and if Lord Camden had only disagreed with Lord Halifax about whether it was supported by probable cause, then the messengers would have had a defense in claiming that they acted in good faith in reliance upon official authorization.

[340] United States v. Rabinowitz, 339 U.S. 56 (1950). *See also* Trupiano v. United States, 334 U.S. 699 (1948); cases cited in text at notes 109-12 *supra*.

[341] 339 U.S. at 58-59.

[342] *Id.* at 66.

[343] Katz v. United States, 389 U.S. 347, 356-58 (1967); Johnson v. United States, 333 U.S. 10, 13-14 (1948).

[344] *See* notes 58-60 and accompanying text *supra*. *See also* Warden v. Hayden, 387 U.S. 294, 316-17 (1967) (Douglas, J., dissenting).

[345] Wong Sun v. United States, 371 U.S. 471, 479-80 (1963) (holding that "the requirements of reliability and particularity of the information on which an officer may act" cannot be "less stringent" when an officer acts alone than when he or she acts on a warrant). *Cf.* United States v. Santana, 427 U.S. 38 (1976) (Marshall, J., dissenting) (suggesting that the standards for warrantless action may be more stringent).

[346] *E.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 449-53 (1971) (disapproving warrants issued by the district attorney). *See* Mancusi v. DeForte, 392 U.S. 364, 371 (1968) (same).

of criminal investigations.[347] The best illustration of this second view is Justice Frankfurter's dissent in *Rabinowitz*. He would have restricted a search incident to arrest to the suspect's person and the area within his or her "immediate physical control."[348] Insisting that "[o]ne cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment," he said that "a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity."[349]

To be sure, the Frankfurter position is open to criticism. The *Rabinowitz* majority accused him of reducing the fourth amendment to a "fixed formula," something of a "rule of thumb" that had the appeal of "easy administration" but little else to recommend it.[350] Telford Taylor has offered that Justice Frankfurter stood the fourth amendment on its head by insisting that most searches be covered by warrants when, at least according to Taylor, the very idea of the fourth amendment was to discourage the issuance of warrants.[351] Nevertheless, the incoming Warren Court Justices embraced the Frankfurter view with enthusiasm. In retrospect, it appears they had two solid reasons for doing so. First, the preference for warrants offers manageable standards that a case-by-case test of reasonableness cannot. As Justice Frankfurter put it, "To say that the search must be reasonable is to require some criterion of reason. It is no guide at all . . . to say that an 'unreasonable search' is forbidden—that the search must be reasonable."[352] Notwithstanding the doubts expressed by the *Rabinowitz* majority,[353] the Warren Court found it far easier to determine whether the police might reasonably have obtained a warrant than whether, having failed to procure one, they acted reasonably on their own. Second, the principle of judicial supervision before the fact ensures that the decision whether to intrude upon the individual will be made not, in Justice Jackson's famous phrase, "by the officer engaged in the often competitive enterprise of ferreting out crime,"[354] but by a "neutral and detached"[355] magistrate who objectively weighs the evidence supporting the investigation. Moreover, by encouraging that the magisterial determination take place *before* intrusive police action is taken, the Frankfurter view limits the chance that a search will inappropriately "be made legal by what it turns up."[356] It is one thing for a court to appraise evidence before the fact and to determine that the police have insufficient grounds for a search, and quite another to review the evidence in hindsight and to disapprove what the police have already done—ignoring the success they have already had.

So it was that in *Chimel*[357] the Warren Court squarely overruled *Rabinowitz*

---

[347] *See* United States v. Ventresca, 380 U.S. 102 (1965) (expressing a preference for search warrants); Beck v. Ohio, 379 U.S. 89 (1964) (expressing a preference for arrest warrants). *See generally* Player, *Warrantless Searches and Seizures*, 5 GA. L. REV. 269 (1971).

[348] 339 U.S. at 72.

[349] *Id.* at 70. *See also* Trupiano v. United States, 334 U.S. 699 (1948); Harris v. United States, 331 U.S. 145, 161-62, 168 (1947) (Frankfurter, J., dissenting).

[350] 339 U.S. at 63, 65.

[351] TAYLOR, *supra* note 8, at 46-47.

[352] 339 U.S. at 83.

[353] Justice Minton dealt with the matter explicitly, allowing that the judgment in every case would be difficult—but none the less so for shifting the issue presented from the reasonableness of the police action to the "fallacious" question whether there was time to procure a warrant. *See id.* at 65.

[354] Johnson v. United States, 333 U.S. 10, 14 (1948).

[355] *Id.*

[356] United States v. Di Re, 332 U.S. 581, 595 (1948).

[357] Chimel v. California, 395 U.S. 752 (1969).

and adopted not only the dissent's result but its answer to the fundamental question of the relationship between the fourth amendment's two clauses. Assuming that the police had lawfully arrested the suspect in *Chimel,*[358] Justice Stewart held for the Court that the incident search could go no further than his person and the area into which he might reach for a weapon or evidence.[359] The rationale, drawn from Justice Frankfurter's *Rabinowitz* dissent, was that a search of the "grabbing area" was necessary to prevent the suspect from using a weapon to resist arrest or effect escape and from concealing or destroying evidence that might then be lost to the investigation.[360] Those justifications would not support a broader search, however, even if the police had probable cause to believe that a more extensive search of the premises would turn up further evidence.[361] "Such searches in the absence of well-recognized exceptions, may be made only under the authority of a search warrant."[362] In *Vale,*[363] following soon after, the Court decided what had been implicit in *Chimel*—that a broader search must be delayed until a warrant can be obtained even if in the interim the police must rope off the premises to prevent the removal of evidence by others.[364]

Chimel and *Vale* were hardly unanimous decisions. Justice Harlan concurred in *Chimel*—lamenting that in fashioning protective fourth amendment doctrine inconsistent with long-standing practices of local authorities and then forcing that doctrine upon the states through incorporation and the exclusionary rule, the Court was constructing a dilemma. Sooner or later, he warned, the Court must decide whether it will disregard competing law enforcement concerns at the state level or respect those concerns, alter its protective doctrine, and thereby dilute the federal standard.[365] Justice White dissented in *Chimel.* Justice Black concurred in that dissent and wrote his own in *Vale.* While the two Justices purported to embrace the essence of the Frankfurter position,[366] the tenor of their opinions clearly looked back to the majority opinion in *Rabinowitz.* In *Chimel,* Justice White said simply

---

[358] Although all parties agreed that an arrest warrant upon which the arresting officers relied was invalid, the state courts had approved the arrest without a warrant but upon probable cause. In order to reach the "search incident" question without straying into a review of that determination, Justice Stewart assumed without deciding that "the California courts were correct in holding that the arrest of the petitioner was valid under the Constitution." *Id.* at 755.

[359] *Id.* at 762-63.

[360] *Id. See* United States v. Rabinowitz, 339 U.S. 56, 72 (1950) (Frankfurter, J., dissenting).

[361] 395 U.S. at 766 n.12.

[362] *Id.* at 763.

[363] Vale v. Louisiana, 399 U.S. 30 (1970).

[364] The suspect in *Vale* had been arrested on the steps in front of his house, and the narrow question was whether the "search incident" theory would admit the arresting officers into the house for a search. By holding that *Chimel* would not permit such a search without a warrant, *id.* at 33, the Court implicitly held that the police can "maintain the status quo" while they send one of their number to a magistrate. Griswold, *Criminal Procedure, 1969—Is It a Means or An End?,* 29 MD. L. REV. 307, 317 (1969). *But see* United States v. Gardner, 553 F.2d 946 (5th Cir. 1977) (distinguishing *Vale* in a case in which the police knew that someone was in the house already and might destroy evidence before a warrant could be obtained). To the extent difficulties with the necessary oath and general decorum can be ironed out, the issuance of search warrants over the telephone may provide a fair answer. United States v. Johnson, 561 F.2d 832, 843 n.12 (D.C. Cir.) (en banc), *cert. denied,* 97 S. Ct. 2953 (1977); United States v. Turner, 558 F.2d 46 (2d Cir. 1977). *See* FED. R. CRIM. P. 41(c).

[365] 395 U.S. at 769. *See also* Williams v. Florida, 399 U.S. 78, 117 (1970) (Harlan, J., concurring).

[366] In a footnote in his *Chimel* dissent, joined by Justice Black, Justice White said he did not question the holding of prior cases that "where it is practicable to obtain a search warrant and the search is not contemporaneous with an arrest, a warrant must be obtained to validate the search." 395 U.S. at 776 n.8. The concession, of course, was backhanded at best. Not only did Justice White relegate the comment to an obscure footnote, but he specifically excepted searches incident to arrest from the Frankfurter analysis.

that "[f]or the police to search the house while the evidence they had probable cause to search out and seize was still there cannot be considered unreasonable."[367] Similarly, in *Vale,* Justice Black insisted that "[i]t is only necessary to find that, given Vale's arrest in a spot readily visible to anyone in the house and the probable existence of narcotics inside, it was reasonable for the police to conduct an immediate search of the premises."[368]

The staged entrance of the Nixon appointees magnified the debate. Chief Justice Burger arrived in time for *Vale* and dissented with Justice Black. Justice Blackmun joined the dissenters soon after,[369] and when the Frankfurter position prevailed in *Coolidge,*[370] it was only in a plurality opinion.[371] The opinions in that perplexing case depicted the Court in analytic transition. Justice Stewart pulled and bent the precedents into line behind his opinion for the plurality in a desperate attempt to consolidate his position,[372] while Justice White fly-specked Justice Stewart's logic—insisting that the Court must abandon esoteric line-drawing in favor of clear, workable rules to guide the police.[373] But laying the great mass of detail in their argu-

---

[367] *Id.* at 775.

[368] 399 U.S. at 39. Indeed, Justice Black cited *Rabinowitz* as authority for his view that "whether a search incident to a lawful arrest is reasonable should still be determined by the facts and circumstances of each case." *Id.* at 38. I should say that while I read the White and Black dissents in these cases to partake of the *Rabinowitz* view of the fourth amendment's two clauses, there is in both some attention to exigent circumstances—the sort of situation in which Justice Frankfurter would have permitted warrantless action. In *Chimel,* Justice White contended that the warrantless arrest of the suspect created exigent circumstances justifying an immediate search, and in *Vale* Justice Black maintained that immediate action was necessary to prevent the concealment or destruction of evidence by others. *See* note 366 and accompanying text *supra.* In response, of course, Justice Stewart insisted that the police had simply neglected to obtain search warrants in both cases. Indeed, in *Chimel* they may have timed the arrest of the suspect in order to have an opportunity for a warrantless search of his home. 395 U.S. at 767.

[369] Blackmun had joined the Court by the time *Vale* was decided, but he did not participate in the decision.

[370] Coolidge v. New Hampshire, 403 U.S. 443 (1971), *discussed in* notes 289-300, 325-32 and accompanying text *supra.*

[371] Justice Stewart again wrote for the Court, and Justices Douglas, Brennan, and Marshall concurred. On the other hand, since Justice Harlan concurred in the portion of the plurality opinion that expressly responded to Justice White's dissent, saying that anything other than Justice Stewart's view would "go far toward relegating the warrant requirement . . . to a position of little consequence in federal search and seizure law," I think it fair to count his vote with Justice Stewart on the critical issue in the case. *Accord,* Moylan, *supra* note 290, at 1049. *But see* North v. Superior Court, 8 Cal. 2d 301, 502 P.2d 1305, 104 Cal. Rptr. 833 (1972) (in bank) (declining to follow Stewart's plain view analysis on the theory that since Harlan did not join that part of the plurality opinion the Court was equally divided on the issue).

[372] He had difficulty even with his own recent opinion in *Chimel,* though he allowed that the ruling in that case was not directly controlling for want of retrospective application. 403 U.S. at 455-56. *See* Williams v. United States, 401 U.S. 646 (1971). In *Chimel,* he had held for the Court that the police can search an arrested person and the "area from within which he might gain possession of a weapon or destructible evidence." 395 U.S. at 763. Nothing was said in that case about a requirement that the seizure of evidence found within that area must be inadvertent, and in *Coolidge* Justice Stewart expressly declined Justice White's invitation to rewrite *Chimel* to that effect. *Compare* Coolidge v. New Hampshire, 403 U.S. 443, 465 n.24 (1971) *with id.* at 519. On the contrary, Justice Stewart seemed clearly to leave *Chimel* in place and to apply the rule of inadvertence only to evidence found outside the suspect's physical control. *Id.* at 484 (stating the principle in *Coolidge* as the requirement "that the police must obtain a warrant when they *intend* to seize an object *outside the scope of a valid search incident to arrest*") (emphasis added). In the end, Justice Stewart conceded the obvious—that "it would be nonsense to pretend that our decision today reduces Fourth Amendment law to complete order and harmony." *Id.* at 483.

[373] At bottom, Justice White proposed that in the interest of clarity the Court should "treat searches of automobiles as we do the arrest of a person," *see* notes 403-10, 494-505 and accompanying text *infra,* and thus should permit warrantless searches on probable cause without requiring a showing of exigent circumstances on the facts of the particular case. 403 U.S. at 527. Coming to Justice Stewart's plain view analysis, Justice White contended that the rule of inadvertence was not only inconsistent with the precedents, *Chimel* among others, but protected no fourth amendment values. He said that by the time the police are in a position to seize evidence in plain view, whether inadvertently or not, the invasion of privacy to which the fourth amendment is addressed has already occurred—and been justified on some independent

ments to one side, the familiar debate that had divided the Court twenty years earlier in *Rabinowitz* was easily recognizable just below the surface. It is clear that Stewart and White were in fundamental disagreement from the outset over whether the police can validly enter a suspect's premises to effect a warrantless arrest. Justice Stewart first assumed, as he had in *Chimel,* that the arrest of the suspect was valid.[374] His opinion then launched into the further question of the proper scope of any search and seizure undertaken thereafter. Justice White, on the other hand, began his separate opinion with the proposition that the police can make a warrantless arrest, with or without exigent circumstances, on the suspect's premises or elsewhere.[375] It is hardly surprising, then, that the two Justices should come to different results in *Coolidge.* The critical question, it will be recalled, was whether the automobile taken from the drive had been properly seized without a warrant naming it.[376] Justice Stewart thought not. Since the police had anticipated finding it and intended to seize it, they should have obtained a warrant.[377] In contrast, Justice White found no difficulty with the seizure. If the police could enter the premises to arrest the suspect without a warrant, as he assumed they could, then it made little sense to contend that they needed a warrant to enter and seize real evidence, whether they anticipated finding it or not.[378]

---

basis. Accordingly, it makes little fourth amendment sense, as White put it, to prohibit the seizure of one photograph on the theory that the police anticipated finding it but to permit the seizure of an identical photo standing next to it because the police had *not* expected to find *it.* Such a rule, according to Justice White, would not cut short a further intrusion into privacy but would merely protect the suspect's possessory interest in the object seized—an interest, for White, unrelated to "any Fourth Amendment ends." *Id.* at 517. Justice White also objected that the rule of inadvertence does nothing to discourage "planned arrests," offering that if the police have probable cause for a search they will obtain a warrant. "Only oversight or careless mistake would explain the omission . . . ." Of course, Justice White allowed that the police might misjudge their evidence and not realize they have probable cause or a magistrate might fail to issue a warrant when appropriate. In either event, according to White, the rule of inadvertence would prohibit the seizure of things the police have probable cause to search for and seize, but permit the seizure of things they *lack* cause to pursue. A student comment fashioned the scenario:

> Since the burden is traditionally on those seeking exemption from the warrant requirement to show the need for it, the plurality's rule will foster an anomalous situation in which police contend they did not have probable cause to seize the object before they made their entry, while the defendant contends probable cause existed and the police could have obtained a warrant.

The Supreme Court, supra note 325, at 245. That is true, of course, only if the anticipation to which Stewart referred in his rule of inadvertence is to be equated with probable cause. If, on the other hand, he referred only to some quantum of evidence short of probable cause, still sufficient to raise an expectation of finding something, we have a different case. If the real problem to which the rule speaks is the identification of objects not named in a warrant *as evidence,* and Justice Stewart would permit the seizure of an object that was anticipated so long as a magistrate has identified it as evidence, then I at least see no logical flaw in the plurality opinion. *See* notes 325-32 and accompanying text *supra.* Then, if the police find themselves defending a plain view seizure without the benefit of a prior magisterial identification of the thing seized *as evidence,* they will not argue that they lacked probable cause for a warrant but that they had not the slightest thought they would find it and thus had no reason to ask a magistrate whether, if found, the thing would be useful in a criminal prosecution.

[374] *See* note 358 *supra.* The officers in *Coolidge* had gone to the suspect's home on the authority of warrants for the arrest of the suspect and the seizure of the Pontiac car, issued by the state Attorney General—"who had personally taken charge of all police activities relating to the murder." 403 U.S. at 446-47. The Court agreed that the warrants were invalid for want of issuance by a "neutral and detached" magistrate but assumed for purposes of decision that the warrantless arrest was valid. The warrantless seizure of the car was, then, the remaining critical issue and the one Stewart examined in depth in his opinion for the Court. *Id.* at 455.

[375] That, he said, was the common law rule and the one supported by the weight of authority. 403 U.S. at 510-11 n.1. In his concurring opinion, however, Justice Harlan said that the Court had never expressly taken that position and, while it appeared to be the crux of the disagreement between Stewart and White in this case, the Court still had not decided who was right. *Id.* at 492. *See* note 406 *infra.*

[376] *See* note 300 *supra.*

[377] 403 U.S. at 484. *See* note 325 *supra.*

[378] Chimel v. California, 395 U.S. 752, 776 (1969) (White, J., dissenting).

After *Coolidge*, the deluge. While *Rabinowitz* has not been explicitly resurrected, the Burger Court appears to accept the view that warrantless police action is per se unreasonable except in exigent circumstances only in cases in which the police pry into large, immobile containers, preferably double-locked[379] and even more preferably resembling a house or office building.[380] In all other cases, the Court seems unconcerned that the police act without a warrant, even when there is ample time to obtain one. To my mind, the Court applies a standard of case-by-case reasonableness that is indistinguishable from that employed by the majority in *Rabinowitz*,[381] which in turn is indistinguishable from the flexible, "fundamental fairness" standard that Justice Frankfurter would have limited to state cases examined under the due process clause.[382] In so doing, the Court loses both the additional guidance for decision provided by the preference for warrants and the advantages of prior judicial supervision of criminal investigations. In the end, the Court finds itself asking just how badly the police acted and then judging whether they acted badly enough.[383] I will set forth only three illustrations—the decisions on the detention of the person, those on searches incident to arrest following *Chimel*, and those on automobile searches.[384]

1. Detention of the Person

The term "arrest" is not mentioned in the Constitution. Yet the fourth amendment plainly speaks to detention of the person by protecting the right of the people to be secure in their *persons* and by requiring that warrants particularly describe

---

[379] *E.g.*, United States v. Chadwick, 433 U.S. 1 (1977) (invalidating the warrantless search of a double-locked trunk).

[380] *E.g.*, G.M. Leasing Corp. v. United States, 429 U.S. 338 (1977) (invalidating a warrantless search of business premises used in part as a dwelling place).

[381] *See* text at note 342 *supra*.

[382] *See* notes 116-30 and accompanying text *supra*.

[383] *See* text at note 130 *supra*.

[384] One illustration I will not present is the line of decisions on the requirements for probable cause in the rare cases in which the police seek a warrant. *See* LaFave, *Probable Cause From Informants: The Effects of Murphy's Law on Fourth Amendment Adjudication*, 1977 U. ILL. L.F. 1. There, too, however, I believe the Burger Court is fast retreating from the more structured precedents set down during the Warren Court years. Beginning with Nathanson v. United States, 290 U.S. 41 (1933) (*see* text at note 104 *supra*) the Court recognized that the affidavit supporting a warrant must be more than a bald assertion of suspicion but must contain facts that allow the reviewing magistrate to make an independent determination of probable cause. While the early Warren Court decisions gave questionable warrants the benefit of the doubt, *see, e.g.*, United States v. Ventresca, 380 U.S. 102 (1965) (observing that affidavits and warrants are often drafted by nonlawyers and must be judged in a "common sense and realistic fashion"); Jones v. United States, 362 U.S. 257 (1960) (concluding that if there is a "substantial basis" for crediting hearsay in an affidavit it may justify issuance of a warrant), the decisions in later years were more demanding. *See, e.g.*, Aguilar v. Texas, 378 U.S. 108 (1964) (holding that informers' tips used in affidavits must be both reliable and credible); Spinelli v. United States, 393 U.S. 410 (1969) (rejecting a totality of the circumstances standard and finding that the two-prong *Aguilar* test was not satisfied even though the police had attempted to verify the informer's tip on which they relied). The Burger Court has altered course. In United States v. Harris, 403 U.S. 573 (1971), the Court used *Jones* as a "suitable benchmark" and expressly overruled *Spinelli* in one respect on the way to a judgment clearly inconsistent with the earlier cases. *See* 43 COLO. L. REV. 357 (1972). I judge more recent decisions summarily treating these issues to reflect this Court's lack of interest in thorough re-examination of what the police and magistrates do in the "haste of a criminal investigation." United States v. Ventresca, 380 U.S. at 108. *See, e.g.*, Andresen v. Maryland, 427 U.S. 463 (1976) (treating the petitioner's attack on the sufficiency of the warrant in a footnote). To the extent the recent cases spend less energy in detailed logical analysis but rather examine in seratim various indicia of reliability regarding evidence submitted to the magistrate, *see, e.g.*, United States v. Harris, 403 U.S. 573 (1971) (relying on various circumstances in the case to justify a finding that an informer's tip was sufficiently credible), I find them consistent with the Court's overarching approach to search and seizure issues. This Court prefers a flexible, case by case methodology which allows leeway to do rough justice in the particular case but does not hamper the Court's disposal of arguments that do not go to "fundamental fairness."

the *persons* or things to be seized. When a police officer "accosts an individual and restrains his freedom to walk away,"[385] the fourth amendment comes into play. That much is clear. Indeed, there has never been serious doubt of it. The questions that have troubled the Court are of a different order. First, the Court has had to decide whether the amendment's preference for warrants means that the police are bound to obtain a warrant before acting whenever there is a reasonable opportunity to do so. Second, assuming that there will be cases in which the police detain individuals without a warrant, the Court has had to decide whether the same standards applicable to a magisterial determination of probable cause apply as well to police judgments in the field.

The early decisions frankly avoided the first question. The familiar cases—*Di Re*,[386] *Johnson*,[387] and *Brinegar*[388]—at most only assumed that a warrantless arrest on probable cause would pass muster and went on to the further question whether, on the facts, the police had probable cause at the time they took action.[389] The Warren Court, too, preferred to duck the issue. In both *Draper*[390] and *Henry*,[391] the only question before the Court was again whether the police had acted on probable cause and, in any event, a strong case for exigent circumstances excusing failure to obtain a warrant might have been made out in either.[392] In *Beck*,[393] the Court stressed the advantages of "an objective predetermination of probable cause" and worried that a warrantless arrest "bypasses" those safeguards and substitutes the "far less reliable procedure of an after-the-event justification."[394] Still, the Court did not squarely require the police to explain their failure to get a warrant in every case. When the Court passed up yet another opportunity to do just that in *Wong Sun*,[395] Justice Douglas was obliged to state his view in a concurring opinion.[396] Toward the end of the Warren era, in both *Chimel*[397] and *Coolidge*,[398] the Court declined still more opportunities to flatly adopt Frankfurter's position.[399]

The incoming Burger Court began with a promising but ambiguous comment in the *Pugh* case.[400] The question at bar was not whether the police must have a

---

[385] Terry v. Ohio, 392 U.S. 1, 16 (1968).

[386] United States v. Di Re, 332 U.S. 581 (1948).

[387] Johnson v. United States, 333 U.S. 10 (1948).

[388] Brinegar v. United States, 338 U.S. 160 (1949).

[389] *E.g.*, United States v. Di Re, 332 U.S. 581, 592 (1948) ("[a]ssuming, without deciding, that an arrest without a warrant . . . may later be justified if the arresting officer's knowledge gave probable grounds to believe any felony found in the statute books had been committed").

[390] Draper v. United States, 358 U.S. 307 (1959).

[391] Henry v. United States, 361 U.S. 98 (1959).

[392] In *Draper*, the officers did not have probable cause until they were able to verify their information as the suspect was leaving a train with suitcase in hand, and in *Henry* the suspects were in an automobile. Of course, the arrest in *Henry* was disapproved, in any case. Nor does the opinion in Giordenello v. United States, 357 U.S. 480 (1958), offer guidance. In that case, the police obtained a warrant.

[393] Beck v. Ohio, 379 U.S. 89 (1964).

[394] *Id.* at 96.

[395] Wong Sun v. United States, 371 U.S. 471 (1963). *See* Broeder, *Wong Sun v. United States: A Study in Faith and Hope*, 42 NEB. L. REV. 483, 496-97 (1962).

[396] 371 U.S. at 497 (insisting that "there having been time to get a warrant, probable cause alone could not have justified the arrest . . . without a warrant").

[397] Chimel v. California, 395 U.S. 752, 755-56 (1969). *See* note 358 and accompanying text *supra*.

[398] Coolidge v. New Hampshire, 403 U.S. 443 (1971). *See* note 374 and accompanying text *supra*.

[399] I refer here only to the general view that warrantless police action is per se unreasonable except in exigent circumstances excusing failure to obtain a warrant. *See* notes 343-49 and accompanying text *supra*. Justice Frankfurter formulated the proposition in cases involving search incident to arrest. I do not know whether he would have adhered to it in examining the lawfulness of the arrest itself.

[400] Gerstein v. Pugh, 420 U.S. 103 (1975).

warrant before making an arrest, but rather whether they must seek judicial approval of a warrantless arrest promptly after the suspect is taken into custody. In holding that they must do precisely that, Justice Powell observed that "the Court has required that the existence of probable cause be decided by a neutral and detached magistrate whenever possible."[401] Then, in an accompanying footnote, he said:

> We reiterated this principle in United States v. United States District Court [the domestic wire-tapping case] . . . . *In terms that apply equally to arrests,* we described the "very heart of the Fourth Amendment directive" as a requirement that "where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizen's private premises or conversation."[402]

It must be kept in mind, of course, that this language was written to justify a requirement of speedy judicial review after the police have made a warrantless arrest. It might have been intended only to underscore the value of judicial participation—at some point. Yet the language, read literally, seems to say that a magisterial determination should precede the intrusion "whenever possible."

If Justice Powell had in mind the second possibility, his comment in *Pugh* must be the shortest-lived constitutional decision of this century. For in the very next Term, Justice White finally had his way. Writing for the Court in *Watson,*[403] he allowed that the police "may find it wise to seek arrest warrants where practical to do so" and even that the Court might more readily accept their determinations of probable cause if warrants are obtained.[404] But he refused to "transform this judicial preference into a constitutional rule."[405] Instead he held that the police may arrest a suspect in a public place on a determination of probable cause[406] even when there

---

[401] *Id.* at 112.
[402] *Id.* at 113 n.12 (emphasis added) (citation omitted).
[403] United States v. Watson, 423 U.S. 411 (1976).
[404] *Id.* at 423.
[405] *Id.*
[406] The opinion was explicitly limited to detentions in a public place and thus once again left open the question whether the police can enter private premises to make a warrantless arrest on probable cause but in the absence of exigent circumstances. *Id.* at 418 n.6. While it appears that Justice White himself would have no difficulty approving such an entry, provided the police have probable cause to believe the suspect is at home, *accord,* ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 120.6 (1975), other Justices are by no means convinced. *See, e.g.,* Coolidge v. New Hampshire, 403 U.S. 443, 477-78 (1971) (plurality opinion). In United States v. Santana, 427 U.S. 38 (1976), *discussed in* notes 186-89 and accompanying text *supra,* the suspect was standing in the threshold of her home when she was first accosted by the police, and they chased her into the vestibule in "hot pursuit." Accordingly, the Court again declined to pass on the validity of a warrantless entry in the absence of exigent circumstances. Again, individual Justices stated their personal views. *Compare* 427 U.S. at 43-44 (White, J., concurring) (approving warrantless entries) *with id.* at 45-58 (Marshall, J., dissenting) (disapproving them). For my own part, the entire controversy is distressing. I find warrantless arrests in public dangerous enough without permitting them in private as well. Indeed, I would not approve entry upon private premises to effect an arrest on a warrant. This sort of police action has about it the character of a search. Justice White agrees and would require that the police have probable cause to believe the suspect will be found inside, but that is hardly the familiar rule for searches of dwellings. I should have thought a search warrant would be required. That, after all, is the standard for searches of buildings for real evidence. *See* Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970); Rotenberg & Tanzer, *Searching for the Person to be Seized,* 35 OHIO ST. L.J. 56 (1974); Note, *The Neglected Fourth Amendment Problem in Arrest Entries,* 23 STAN. L. REV. 995 (1971). At the very least, a search warrant would serve the function of informing occupants of the legal authority for the intrusion and the scope of the search to be undertaken. *See* United States v. Chadwick, 433 U.S. 1, 17 n.1 (1977) (Blackmun, J., dissenting); South Dakota v. Opperman, 428 U.S. 364, 383-84 (1976) (Powell, J., concurring); Camera v. Municipal Ct., 387 U.S. 523 (1967), *discussed in* notes 216-39 and accompanying text *supra.* It appears, however, that the lower courts anticipate

is time and opportunity to obtain a warrant before taking action.[407] Justice White cited *Pugh,* but not on the key issue;[408] Justice Powell's concurring opinion failed even to mention his own language of only the year before.[409] Indeed, reflecting on *Watson* in the school paddling case last Term, Justice Powell read that case to have found "judicial scrutiny after the fact" sufficient "despite the distinct possibility that a police officer may improperly assess the facts and thus unconstitutionally deprive an individual of liberty."[410] The change occasioned by the *Watson* decision, then, is nothing short of dramatic. The case flatly denies the Frankfurter position—that warrantless police action is per se unreasonable except in exigent circumstances—and with it rejects the principle of judicial supervision of criminal investigations.

The first question, then, appears to have been decided, however unhappily. The second, the question whether the police will be held to the standards that govern a magistrate, is still in flux. At first, the Warren Court was firm on the matter. In *Wong Sun,*[411] the Court said that the police must be held at least to the standard applicable to magistrates in order to avoid encouraging them to act without judicial supervision. In *Beck,*[412] the Court blurred the standards for arrest and search warrants, bringing to bear upon each some relatively stringent precedents.[413] By the time *Henry*[414] was decided in 1959, litigants assumed that before the police could interfere in any significant way with the liberty of a citizen they would have to have the sort of evidence that would persuade a magistrate to issue a warrant for the

---

that Justice White will win out. *See, e.g.,* United States v. Woods, 560 F.2d 660 (5th Cir. 1977); United States v. Easter, 552 F.2d 230 (8th Cir. 1977). *But see* People v. Ramey, 16 Cal. 3d 263, 545 P.2d 1333, 127 Cal. Rptr. 629 (1976) (requiring exigent circumstances). The issue is presented for decision in Browder v. Director, Dep't of Corrections, 534 F.2d 331 (7th Cir. 1976) (chart of decisions without published opinions), *cert. granted,* 429 U.S. 1072 (1977). Entry upon property in the possession of third parties raises even more serious questions. *See* KAMISAR, LAFAVE & ISRAEL, *supra* note 103, at 312-13. In Zurcher v. Stanford Daily, 353 F. Supp. 124 (N.D. Cal. 1972), *aff'd,* 550 F.2d 464 (9th Cir.), *cert. granted,* 46 U.S.L.W. 3182 (U.S. Oct. 4, 1977), the Court will be asked to hold that if the things for which the police wish to search are in the hands of a third party, they must first attempt to obtain them by subpoena, resorting to a search warrant only after failure through the less intrusive means.

[407] 423 U.S. at 423-24.

[408] Indeed, he drew out of *Pugh* the comment, gratuitous in that case, that the Court "has never invalidated an arrest supported by probable cause solely because the officers failed to secure a warrant." 420 U.S. at 113, *quoted in* 423 U.S. at 417-18.

[409] To be sure, Justice Powell did point out the obvious—that none of the Court's prior cases had held that the police might ignore an opportunity to obtain a warrant before making an arrest in a public place and that the Court's decision in *Watson* was inconsistent with the general rule that warrantless police action is per se unreasonable except in exigent circumstances. In the end, however, he decided to live with the holding on the theory that "logic sometimes must defer to history and experience." 423 U.S. at 429. Like Justice White, Justice Powell found that the common law had permitted such arrests. *See* Williams, *Arrest for Felony at Common Law,* 1954 CRIM. L. REV. 408. It hardly need be said, however, that it is one thing to find in legal history a reason to protect the individual from some form of governmental power and quite another to rely on history to deny that protection. In other contexts Justice Powell has not taken the view that Americans are entitled only to the precise quantum of liberty that British subjects enjoyed in 1791. *E.g.,* United States v. United States Dist. Ct., 407 U.S. 297 (1972) (requiring a warrant in electronic surveillance cases involving domestic security).

[410] Ingraham v. Wright, 430 U.S. 651, 679-80 (1977).

[411] Wong Sun v. United States, 371 U.S. 471, 480-81 (1963). *Accord,* Beck v. Ohio, 379 U.S. 89, 96 (1964).

[412] The Court relied on Giordenello v. United States, 357 U.S. 480 (1958), for the proposition that "[t]he language of the Fourth Amendment, that '. . . no Warrant shall issue, but upon probable cause . . .' of course applies to arrest as well as search warrants." 379 U.S. at 96 n.6, *quoting* 357 U.S. at 485-86. But *Beck* took the point further—applying all the precedents on what constitutes probable cause in search cases to the arrest situation.

[413] *See* note 384 *supra.*

[414] Henry v. United States, 361 U.S. 98 (1959).

suspect's arrest.[415] A few years later, however, events began to weaken the Court's resolve. The crime rate rose, "aggressive patrol" in the inner cities became an accepted practice,[416] and the Court's critics demanded a more flexible approach to street encounters.[417] Specifically, there was building pressure to approve the "stop and frisk" laws that were fast being adopted across the country.[418] Those statutes authorized the police to briefly detain suspects on the basis of *reasonable suspicion* that they were involved in criminal activity.[419]

The Court stepped ever so lightly. It declined to review the validity of any particular state's law but chose as its principal case one from a state that had no stop and frisk statute. Even in *Terry*,[420] the Court vaguely attempted to bypass the troubling "stop" issue and approve only a limited "frisk" of the outer clothing after detention of the suspect.[421] The facts were typical. An experienced officer had observed three suspects apparently casing a store for a daylight robbery in downtown

---

[415] Indeed, in *Henry* the Government conceded that at the very moment the officers in that case had stopped the suspect's car an "arrest" had occurred, necessitating the justification of probable cause. *Id.* at 103. *But see* Rios v. United States, 364 U.S. 253, 262 (1960) (suggesting that the subjective intention of the officers is controlling). *Cf.* Belcher v. Stengel, 97 S. Ct. 514, 515 (1976) (Burger, C.J., concurring) (indicating that an officer's intent to make an arrest may influence a decision on whether his or her action is to be ascribed to the state).

[416] *See* Skolnick, *The Police and the Urban Ghetto*, 1968 AM. B. FOUNDATION RESEARCH J. No. 3.

[417] *E.g.*, Vorenberg, *Police Detention and Interrogation of Uncounselled Suspects: The Supreme Court and the States*, 44 B.U. L. REV. 423 (1964).

[418] The most important examples were New York's statute, then N.Y. CODE CRIM. PROC. § 180-a (McKinney Supp. 1967) (Law of Mar. 2, 1964, ch. 86, § 2, 1964 N.Y. Laws 111, *as amended by* Law of April 27, 1967, ch. 681, § 39, 1967 N.Y. Laws 1602), and now N.Y. CRIM. PROC. LAW § 140.50 (McKinney 1971), and the provision in the Model Code. ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2 (1975). *See* Ronayne, *The Right to Investigate and New York's "Stop and Frisk" Law*, 33 FORDHAM L. REV. 211 (1964); Siegel, *The New York "Frisk" and "Knock-Not" Statutes: Are They Constitutional?*, 30 BROOKLYN L. REV. 274 (1964); Comment, *Selective Detention and the Exclusionary Rule*, 34 U. CHI. L. REV. 158, 158 n.2 (1966) (collecting the authorities).

[419] *See* N.Y. CRIM. PROC. LAW § 140.50 (McKinney 1971); ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.2 (1975). Wayne LaFave speculated on the various verbal formulations that might be employed in "stop and frisk" situations and concluded that in order to meet the reasonable suspicion standard the police must have evidence raising a "substantial possibility" of criminal activity. LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40 (1968).

[420] Terry v. Ohio, 392 U.S. 1 (1968).

[421] The Court's language was painfully ambiguous. In the text, the Court acknowledged that when the officer "took hold of" the petitioner and "patted down the outer surfaces of his clothing," he had "seized" and "searched" him, and stated the task as deciding "whether at that point it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did." *Id.* at 19. Yet in an accompanying footnote, the Court added:

> We thus decide nothing today concerning the constitutional propriety of an investigative "seizure" upon less than probable cause for purposes of "detention" and/or interrogation. Obviously, not all personal intercourse between policemen and citizens involves "seizures" of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. We cannot tell with any certainty upon this record whether any such "seizure" took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.

Id. at n.16. *Cf. id.* at 34 (White, J., concurring) (suggesting that in appropriate circumstances an officer may briefly detain a suspect for questioning but that the suspect may refuse to answer without, in the process, furnishing grounds for arrest). The notorious footnote 16 in the *Terry* case is open to at least two readings. On the one hand it can be read as an attempt to avoid the "stop" issue altogether and to deal in the opinion only with the "frisk." *See* Meyer, *Arrest Under the New Kansas Criminal Code*, 20 KAN. L. REV. 685, 724-25 (1972). On the other, it can be read to have merely carved out of the case the question of detention for interrogation. *But see* Terry v. Ohio, 392 U.S. 1, 30 (1968), *set forth in* note 422 *infra*, expressly mentioning "reasonable inquiries." Of course, it is difficult to understand what other reason the police might have for accosting a suspect on the street. Hence White's concurring opinion treating the issue. In a concurring opinion of his own, Justice Harlan said that he "would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime." *Id.* at 33.

Cleveland. He briefly detained them for questioning, and when he received no reasonable explanation for their behavior and began to fear for his own safety, he conducted a pat-down search of their outer clothing. Feeling pistols under the clothing, he reached in and seized them. Chief Justice Warren's opinion for the Court was laced with qualifications and ambiguities that might provide room to retreat should the Court's position become untenable. The holding itself was so carefully groomed to the facts of the Ohio case that it was altogether unclear how far the Court had gone.[422] Specifically, it appeared that the decision might depend upon personal observation by an experienced officer,[423] a reasonable apprehension of impending violent crime,[424] and exigent circumstances demanding swift and sure police action.[425] In the end, however, a definite shift in fourth amendment doctrine was apparent. For the first time, the Court had approved a significant interference with liberty on something less than probable cause.[426]

If the Warren Court's first step into "stop and frisk" was fearful and hesitant, the Burger Court's follow-through decisions have been bold and decisive. *Adams*[427] is the principal case. Acting on a tip from an unnamed informant that a man seated in a nearby automobile was carrying drugs and a gun at his waist, the officer in *Adams* walked over, tapped on the window, and asked the suspect to open the door. When instead the suspect rolled down the window, the officer immediately reached inside and pulled a pistol from his waist. The officer then placed the suspect under arrest for unlawful possession of the gun, and when other officers arrived on the scene he conducted a search incident to the arrest that turned up narcotics in the suspect's wallet and coat pocket and a machete under the front seat.[428] While

---

[422] Reading more like an National Labor Relations Board decision that merely recites the findings of fact at length and then attaches the Board's conclusion, the narrow holding in *Terry* was expressly set forth near the end of the opinion:

> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

392 U.S. at 30. *See* Schaefer, *The Fourteenth Amendment and Sanctity of the Person*, 64 NW. L. REV. 1, 7-14 (1969) (juxtaposing *Terry* to *Miranda*—where the Court acted against a background of countless confession cases).

[423] *See* note 422 *supra*. Concurring in a companion case, Justice Harlan pointed out that *Terry* had "emphasized the special qualifications of an experienced police officer." Peters v. New York, 392 U.S. 40, 78 (1968).

[424] In another companion case, Sibron v. New York, 392 U.S. 40 (1968), the Court disapproved an officer's action in forcing an encounter with a narcotics suspect and driving his hand into the suspect's pocket without a preliminary pat-down. Again concurring in the result, Justice Harlan commented that the case was distinguishable from *Terry*, where the "police officer judged that his suspect was about to commit a violent crime." *Id.* at 73.

[425] On this question, Justice Harlan was even more explicit. He insisted that "one important factor" in stop and frisk cases is the "need for immediate action." "[I]t seems to me," he said, "that where immediate action is obviously required, a police officer is justified in acting on rather less objectively articuable evidence than when there is more time for consideration of alternative courses of action." *Id.* at 73, 78.

[426] In light of footnote 16, *see* note 421 *supra*, it is inappropriate to say that the Court approved a *detention of the person* on less than probable cause. Of course, laying the initial encounter to one side, it is clear that *Terry* approved a limited search for weapons on some lesser standard. United States v. Brignoni-Ponce, 422 U.S. 873, 880 (1975).

[427] Adams v. Williams, 407 U.S. 143 (1972). *See also* Pennsylvania v. Mimms, 98 S. Ct. 330 (1977) (per curiam) (approving the practice of ordering motorists stopped for minor traffic offenses to get out of their cars—regardless of whether the police have reason to fear that such motorists are armed).

Terry had winked at the question whether a "stop" on less than probable cause might be proper, *Adams* led off with the proposition that "[a] brief stop of a suspicious individual . . . may be most reasonable in light of the facts known to the officer at the time."[429] While *Terry* had emphasized the personal observations of an experienced officer, *Adams* approved warrantless action based on information received from an unnamed informant. And while *Terry* had emphasized a situation in which an officer had to move rapidly to avert violent crime, *Adams* validated an investigation of a suspect thought to be holding drugs.

A good many criticisms can be leveled against *Adams*. The informant's tip was questionable at best,[430] and the search conducted after the detention was more extensive than anything approved in like circumstances in the past.[431] The most telling criticism is that in seven pages the decision transformed the relatively narrow exception to the probable cause standard, so tentatively agreed to in *Terry*, into a virtual abrogation of the pre-existing law of arrest. Certainly, in combination, *Adams* and *Watson* are at war with the preference for warrants and any meaningful judicial supervision of criminal investigations. No longer must the police seek a magistrate's

---

[428] Some of these facts are gathered from the lower court's opinion. Williams v. Adams, 441 F.2d 394 (2d Cir. 1971) (relying upon Judge Friendly's dissent from the panel's opinion, published at 436 F.2d 30 (2d Cir. 1970)). Justice Rehnquist neglected to say precisely where the narcotics and machete had been found.

[429] 407 U.S. at 146.

[430] Justice Rehnquist conceded that the unverified tip "may have been insufficient for a narcotics arrest or search warrant," but insisted that "the information carried enough indicia of reliability to justify the officer's forcible stop of Williams." *Id.* at 147. *See* note 384 *supra*. Looking back on the case, a student commented that the Court had taken a startling step in approving police action based, not only on a lesser quantum of reliable information, but upon information obtained in a less reliable manner. *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 50, 177-79 (1972). The tip in *Adams* was even more troubling. Dissenting from the panel's decision below, Judge Friendly pointed out that in the first suppression hearing the officer had not mentioned receiving a tip but rather had claimed to have relied on a radio signal. It was only in a later hearing that "the informer appeared and the signal disappeared." 436 F.2d at 36 n.4. *Cf.* McCray v. Illinois, 386 U.S. 300, 316 (1967) (Douglas, J., dissenting) (referring to "Old Reliable, the informer").

[431] Justice Rehnquist reasoned that finding the gun precisely where the informer said it would be tended to corroborate the tip, including the allegation that the suspect had narcotics in his possession. That verified information, "together with the surrounding circumstances" suggested "no lawful explanation for possession of the gun." Thus an arrest for unlawful possession of it was justified. Then, citing Carroll v. United States, 267 U.S. 132 (1925) (the automobile search case), Justice Rehnquist approved the search of the suspect's person and the car as incident to the arrest. 407 U.S. at 150. The analysis is troubling on several grounds. First, while Rehnquist made clear that the gun had not been visible from outside the car, he neglected to say whether it was hidden from view by the suspect's clothing or merely the curvature of the body. If the officer was required to reach under the suspect's clothing to grasp the weapon, one would have expected *Sibron* to control. *See* note 424 *supra*. Second, Rehnquist did not explain how the circumstances warranted the officer's supposed belief that the gun was possessed unlawfully. As Justice Marshall's dissent pointed out, Connecticut law did not proscribe the possession of pistols in all cases. If Justice Rehnquist rested on an assumption that the suspect could now be considered a narcotics dealer and that the officer could act on the probability that dope peddlers do not have licenses for their guns, his reasoning was dubious at best. Finally, if Justice Rehnquist genuinely intended to rely upon the "search incident" rationale to support the further search of the suspect and the car, his explanation for it was again sorely lacking. At the outset, he failed to mention that since the events in this case had occurred prior to *Chimel* the decision in that case would not control. *See* note 372 *supra*. Even if the earlier cases would permit the search to extend throughout the car, however, he failed to explain how the officer could delay any search until other officers arrived on the scene. *See* Preston v. United States, 376 U.S. 364 (1964) (demanding that searches incident to arrest be conducted contemporaneously). In addition, he did not explain how the officers identified the drugs as contraband when they were turned up. *See* notes 316-19 and accompanying text *supra*. Again, Connecticut law did not condemn even all possession of narcotics. Finally, Rehnquist's citation to an automobile case was troubling. *Carroll* stands only for the proposition that the police may search a car on probable cause to believe it contains contraband—on the theory that if they leave to obtain a warrant the car may be gone when they return. There was apparently no showing of exigent circumstances in *Adams*. *But see* notes 491, 494-505 and accompanying text *infra* (indicating that in more recent cases the Burger Court has not required a showing of exigent circumstances in each automobile case).

determination of probable cause before they act, and if it appears later that their own determination was in error, they can rest upon their parallel authority to detain suspicious persons briefly for investigation.[432] Indeed, these decisions have worked a radical change in the meaning of "arrest." No longer must the police have probable cause at the moment they interfere with a citizen's liberty. Henceforth, probable cause is the standard of review for something that comes later. An "arrest" is the decision to take a suspect into custody for a trip to the station, booking, and prosecution.[433] In contrast, the police in the field may act on the basis of reasonable suspicion alone.[434] It is hardly necessary to point out that the evolving standard is little different from "reasonableness" or "fundamental fairness." At bottom, the Court is fast approaching in its cases on detention of the person the very approach it has adopted in other fourth amendment fields.

2. Search Incident to Arrest

In combination, *Terry* and *Adams* introduced into search and seizure law an entirely new idea that reduced the individual's protection from coercive state power. For the first time, the police were permitted to act on something less than probable cause.[435] At the same time, however, the "stop and frisk" cases revived an older notion that had long served to enhance the individual's protection. *Terry* was clear on this point; the scope of a search must be justified by the purpose for which it is undertaken.[436] The proposition is unremarkable. It is implicit in the requirement of particularity in search warrants[437] and explicit in the cases on search incident to

---

[432] I am sorry to say that in the lower court cases, this is precisely what the police are doing. *E.g.*, United States v. Pope, 561 F.2d 663 (6th Cir. 1977) (holding that a suspect's flight at the first show of official authority gave rise to "reasonable suspicion" and that his subsequent conduct built that into probable cause for arrest); United States v. Oates, 560 F.2d 45 (2d Cir. 1977) (finding no probable cause initially for an arrest but approving an officer's action as a stop). Indeed, given the suggestion in *Adams* the lower courts have extended the stop and frisk analysis to suspects traveling in automobiles. *See* Note, *Nonarrest Automobile Stops: Unconstitutional Seizures of the Person*, 25 STAN. L. REV. 865 (1973). In United States v. Martinez-Fuerte, 428 U.S. 543, 546 n.1 (1976), the Court assumed *arguendo* that motorists "slowed" but not actually "stopped" have nevertheless been "seized" within the meaning of the fourth amendment. *Cf.* Pennsylvania v. Mimms, 98 S. Ct. 330 (1977) (per curiam) (assuming that a seizure occurred when a motorist was ordered out of his automobile after a stop for the purpose of issuing a ticket).

[433] While some have used this definition for some time, *e.g.*, W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY (1965) [hereinafter cited as ARREST], prior to the stop and frisk cases any significant interference with liberty of the person had been viewed as an arrest and had been measured against the probable cause standard. *Compare* Henry v. United States, 361 U.S. 98 (1959) *with* Terry v. Ohio, 392 U.S. 1, 26 (1968). *But see* Davis v. Mississippi, 394 U.S. 721 (1969) (suggesting in dictum that a brief period of detention for the purpose of taking fingerprints might be valid in the absence of probable cause to arrest the suspect).

[434] In *Terry*, Chief Justice Warren carefully avoided embracing this standard, and even in *Adams* Justice Rehnquist did not employ it expressly. Yet in referring back to those cases more recently, the Burger Court has read the reasonable suspicion standard into them. *E.g.*, United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975). *See* United States v. Robinson, 414 U.S. 218, 227 (1973) (reading *Terry* to have approved "an investigative stop based on less than probable cause to arrest"). So far has this Court retreated from the probable cause standard that in United States v. Ramsey, 431 U.S. 606 (1977), when it upheld the opening of international mail on "cause to suspect," it then found it unnecessary to decide whether in that case the government had probable cause. A few years ago, the Court would have treated the probable cause question first and reached the presumably more difficult issue whether "cause to suspect" would suffice only if that step became necessary. *E.g.*, Peters v. New York, 392 U.S. 40 (1968) (finding probable cause for an arrest and failing to reach the question whether a *Terry* "stop" would have been permissible).

[435] *See* Terry v. Ohio, 392 U.S. 1, 36-37 (1968) (Douglas, J., dissenting).

[436] *Id.* at 18-19 (opinion of the Court).

[437] It is this fundamental proposition to which a court responds when it invalidates the seizure of an object not named in a search warrant because it was taken in a search that went beyond the intrusion necessary to discover objects that *were* named. *E.g.*, United States v. Clark, 531 F.2d 928 (8th Cir. 1976).

arrest. Dissenting in *Rabinowitz,* Justice Frankfurter insisted that the only permissible objects of such a search were weapons or evidence that might be concealed or destroyed in a sudden movement, and the search could therefore extend no further than the area within the suspect's immediate physical control.[438] *Chimel,* of course, was to the same effect.[439]

The emphasis in *Terry* upon the limited scope of a pat-down search for weapons renewed interest in limitations on the scope of searches generally. Before long the lower courts were taking the issue seriously. In *Robinson,*[440] a District of Columbia police officer had arrested a suspect for operating a vehicle after the revocation of his operator's permit. In accordance with standard operating procedure in the District,[441] the officer had conducted a search of the suspect's clothing. Feeling a hard object in the left breast pocket, he reached inside and withdrew a crumpled cigarette package. He opened the package and extracted several capsules of white powder later identified as heroin.[442] The circuit court took *Terry* as its point of departure, reasoning that the search must be justified with respect to its purpose. Ordinarily, the court offered, an arresting officer may have probable cause to believe the suspect has evidence on his or her person and, if that is the case, a search for evidence is valid.[443] Here, however, there could be no evidence of the offense for which the suspect had been arrested. The only object of search, then, was a weapon that might have been used to assault the officer and effect an escape. That danger could be averted by a *Terry*-style pat-down of the suspect's outer garments. In this case, since the officer had admitted from the stand that he had not taken the cigarette package for a weapon but had removed it nonetheless,[444] the proper scope of the search for weapons had been exceeded. The further inspection of the package itself was a fortiorari invalid, and the evidence inadmissible.

In the Supreme Court, Justice Rehnquist's opinion for the Court reversed the judgment. He said that in all the cases in which the Court had wrestled with searches of the vicinity of an arrest it had never restricted the search of the suspect's person, that in fact there was a good bit of dicta in the cases to the effect that no

[438] *See* note 348 and accompanying text *supra. See also* Note, *Scope Limitations for Searches Incident to Arrest,* 78 YALE L.J. 433 (1969) (suggesting that *Rabinowitz* could not survive *Terry*).

[439] *See* notes 357-64 and accompanying text *supra.*

[440] United States v. Robinson, 414 U.S. 218 (1973).

[441] Some critics have seized upon the existence of rules and regulations in *Robinson* as a fair basis for distinguishing it from the companion case, Gustafson v. Florida, 414 U.S. 260 (1973), in which a state police officer exercised his own judgment without the guidance of rules. While I join those who would settle search and seizure questions well above the constitutional floor by demanding that the police adhere to clear and workable rules, I do not see that the regulations involved in *Robinson* fill the bill. I see nothing in particular to be gained, and a good bit to be lost, through rules that mandate the most extensive intrusion upon liberty in *every* case. *See* United States v. Martinez-Fuerte, 428 U.S. 543, 572 n.2 (1976) (Brennan, J., dissenting); United States v. Robinson, 414 U.S. 218, 221 n.2 (1973) (reviewing the rules in effect in the District of Columbia at the time of decision).

[442] Officer Jenks testified that he felt the package from the outside and determined that it contained something other than cigarettes. Only then did he open it to discover what was inside. The Court stated that Jenks "thought" the capsules were heroin, but that fact was verified only later by chemical analysis.

[443] Judge Wright's broad-ranging opinion for a plurality drew a distinction between routine traffic arrests, which ordinarily result only in the issuance of a citation, and more serious cases in which the suspect is taken into custody. He concluded that in either case the police should be limited to searching for evidence they have probable cause to believe the suspect is holding or, in the absence of probable cause, to frisking the suspect's outer garments for self-protection. Indeed, following *Terry,* he said that even the frisk for weapons would be appropriate only in cases in which the officer has a reasonable apprehension that the suspect is armed and dangerous. United States v. Robinson, 471 F.2d 1082, 1097-98 (D.C. Cir. 1972). *Accord,* Aaronson & Wallace, *A Reconsideration of the Fourth Amendment's Doctrine of Search Incident to Arrest,* 64 GEO. L.J. 53 (1975).

[444] 471 F.2d at 1089.

such restriction was necessary, and that the common law authorities had never proposed anything else.[445] Coming to the critical holdings below, he said that the "extended exposure" of an officer who takes a suspect into custody justifies a "full" search at the scene rather than the "frisk" that suffices when the encounter with the suspect is brief.[446] Gratuitously, it would seem,[447] he said that in any event the Court could not require a police officer to make an ad hoc judgment in each case on whether there is probable cause to believe that evidence will be found in a search of a suspect's person.[448] In effect, Justice Rehnquist said that the police could do precisely what the officer in *Robinson* had done. Said Officer Jenks, "I just searched him. I didn't think about what I was looking for. I just searched him."[449]

Most of the criticism of *Robinson* has focused on the essentially unexplained inspection of the cigarette package *after* it was removed from the suspect's reach.[450] Indeed, some commentators have found the rest of the Court's opinion "well-reasoned and persuasive."[451] To my mind, emphasis on the cigarette package only

---

[445] 414 U.S. at 227-35. The dissenters, of course, disputed Justice Rehnquist on all counts. Relying on the familiar cases emphasizing the presumption in favor of warrants, they insisted that the circuit's result was neither "novel" nor "unprecedented," as Rehnquist would have it, but rather consistent with the weight of authority. *Id.* at 244-48.

[446] *Id.* at 234-35. The argument is not without force. Expert testimony in the trial court showed that suspects may harbor all manner of weaponry that cannot be turned up by a pat-down of outer clothing. In a *Terry* situation, when the suspect is standing alone in full view of the officer, a "frisk" may be enough to preclude his or her possession of a large, bulky weapon. But when the suspect is to be placed in a squad car with time and opportunity to draw a razor blade from the hem of a coat, a prudent officer may well want to search more thoroughly. Indeed, in his dissent in *Robinson* Justice Marshall acknowledged that the issue was difficult for him and expressly declined to decide it. *Id.* at 253-54. *Accord, Dilemma, supra* note 325, at 146-49. I do not discount all that, but in the end I am persuaded by Judge Wright, who noted that the Government's expert admitted at trial that in order to be entirely sure that a suspect does not possess some obscure weapon the officer would have to "spread-eagle the arrestee, strip him of his clothes, and feel into his body cavities for weapons." 471 F.2d at 1100-01. A line must be drawn somewhere, and like Judge Wright I conclude that it might as well be drawn where *Terry* first put it. Indeed, as I think of it, I am not at all sure that by approving the "full" search in *Robinson* the Court intended to validate the field strip search to which Judge Wright referred. If not, then perhaps there are cases yet to be decided that will move the line somewhat closer to *Terry* than *Robinson* left it. It is noteworthy, perhaps, that two months before the decision in *Robinson* was handed down, the Court denied certiorari in a case in which the petitioner contested the validity of a border search of a woman's vagina. Dissenting from that judgment, Justice Douglas took the position that "highly intrusive" searches of this kind should always be approved by a magistrate before the fact. Mason v. United States, 414 U.S. 941 (1973) (Douglas, J., dissenting). *See* Note, *From Bags to Body Cavities: The Law of Border Search,* 74 COLUM. L. REV. 53 (1974).

[447] Once the Court had decided that a "full" search for weapons was valid, it was really unnecessary to deal with searches for evidence. If weapons could be so small and inconspicuous as the Court suggested, the search for weapons would surely swallow up any concurrent search for something else.

[448] While in many cases the decision would not be burdensome, because the same evidence that constitutes probable cause for an arrest also supports probable cause for a search for evidence, there will certainly be cases in which the officer would have to draw nice distinctions. The obvious example is an arrest for an offense that was committed some time in the past. At the time of arrest, it is unlikely that the suspect still has evidence on his or her person. *See Dilemma, supra* note 325, at 138-39. *See also* United States v. Robinson, 471 F.2d 1082, 1094 n.17 (D.C. Cir. 1972) (rejecting the Government's claim that the officer in *Robinson* might have been searching for a notice that his operator's license had been revoked—five years after it had been mailed to him). On the other hand, there is something disquieting in a rule that permits the police to search when they have no idea what they are searching *for*. Burdensome or not, I find the requirement that they have *cause* for what they do to be the least the Constitution can demand.

[449] 414 U.S. at 236 n.7. *Cf.* Pennsylvania v. Mimms, 98 S. Ct. 330 (1977) (per curiam) (holding that, on the facts of the individual case, motorists stopped for minor traffic offenses may be asked to get out of the car without explanation).

[450] 414 U.S. at 256 (Marshall, J., dissenting). *See also* White, *supra* note 149, at 201-03; Shapiro, *Mr. Justice Rehnquist: A Preliminary View,* 90 HARV. L. REV. 293, 329-30 (1976). *But see Dilemma, supra* note 325, at 149 (commenting that it would be burdensome to require the officer to carry wallets, purses, and other containers and packages to the station); Note, *Restricting the Scope of Searches Incident to Arrest: United States v. Robinson,* 59 VA. L. REV. 724, 740 (1973).

[451] Shapiro, *supra* note 450, at 330.

distracts attention from the more serious search and seizure issues in the case. Suffice it to say that I find Judge Wright's circuit court opinion to be an admirable treatment of the questions presented. It seems only sensible to permit a search for evidence incident to an arrest only if the police have cause to believe that evidence will be found, and surely a "frisk" for weapons will sufficiently protect the police from attack.[452] I must say, however, that nothing disturbs me so much as the language that appeared in the last paragraph of Justice Rehnquist's opinion. He said that a "custodial arrest" on probable cause is a "reasonable intrusion under the fourth amendment" and "that intrusion being lawful, a search incident to the arrest requires *no additional justification*."[453] There is ambiguity here. Justice Rehnquist went on to pronounce a "full search of the person" not only an exception to the warrant requirement, but a "reasonable" search under the fourth amendment.[454] Yet, the italicized words stand out from the page. Read literally, Justice Rehnquist seems to have said that the real issue in *Robinson* was not whether Officer Jenks needed a search warrant or even probable cause to search, nor whether what he did was otherwise "reasonable." The real issue was whether, after the arrest had been accomplished, the suspect retained any expectation of privacy in his person to hold the fourth amendment in play. To be sure, the question was one of scope. But the scope of the fourth amendment itself, its very applicability to the case beyond the point of arrest, rather than the scope of a reasonable search under it, captured the Court's attention.

The scope analysis was explicit in Justice Powell's concurring opinion. He wrote only to emphasize the majority's "essential premise."[455]

> I believe that an individual lawfully subjected to a custodial arrest retains no significant Fourth Amendment interest in the privacy of his person. Under this view the custodial arrest is the significant intrusion of state power into the privacy of one's person. If the arrest is lawful, the privacy interest guarded by the Fourth Amendment is subordinated to a legitimate and overriding governmental concern. No reason then exists to frustrate law enforcement by requiring some independent justification for a search incident to a lawful custodial arrest. This seems to me the reason that a valid arrest justifies a full search of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee. The search incident to arrest is reasonable under the Fourth Amendment because the privacy interest protected by that constitutional guarantee is legitimately abated by the fact of arrest.[456]

---

[452] *See* note 446 *supra*. I hasten to add that the long-run solution to the problem of search incident to traffic arrests lies in the elimination of custodial arrests altogether in this context. Justice Stewart's concurring comment in Gustafson v. Florida, 414 U.S. 260, 266-67 (1973), suggested the argument that the arrest itself had been invalid in that case. But some have read that statement to refer to the possibility of a sham arrest, *see* Amador-Gonzalez v. United States, 391 F.2d 308 (5th Cir. 1968), rather than a proposal to strike down all custodial arrests for traffic offenses. *Compare Dilemma, supra* note 325, at 158-60 *with* White, *supra* note 149, at 208. *See* Pennsylvania v. Mimms, 98 S. Ct. 330, 338-39 n.11 (1977) (per curiam) (Stevens, J., dissenting) (assuming "perhaps somewhat naively" that the motorist stopped for an expired license plate in that case could not without more have been subjected to a custodial arrest). The states, of course, are free to restrict the authority of the police as they see fit. *E.g.*, State v. Martin, ... Minn. ...., 253 N.W.2d 404 (1977) (holding that officers in Minnesota have no power to make custodial arrests for petty offenses unless the suspect refuses to accept a citation).

[453] 414 U.S. at 235 (emphasis added).

[454] *Id.*

[455] *Id.* at 237.

[456] *Id.* at 237-38 (footnotes omitted).

In a footnote, he quoted with approval language from an old Ninth Circuit opinion: " 'Once the body of the accused is validly subjected to the physical dominion of the law, inspections of his person, regardless of purpose, cannot be deemed unlawful, unless they violate the dictates of reason either because of their number or their manner of perpetration.' "[457]

In the next case, *Edwards,*[458] the Powell view was apparently elevated to firm constitutional doctrine. The suspect had been lawfully arrested without a warrant, charged with burglary, and placed in a jail cell. Next morning, ten hours after the arrest, the police took his clothing from him to be analyzed for traces of paint similar to that on the window used in the burglary. On the facts, the "search incident" theory seemed unavailable, because the seizure had not been contemporaneous with the arrest.[459] Nor could the seizure rest on the "routine custom"[460] of examining a suspect's effects incident to incarceration. Again, the clothing had been seized long after the administrative process at the jail had come to an end.[461] Nevertheless, Justice White's opinion for the Court sustained the conviction. He relied, first, upon a rule fashioned in the lower courts that when the police have authority to search on the spot at the time of arrest, there is no constitutional infirmity in delaying the search until the suspect arrives at the place of detention.[462] Next, he proposed that the suspect's clothing had been in the lawful custody of the police from the moment of arrest, and inspection at any later time could rest on the cases upholding the inspection of impounded goods.[463] In *Cooper,*[464] for example, the Court had held the test to be "not whether it was reasonable to procure a warrant, but whether the search itself was reasonable."[465] Finally, Justice White made it clear that he intended

---

[457] *Id.* at 237 n.1, *quoting* Charles v. United States, 278 F.2d 386, 388-89 (9th Cir. 1960).

[458] United States v. Edwards, 415 U.S. 800 (1974).

[459] Stoner v. California, 376 U.S. 483, 486 (1964); Preston v. United States, 376 U.S. 364 (1964). *See* Coolidge v. New Hampshire, 403 U.S. 443, 523 (1971) (White, J., dissenting).

[460] United States v. Edwards, 415 U.S. 800, 804 n.6 (1974).

[461] Two justifications are usually offered for station house inspections of suspects' effects. First, it is argued that it is necessary to prevent the introduction of weapons or contraband into the jail, and, second, it is argued that effects must be inventoried in order to ensure their safety in the hands of custodial officers. In this case, the officers had not taken the suspect's clothing before placing him in the cell, indicating that they viewed the clothing as safe in his possession. The Government conceded at oral argument that the later search and seizure was not a continuing branch of the administrative process regarding incarceration. It was a search for evidence, based on probable cause to believe that paint scrapings from the clothes would match those taken from the scene of the burglary. 415 U.S. at 810 n.2 (Stewart, J., dissenting).

[462] *Id.* at 803. *See, e.g.,* United States v. Manar, 454 F.2d 342 (7th Cir. 1971); United States v. Gonzalez-Perez, 426 F.2d 1283 (5th Cir. 1970). The only Supreme Court precedent cited was Abel v. United States, 362 U.S. 217 (1960). To be sure, in that case, Justice Frankfurter wrote a 5-4 majority opinion upholding the search of a deportation suspect's luggage after it had been removed from his hotel room to a place of detention. However, Justice Frankfurter expressly adhered to the majority position in *Rabinowitz,* presumably against his own judgment, and thus approved a search of the suspect's effects at the scene of arrest. The subsequent search at Immigration and Naturalization Service headquarters was at most a more thorough examination of what had already been inspected at the scene. In *Edwards,* the officers had not attempted an on-the-scene search of the suspect's clothing. If they had, the case would presumably have been controlled by *Robinson,* and Supreme Court review would have been unnecessary. The delay in *Edwards* was hardly so insignificant as Justice White seemed to think. The point is that whatever the Court's fears about restricting officers' freedom to search as they see fit in the field, in a case such as this when the safety of the officers is not implicated and there is ample time to obtain a magistrate's approval before taking action, there is simply no basis for warrantless search and seizure. Not, at least, if the Court is serious about judicial supervision of criminal investigations.

[463] 415 U.S. at 806.

[464] Cooper v. California, 386 U.S. 58 (1967) (approving an inventory of the contents of an impounded automobile).

[465] *Id.* at 61-62.

to apply that test, drawn from the majority opinion in *Rabinowitz*,[466] to the facts in *Edwards*. He frankly acknowledged that he could find nothing unreasonable in what the police had done. No different clothing had been available the night before, "and it would certainly have been unreasonable for the police to have stripped respondent of his clothing and left him exposed in his cell throughout the night."[467]

If the Court had stopped there, the assault on the preference for warrants and the principle of judicial supervision of criminal investigations would have been no more serious than that in other recent cases.[468] But Justice White did not stop there. Rather, without citing Justice Powell expressly, Justice White called up the fundamental idea of the *Robinson* concurrence. He insisted that the Court had not concluded that "the Warrant Clause is never applicable to post-arrest seizures of the effects of an arrestee."[469] Nevertheless, he offered that the Fourth Circuit had "captured the essence" of the matter:[470] " 'While the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence.' "[471] To this language, he added a footnote of his own:

> Holding the Warrant Clause inapplicable in the circumstances present here does not leave law enforcement officials subject to no restraints. This type of police conduct "must [still] be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures." Terry v. Ohio . . . . But the Court of Appeals here conceded that probable cause existed for the search and seizure of respondent's clothing, and respondent complains only that a warrant should have been secured. We thus have no occasion to express a view concerning those circumstances surrounding custodial searches incident to incarceration which might "violate the dictates of reason either because of their number or their manner of perpetration." *Cf.* . . . Rochin v. California . . . .[472]

On the face of it, one would have expected Justice White to limit his holding to approval of the warrantless action in *Edwards*. Then, since it was undisputed that the officers had probable cause to take the clothing, he might have reserved the question whether something less than probable cause for a search would have sufficed. But a close reading of the quoted language reveals that he went further. Indeed, he clearly stated that the standard was *not* probable cause but "reasonableness," citing *Terry*. Then he blurred that standard into the due process prohibition on repetitive or brutal searches, citing *Rochin*.[473] All told, it appears that the probable cause that existed in the case was unnecessary. After the lawful arrest, the police were au-

---

[466] *See* text at note 342 *supra*.

[467] 415 U.S. at 805. Not that Justice White was particularly squeamish about the case. He commented, for example, that "[s]urely, the clothes could have been brushed down and vacuumed while Edwards had them on in the cell." Accordingly, he said, "it was similarly reasonable to take and examine them as the police did." *Id.* at 806.

[468] *See* notes 400-16, 427-34 and accompanying text *supra*.

[469] 415 U.S. at 808.

[470] *Id.*

[471] *Id.* at 808-09, *quoting* United States v. DeLeo, 422 F.2d 487, 493 (1st Cir. 1970) (footnote omitted). As I read this language, the suspect retains a legitimate interest in the privacy of his or her *property* as opposed to his or her *person*. *Cf.* United States v. Chadwick, 433 U.S. 1, 16 n.10 (1977) (recognizing an arrestee's continuing expectation of the privacy of a footlocker in his possession at the time of arrest).

[472] 415 U.S. at 808 n.9 (citations omitted).

[473] *See* notes 124-30 and accompanying text *supra*.

thorized to conduct any search they desired without treating the suspect in a fundamentally unfair fashion.

It is not too much to suggest that in *Edwards* the Burger Court has enthroned an exception to the warrant requirement into the rule. Indeed, by denying the suspect's expectation of privacy following arrest, the Court has not only eliminated the principle of judicial supervision from discussion, but has rejected the probable cause standard and any fourth amendment test of "reasonableness" that can be distinguished from "fundamental fairness" under the due process clause. As a result, looking back over all the recent decisions, we have entered upon an entirely new state of affairs. The police are no longer required to seek judicial approval before they arrest a suspect in a public place.[474] If they doubt their own determination of probable cause, they can rely on reasonable suspicion to accost the suspect for a brief investigative detention.[475] Then, if something occurs in that encounter to establish probable cause,[476] or if a protective "frisk" of the suspect's clothing brings to light something that justifies an arrest,[477] the suspect can be taken into custody for a "full" search—on the spot or at the station,[478] contemporaneously with the arrest or as much as a day later.[479] The only standard applicable to the post-arrest search is due process fairness, the fourth amendment having fallen out of the case when the suspect lost his or her expectation of privacy after arrest.[480]

3. Automobile Searches

The framers of the fourth amendment could hardly have anticipated that the most frequent application of their new constitutional provision would be in cases involving numerous and highly mobile containers in which the average American would one day spend a fair portion of every day.[481] Indeed, in the earliest times emphasis was placed, first, upon the security of one's home or other structure and, second, upon one's personal freedom of movement. Conveyances of the day were viewed merely as tools of locomotion having no independent fourth amendment significance.[482] The increasing importance of vehicles could not, however, be denied.

---

[474] This is *Watson*, discussed in notes 403-16 and accompanying text *supra*.

[475] This is *Adams'* elaboration on *Terry*, discussed in notes 420-34 and accompanying text *supra*.

[476] The possibilities abound, but the most obvious case is one in which the police see identifiable evidence inside an automobile as they approach it for an investigative detention. *E.g.*, United States v. Payne, 555 F.2d 475 (5th Cir. 1977); United States v. Bertucci, 532 F.2d 1144 (7th Cir. 1976). *Cf.* United States v. Thompson, 558 F.2d 522, 524 (9th Cir. 1977) (resting a finding of probable cause on a "strong odor of marijuana" coming from a van after an "investigatory stop"); United States v. Garcia-Rodriguez, 558 F.2d 956 (9th Cir. 1977) (same).

[477] Both *Terry* and *Adams* involved arrests for unlawful possession of weapons found in a "frisk."

[478] This is *Robinson* in combination with *Edwards*. *See* notes 435-49, 462-67 and accompanying text *supra*.

[479] *Id. Accord*, United States v. Chadwick, 97 S. Ct. 2476, 2487 (1977) (Blackmun, J., dissenting).

[480] This, of course, is my perhaps pessimistic reading of the concluding language in *Robinson* and *Edwards* and particularly Justice Powell's concurring opinion in *Robinson*. I will say in passing, however, that there is at least one other view—one that I must say I wish I could accept. Professor White guesses that the citation to *Rochin* in these cases only reflects the Court's desire to avoid talking about *Mapp*. White, *supra* note 149, at 209 n.86. I will leave a discussion of the Burger Court's treatment of the exclusionary rule for later. *See* notes 572-645 and accompanying text *infra*.

[481] In 1975, four out of five Americans over the age of 16 had operators' licenses. There were more than 100,000,000 automobiles on the road in the United States, logging over 1,000,000,000,000 miles. Each car traveled an average of 28 miles per day. U.S. DEP'T OF TRANSPORTATION, NATIONAL TRANSPORTATION TRENDS AND CHOICES 86 (1977).

[482] Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835, 840 n.28 (1974) [hereinafter cited as *Warrantless Searches*].

The test came during Prohibition, when moonshiners used automobiles to deliver their wares wherever a market could be found, and federal agents were consistently confronted with the most illusive of adversaries.[483] The leading case was *Carroll*.[484] Federal agents with probable cause to believe that their car was being used to transport illicit liquor stopped the Carrolls on the highway between Grand Rapids and Detroit. The agents summarily searched the car, found and seized sixty-eight bottles of contraband whiskey, and then arrested the Carrolls for violation of the Volstead Act. Reflecting the historical doubt that the automobile itself presented a search and seizure issue, the Supreme Court focused on the infringement of the suspects' freedom of movement. The Court's opinion contained no discussion of any supposed invasion of privacy occasioned by the search of the car.[485] The Court held that it would be unreasonable to expect agents to procure a warrant before stopping fast-moving automobiles for purposes of search and that the concomitant detention of the occupants of the car for the period of the search must therefore be considered reasonable and lawful under the fourth amendment.[486]

Despite *Carroll*'s seeming lack of interest in the issue, later decisions showed a growing concern for the interest one has in the privacy of an automobile.[487] Gradually, the holding in the case was reworked to speak to that interest and, further, to embrace the developing preference for warrants. Ultimately, *Carroll* came to stand for the proposition that "a car may be searched or seized without a warrant if there are both exigent circumstances and probable cause to believe that the car will yield contraband or evidence useful for prosecution of crime."[488] During the Warren Court years, the automobile search was the most familiar exception to the warrant requirement. Ordinarily, an automobile's mobility established exigent circumstances excusing failure to obtain a warrant and justified warrantless action based on the officers' own determination of probable cause.[489] On the other hand, the Court was emphatic that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears."[490] It was insisted that in every case it must be *shown* that the police acted on probable cause and in exigent circumstances when they searched an automobile without a magistrate's approval.[491]

The arrival of the Nixon appointees has gradually altered the situation. Judging the combined effect of the decisions in hindsight, it appears the new Justices have made two important changes. First, as it has in virtually every other field of fourth

---

[483] *See* notes 98-99 and accompanying text *supra*.

[484] Carroll v. United States, 267 U.S. 132 (1925).

[485] *See Warrantless Searches, supra* note 482, at 837-40. *Cf.* Brinegar v. United States, 338 U.S. 160, 176-77 (1949) (commenting that the issue in *Carroll* was the detention of the occupants rather than the subsequent search of their car).

[486] 267 U.S. at 153.

[487] *Warrantless Searches, supra* note 482, at 840-41.

[488] *Id.* at 835. The inclusion of "evidence" in the *Carroll* doctrine was disputed by Justice Harlan in Chambers v. Maroney, 399 U.S. 42, 62 n.7 (1970) (concurring and dissenting opinion). Harlan recalled that *Carroll* itself had been concerned only with searches for contraband and that the discussion of precedents in that case had emphasized as much.

[489] *Compare* Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216, 221 (1968) (dictum) *with* Preston v. United States, 376 U.S. 364, 368 (1964) (finding an automobile in custody no longer mobile). *See generally* Comment, *Interference With the Right to Free Movement: Stopping and Search of Vehicles*, 51 CAL. L. REV. 907 (1963).

[490] Coolidge v. New Hampshire, 403 U.S. 443, 461-62 (1971). *See* Scher v. United States, 305 U.S. 251 (1938); Husty v. United States, 282 U.S. 694 (1931) (indicating that a showing of *potential* mobility may be enough).

[491] Coolidge v. New Hampshire, 403 U.S. 443, 460 (1971).

amendment law, the Burger Court has rejected the preference for warrants and has reverted to the practice of reviewing warrantless police action only for reasonableness on the facts of the particular case.[492] No longer does the Court ask in any meaningful sense whether the police might reasonably have procured a warrant before searching a car, but only whether the action they took without one was reasonable. Second, this Court has revived the early doubt that the individual enjoys any privacy in an automobile. In much the same way that the Court has questioned the suspect's expectation of personal privacy after a lawful arrest,[493] it has suggested that one has only a diminished expectation of privacy in an automobile—chiefly because of the many ways in which government regulates vehicular traffic on public highways and the many circumstances in which the police may legitimately come into contact with personal cars. To be sure, this second proposition partakes of the threshold question of the fourth amendment's scope rather than the further question of the standards it imposes in cases to which it applies, but the Burger Court has not distinguished neatly between those questions. It has relied upon the allegedly reduced expectation of privacy in automobiles as one of many factors to be considered in determining whether police action in a particular case was reasonable.

The retreat from the warrant requirement was signaled in *Chambers*,[494] decided shortly after the new Chief Justice took his seat. The facts were uncomplicated. The police had apprehended four men in an automobile shortly after a service station robbery. There was no question that at the time the police stopped the car they had probable cause both to arrest the suspects and to search the car for weapons, evidence tying them to the robbery, and most certainly the money taken from the station less than an hour before. It was clear enough that under *Carroll* the police might have conducted a warrantless search of the automobile on the spot.[495] The difficulty arose from the officers' decision to impound the car instead, to remove it to the station, and to search it there—some time later and still without a warrant. The obvious argument was that whatever the officers might have done in exigent circumstances in the field, once they took the car into custody and removed it to the station the circumstances were entirely different.[496] With the car in their control, they had ample opportunity to obtain a warrant before undertaking a search. Nevertheless, Justice White's opinion for the Court approved the officers' action. He noted that they had been presented with a choice—either to search the car on the spot without a warrant or to impound it, seek a warrant from a magistrate, and in the meantime deny its use to persons otherwise entitled to it. He saw no difference between the two courses and judged either to be reasonable within the meaning of the fourth amendment.[497] Then, turning to the intermediate course the police had in fact taken—transporting the car to the station and still failing to obtain a warrant

---

[492] *See* notes 400-16, 475-80 and accompanying text *supra*.

[493] *See* notes 453-80 and accompanying text *supra*.

[494] Chambers v. Maroney, 399 U.S. 42 (1970).

[495] *Id.* at 52. Only Justice Harlan disputed the issue. He would have chosen a temporary impoundment of the vehicle while a warrant was obtained as the better and less intrusive course. *Id.* at 63-64 (concurring and dissenting opinion).

[496] *Cf.* Preston v. United States, 376 U.S. 364 (1964) (disapproving a warrantless search of an automobile removed from the place of arrest and held in police custody).

[497] 399 U.S. at 52. Justice White thus rejected Justice Harlan's approach to the case—which would have left it to the motorist concerned to decide which course was the most objectionable. *Id.* at 64-65.

—he saw "little to choose" between that and a warrantless search in the field.[498] He noted, moreover, that moving the car had been "reasonable." The arrest had occurred "in a dark parking lot in the middle of the night," and a search on the spot would have been "impractical" and perhaps even "unsafe."[499] Furthermore, he offered that it served "the owner's convenience and the safety of his car to have the vehicle and the keys together at the station house."[500]

On its face, the opinion in *Chambers* squarely conflicted with the preference for warrants. There was no persuasive argument to be made that in *this* automobile case the circumstances had *in fact* been exigent. While Justice White insisted that "the mobility of the car" still obtained at the station,[501] he made no substantial effort to explain how that was so. In retrospect, it appears that the real explanation lay in White's fundamental resistance to the preference for warrants in automobile cases. This much became clear in *White*.[502] On first blush, the facts were very similar. In *White*, the police again had probable cause to search a suspect's car in the field, and again they chose instead to remove it to the station. Of course, they again neglected to procure a warrant. There was, however, a difference. The car in *White* had been seized, not from a dark parking lot as in *Chambers*, but in front of the First National Bank of Amarillo at 1:30 in the afternoon.[503] No argument was or could have been made that a search on the spot would have been impractical or unsafe. Still, a per curiam opinion approved the removal of the car and the later warrantless search—reading *Chambers* to have held that it is always proper for officers who have probable cause to conduct a warrantless search of an automobile on the scene to delay the search until later at the station.[504] The gist of the Court's position could hardly have been clearer. Henceforth, automobiles, at least those found in a public place, are evidently to be treated like people, also found in a public place. If the police have probable cause to search and seize a car or to arrest a person, they may act without the prior approval of a magistrate even when there is a reasonable opportunity to seek such approval.[505]

The border search and regulatory inspection cases, though arguably distinguish-

---

[498] *Id.* at 52. Again Justice Harlan objected, complaining that the Court had approved the search "without even an inquiry into the officers' ability promptly to take their case before a magistrate." *Id.* at 63 n.8.

[499] *Id.* at 52 n.10.

[500] *Id.*

[501] *Id.* at 52.

[502] Texas v. White, 423 U.S. 67 (1975).

[503] *Id.* at 67.

[504] *Id.* at 68. In dissent, Justice Marshall insisted that *Chambers* had held no such thing and that, just as the police must show exigent circumstances to justify a search without a warrant, they must show some reason to justify conducting a warrantless search at the station rather than in the field. In *Chambers*, the Court had explained why the move to the station was reasonable, *see* notes 498-500 and accompanying text *supra*, and Marshall demanded a similar explanation in *White*. He did not get it.

[505] *See* notes 403-10 and accompanying text *supra*. *See* Cady v. Dombrowski, 413 U.S. 433, 447 (1973) (citing *Chambers* for the proposition that a search is not unreasonable simply because the public might be protected by "less intrusive" means); Coolidge v. New Hampshire, 403 U.S. 443, 527 (1971) (White, J., concurring and dissenting); United States v. Chuke, 554 F.2d 260, 263-64 (6th Cir. 1977) (upholding a warrantless automobile search even after the police had "squandered" an opportunity to present their evidence to a magistrate before taking action); United States v. Mitchell, 538 F.2d 1230 (5th Cir. 1976) (en banc) (same). *But see* United States v. Pruett, 551 F.2d 1365, 1370 (5th Cir. 1977) (invalidating a warrantless automobile seizure but only after "vigorously" searching for a "case on all fours" that would release the court from its allegiance to *Coolidge*).

able,[506] have taken the matter a step further. Justice Powell has held the swing vote. He concurred in *Almeida-Sanchez*[507] and wrote the opinion in *Ortiz*[508] when the Court held over strong dissents from Justice White and the Nixon appointees that border police, operating in roving patrols or at fixed checkpoints, must have probable cause to believe a car contains illegal aliens before it can be stopped and searched. In other cases, however, he has drawn upon the "stop and frisk" analysis in *Terry-Adams*[509] and the *Camara-Biswell*[510] line of inspection cases to strike "a balance between the public interest and the individual's right to personal security."[511] Thus, in *Brignoni-Ponce*[512] he held that roving patrols near the border may briefly detain cars for an inquiry into the status of their occupants, so long as there is *reasonable suspicion* that the cars carry illegal aliens.[513] In *Martinez-Fuerte*,[514] he approved an entirely random selection of cars for a similar "brief questioning" at fixed checkpoints.[515] To be sure, *Brignoni-Ponce* and *Martinez-Fuerte* approved only a brief "seizure"[516] of an automobile without probable cause and expressly limited any accompanying "search" to a visual inspection from the outside.[517] Yet, in *Opperman*,[518] the inventory inspection case from South Dakota decided with *Martinez-Fuerte*, Chief Justice Burger upheld a thorough inventory of an overparked car—without a warrant and without probable cause.[519] Although he declined to

---

[506] The United States has a special interest in the control of international boundaries, and the Court has recognized that Congress may authorize intrusions into privacy at the border or its functional equivalents that would not be valid under the fourth amendment elsewhere. *E.g.*, United States v. Ramsey, 431 U.S. 606 (1977) (upholding warrantless searches of international mail on less than probable cause). *See* Note, *Border Searches and the Fourth Amendment*, 77 YALE L.J. 1007 (1968). As to regulatory inspections, even as the Court has acknowledged that the fourth amendment applies to intrusions whose purpose is not to seek evidence of crime, it has said that the warrant clause is "irrelevant" to such intrusions and that they must be judged "on other bases." United States v. Chadwick, 97 S. Ct. 2476, 2483 n.5 (1977). *See* South Dakota v. Opperman, 428 U.S. 364, 370 n.5 (1976).

[507] Almeida-Sanchez v. United States, 413 U.S. 266 (1973).

[508] United States v. Ortiz, 422 U.S. 891 (1975).

[509] *See* notes 420-34 and accompanying text *supra*.

[510] *See* notes 216-24 and accompanying text *supra*.

[511] United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975).

[512] United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

[513] *Id.* at 882. The Court was careful to point out that it had no occasion to decide whether state and local law enforcement agencies can lawfully "conduct such limited stops as are necessary to enforce laws regarding drivers' licenses, vehicle registration, truck weights, and similar matters." *Id.* at 883 n.8. That issue has occupied a great many courts in recent years. *See* United States v. Montgomery, 561 F.2d 875 (D.C. Cir. 1977) (collecting the cases).

[514] United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

[515] *Id.* at 566.

[516] It was agreed in both cases that border "stops" of vehicles are "seizures" of the person within the meaning of the fourth amendment. United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976); United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975). Indeed, in *Martinez-Fuerte* the Court assumed *arguendo* that the border police had "seized" motorists passing through their checkpoint by merely "slowing" their cars. 428 U.S. at 546 n.1. It is open to argument, of course, that automobiles are "effects," *see* Cady v. Dombrowski, 413 U.S. 433, 439 (1973); Brinegar v. United States, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting), and that *their* seizure wholly apart from the seizure of occupants implicates the fourth amendment. *See also* Note, *Mobility Reconsidered: Extending the Carroll Doctrine to Movable Items*, 58 IOWA L. REV. 1134, 1156 (1973). The Court has, however, avoided that approach —perhaps to skirt any discussion of the fourth amendment's protection for personal property divorced from privacy concerns or even the individual's privacy interests in automobiles. *Cf.* Cady v. Dombrowski, 413 U.S. at 449-50 (failing to reach the question whether the search of a car located in an "open field" needed "a search warrant at all").

[517] Indeed, read literally, Justice Powell's opinion in *Martinez-Fuerte* did not consider such a visual inspection a "search" at all. He said: "Neither the vehicle nor its occupants are searched, and visual inspection of the vehicle is limited to what can be seen without a search." 428 U.S. at 558. *See* notes 293-94 and accompanying text *supra*.

[518] South Dakota v. Opperman, 428 U.S. 364 (1976).

[519] *Id.* at 370 n.5.

hold that the inventory was not a "search" at all within the meaning of the fourth amendment,[520] the Chief Justice found the warrant requirement "unhelpful" in this "noncriminal" case and so applied only the standard of "reasonableness," unrelated to any cause to believe that evidence of crime would be found in the car.[521] In the end, he simply balanced the competing interests and concluded that the inspection —reaching into an unlocked glove compartment—was not unreasonable.[522]

The Burger Court's second departure—the proposition that one has only a diminished expectation of privacy in an automobile and thus is entitled to less fourth amendment protection in a car than, for example, a house—has appeared in numerous recent opinions. Indeed, as early as *Chambers* Justice White distinguished *Vale*,[523] decided on the same day, on the ground that "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars."[524] Justice Rehnquist's elusive opinion in *Dombrowski*[525] noted that the extension of the fourth

---

[520] *Id.* at 370 n.6. Nor, to be sure, did he decide that the inventory *was* a "search." Citing Wyman v. James, 400 U.S. 309 (1971), *discussed in* notes 233-39 and accompanying text *supra*, he commented that some state courts had held that in the "benign noncriminal context of the intrusion" the fourth amendment would *not* apply. In this case, in any event, the State had conceded the applicability of the "reasonableness" standard. *See* 428 U.S. at 377 n.1 (Powell, J., concurring) (stating that despite their "benign purpose," inventories are invasions of privacy and hence "searches").

[521] 428 U.S. at 370 n.5. *Accord,* Nixon v. Administrator of Gen. Servs., 433 U.S. 425, 454 n.21 (1977) (agreeing that the warrant requirement was not involved in the question whether Mr. Nixon's presidential papers could be taken into government custody). Going on, the Chief Justice declined an analogy to the warrant required in *Camara,* commenting only that the Court had never held that procedure "applicable to automobile inspections for safety purposes." 428 U.S. at 367-68 n.2. That was true enough. But, then, the Court had never addressed inventory searches of automobiles for "safety" purposes before *Opperman. See id.* at 377 (Powell, J., concurring) (insisting that no precedents were dispositive of the question whether the fourth amendment permits routine inventory searches of impounded automobiles).

[522] Chief Justice Burger pointed out that the petitioner had not objected to the intrusion necessary to secure objects in plain view from outside the car. When the officer climbed inside to obtain those objects, "it was not unreasonable to open the *unlocked* glove compartment, to which vandals would have had ready and *unobstructed* access *once inside the car.*" 428 U.S. at 376 n.10 (emphasis added). The italicized language offers food for thought. By limiting his holding to an unlocked compartment and a situation in which no obstruction existed inside the car to thwart a wrongdoer able to get through the door, the Chief Justice reserved the question whether entry into locked compartments or containers inside impounded vehicles will be permitted without a warrant. In that sort of case, the owner's interest in the safety of the contents would be served by simply leaving the compartment locked. Indeed, in this case the officers found the trunk of the car locked and left it undisturbed. *Id.* at 380 n.6 (Powell, J., concurring). *Compare* Cady v. Dombrowski, 413 U.S. 433 (1973) (approving a warrantless search of a locked trunk in order to protect the public from harm should an intruder remove a revolver believed to be inside) *with* Cardwell v. Lewis, 417 U.S. 583, 588 n.4 (1974) (noting that the trunk of the car had been opened but that no evidence obtained from it had been introduced at trial). Hearing conflicting signals from the Supreme Court, the lower courts have divided on the issue. *Compare* United States v. Martin, 566 F.2d 1143 (10th Cir. 1977) (approving a search of a locked trunk) *with* United States v. Edwards, 554 F.2d 1331 (5th Cir. 1977) (invalidating an inventory reaching into a locked trunk and under the carpet). On the other hand, by speaking to the case in which a burglar is able to get inside the car by some means, the Chief Justice approved an intrusion broader than necessary to protect objects in plain view from the outside. It is one thing to say that a watch lying on the dashboard of a car should be removed lest it tempt a vandal to smash the windshield to get at it, and quite another to *presume* that a burglar will smash the window without such an enticement and on that basis justify a further intrusion into the glove compartment.

[523] Vale v. Louisiana, 399 U.S. 30 (1970), *discussed in* notes 363-64 and accompanying text *supra.*

[524] Chambers v. Maroney, 399 U.S. 42, 52 (1970).

[525] Cady v. Dombrowski, 413 U.S. 433 (1973). Of all the automobile cases, *Dombrowski* is perhaps the most puzzling. The case involved a warrantless search of the locked trunk of a Chicago police officer's wrecked automobile—for a service revolver the searching officers "were under the impression" must be inside. Justice Rehnquist began safely enough by reciting the rule that warrantless searches are per se unreasonable unless they fall within "certain carefully defined classes of cases." *Id.* at 439, *quoting* Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967). But then he launched into a discussion of the special search and seizure problems associated with automobiles and ultimately relied for his decision upholding the search on "principles that may be extrapolated from" the impoundment cases. *E.g.,* Harris v. United States, 390 U.S. 234 (1968); Cooper v. California, 386 U.S. 58 (1967). Particularly, from *Cooper* Justice Rehnquist drew the proposition that "[t]he Framers . . . have given us only the general

amendment to the states introduced new problems into automobile search cases. When the fourth amendment controlled only federal officers, who generally came into contact with automobiles only in the investigation of interstate crime, the cases were easier to control.[526] State officers, in contrast, deal with automobiles in various regulatory situations unrelated to the detection of crime.[527] Accordingly, he implied, the individual in modern society is not entitled to expect privacy from police inspection in an automobile. Indeed, it appears Justice Rehnquist would say that the only reasonable expectation is that the police *will* in some way come into contact with the car. Similarly, Justice Blackmun's opinion for the plurality in *Cardwell*[528] allowed that while "the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusions," the individual has a "lesser expectation of privacy in a motor vehicle," which "seldom serves as one's residence or as the repository of personal effects," and which "has little capacity for escaping public scrutiny" as it "travels public thoroughfares where both its occupants and its contents are in plain view."[529] Then, in *Opperman*,[530] Chief Justice Burger marshalled all the arguments. He said that the inventory in that case had been reasonable both because of "the inherent mobility of automobiles"[531] and because "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office."[532] Justifying the latter argument, he restated the points made in *Cardwell* and *Dombrowski*.

Just how the Burger Court has arrived at the conclusion that automobiles are not private is anything but clear—reflecting the fundamental fault in the *Katz* explanation of when the fourth amendment comes into play. At best, the Justices merely describe what they perceive to be true of American life; they rely upon their sense of prevailing attitudes about automobiles. Less well-placed Americans are simply told what privacy they do or do not expect in their cars, that is, what expectations of privacy are *reasonable* or *legitimate*. Not only is the analysis suspicious insofar as it is grounded in changing public attitudes, but the Justices' ability to ascertain those attitudes at any point is open to serious question. What of the family

---

standard of 'unreasonableness' as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required." 413 U.S. at 448. At no point did he suggest that when the officer broke into the trunk he had *probable cause* to search for the revolver. The four dissenters focused on the lack of exigent circumstances in the case and insisted that the warrantless action was invalid. They did not indicate a view on whether a warrant might have issued. *Id.* at 450 (Brennan, J., dissenting).

[526] *See* note 442 *supra*.

[527] He mentioned that all states require motor vehicles to be registered and operators to be licensed, that there are extensive rules and regulations concerning the operation of automobiles on the public streets, some requiring periodic inspections of vehicles, and that automobiles frequently become disabled or involved in accidents. In all these situations, he said, the "police-citizen contact" will be "substantially greater than police-citizen contact in a home or office." 413 U.S. at 441.

[528] Cardwell v. Lewis, 417 U.S. 583 (1974).

[529] *Id.* at 582-83.

[530] South Dakota v. Opperman, 428 U.S. 364 (1976).

[531] *Id.* at 367.

[532] *Id.* at 367 (footnote omitted). Of course, *Opperman* made it clear that the inventory rationale would be available only on a showing that an automobile was inventoried as part of a routine program. While some lower courts have recognized the limitation, *e.g.*, United States v. Jamerson, 549 F.2d 1263 (9th Cir. 1977) (noting that a sham inventory for the purpose of finding evidence would be invalid), I am amazed at the ability of others to disregard it entirely. *E.g.*, United States v. McCambridge, 551 F.2d 865 (1st Cir. 1977) (a classic illustration of courts' occasional willingness to construct a string of tenuous search and seizure holdings leading ultimately to the admission of evidence seized under the most questionable circumstances).

that lives in a mobile home or, at least during the month of August, in a recreational vehicle?[533] What of the traveling salesperson who leaves his or her sample case, dirty socks, and old love letters in the backseat of the company sedan parked outside the motel? What of the rest of us who live in overcrowded apartments where the television set is always blasting, the phone is always ringing, and the kids are always screaming? If we leave it all for a pleasant evening drive, who are the Justices to say that by doing so we leave our expectations of privacy behind?[534] The truth is we often *seek* privacy on wheels. It is small wonder that most observors of the Court's automobile decisions have assumed that they reflect, not a withdrawal of fourth amendment protection peculiar to cars, but a broader retreat from the principle of judicial supervision of criminal investigations generally. Thus, the talk in the cases about a diminished expectation of privacy in automobiles has been taken to be only another illustration of this Court's insistence that search and seizure cases be decided by a fact-oriented balancing of competing interests rather than a more predictable search in every case for some justification for police action without prior judicial approval.

Finally, there was *Chadwick* at the very end of last Term.[535] On first blush, the decision seemed to look in a different direction. The facts were almost amusing. Federal agents in San Diego observed two suspects, one of whom "matched a profile used to spot drug traffickers,"[536] load a footlocker—double-locked, overweight, and leaking talcum powder—on board an Amtrak train bound for Boston. The information was relayed to other agents in Boston, and when the two suspects arrived at the station to claim the footlocker they were put under surveillance. The suspects obtained the footlocker, placed it on the floor, and promptly sat on it. At that point, the agents released a dog near the footlocker, and in short order the dog "signaled the presence of a controlled substance inside."[537] The agents held back until the footlocker had been moved outside to a waiting car, driven by a third suspect, Chadwick. Then, just as the footlocker was lifted into the trunk of the car, while the hatch was still open, and "before the car engine had been started,"[538] they moved in, ar-

---

[533] One suspects that the Court would treat the common mobile home as a house and apply the warrant clause. Americans who live in such homes surely expect to enjoy their privacy, and relatively few families are prepared at the drop of a hat to shut off the water, detach the power line, and steal off into the night. *Cf.* Simmons v. Tennessee, 210 Tenn. 443, 360 S.W.2d 10 (1962) (viewing a mobile home as a house for fourth amendment purposes). *But see* United States v. Smith, 515 F.2d 1028 (5th Cir. 1975) (permitting an intrusion into a mobile home to make a "safety check" after the suspect was in custody). On the other hand, so-called recreational vehicles may be entirely self-contained units—with running water and electric power. They are often self-propelled and always heavily regulated. *See* B. HODES & G. ROBERSON, THE LAW OF MOBILE HOMES 45-63 (3d ed. 1974). If the police should come upon a gassed-up Winnebago, parked for the night at a roadside rest stop with its engine running to maintain the air conditioner, the automobile cases may be ever so difficult to distinguish.

[534] I hasten to say that I am not the first to complain. *See* Weinreb, *supra* note 149, at 75-76.

[535] United States v. Chadwick, 433 U.S. 1 (1977).

[536] *Id.* at 3. The Court did not say, but presumably it did not mean to hold, that this alone was sufficient for probable cause. *See* United States v. McCaleb, 552 F.2d 717 (6th Cir. 1977) (finding the Drug Enforcement Administration "drug courier profile" insufficient by itself to justify a *Terry* detention). *See also* Note, *Drugs, Databanks and Dignity: Computerized Selection of Travelers for Intrusive Border Searches,* 56 B.U. L. REV. 940 (1976).

[537] 433 U.S. at 4. It should not go without notice that by letting this pass without comment the Court may have implicitly rejected the cases holding that the use of a dog's sensitive nose to identify the contents of a container is itself a "search" which demands justification under the fourth amendment. *See* Elkins v. Ohio, 47 Ohio App. 2d 307, 354 N.E.2d 712 (1976), *cert. denied,* 430 U.S. 932 (1977) (finding no substantial federal question). *But see* Peebles, *The Uninvited Canine Nose and the Right to Privacy: Some Thoughts on Katz and Dogs,* 11 GA. L. REV. 75 (1976).

[538] 433 U.S. at 4.

rested all three suspects, seized the footlocker, and moved everyone and everything concerned with the case to the federal building. An hour and a half later, acting without a warrant but concededly upon probable cause, the agents opened the footlocker and discovered the marijuana introduced at Chadwick's trial.[539]

Passing over less fundamental contentions in the Supreme Court,[540] the Government put as its chief argument the proposition that "movable personalty lawfully seized in a public place should be subject to search without a warrant if there exists probable cause to believe it contains evidence of a crime."[541] The argument was plainly inconsistent with the preference for warrants—at least in cases not involving the home or similar "high privacy area."[542] Chief Justice Burger would have none of it. Dutifully, he ticked off the precedents in which the Court had insisted upon a warrant outside the home, set forth the values served by objective determinations of probable cause by neutral and detached magistrates, and described the strict security at the federal building—leaving "not the slightest danger that the footlocker or its contents could have been removed before a valid search warrant could be obtained."[543] Coming to the Government's second argument, that the footlocker was mobile and should therefore be treated like an automobile, permitting warrantless search on probable cause, the Chief Justice maintained that the circumstances that diminish the individual's expectation of privacy in automobiles did not apply to a double-locked footlocker. The suspects had manifested an expectation that the footlocker would not be opened, and there were no exigent circumstances to justify immediate warrantless action.[544] Nor could the footlocker be searched merely because it had been seized at the time of arrest and searched "as soon thereafter as was practicable."[545] Under *Chimel,* a search incident to an arrest has limits—the area into which the suspect might reach to obtain a weapon or to conceal or destroy evidence.[546] Even if the footlocker could be viewed as in the control of the suspects at the time of arrest, the search did not take place until later—after it had been taken away from them and secured.[547]

Read charitably, *Chadwick* appears to be a refreshing and hopeful sign that the Burger Court has not yet discarded the preference for warrants and resurrected in its stead the majority position in *Rabinowitz.* But on closer examination, there is reason for caution. The Court's opinion was generously sprinkled with suggestions for distinguishing it next time around. The next case, for example, might involve

---

[539] In an extraordinary footnote, the Court noted that the grant of certiorari in *Chadwick* had been limited to the question whether the police should have obtained a warrant before searching the footlocker. Accordingly, said the Chief Justice, the case presented "no issue of the application to the exclusionary rule." *Id.* at 7 n.3.

[540] *See* notes 553-56 and accompanying text *infra.*

[541] 433 U.S. at 6.

[542] *Id.* at 9 n.4.

[543] *Id.* at 13.

[544] In distinguishing the footlocker from automobiles, the Chief Justice again repeated the points made in earlier cases about the detailed regulation of automobiles and their use on public streets and the public exposure accompanying travel by car, and then added a new one—the frequent unavailability of secure storage facilities for highly mobile automobiles. Footlockers, he said, are quite different. One tends to use them to store personal items and to expect them to be safe from the public eye. As in this case, storage facilities are generally available. *Id.* at 2484 n.7.

[545] *Id.* at 14.

[546] *See* note 359 and accompanying text *supra.*

[547] I should say that it is not a little disturbing that the Court focused on the delayed search in this case rather than squarely holding that a double-locked trunk cannot be within the "control" of an arrestee as that term was construed in *Chimel.*

a container the police have reason to think contains "some immediately dangerous instrumentality."[548] In that event, the Chief Justice was clear that it would be "foolhardy to transport it to the station house without opening [it] and disarming the weapon."[549] Further, he suggested, the next case might involve a container "immediately associated with the person of the arrestee."[550] In that situation, he implied, the container might be searched as was the cigarette package in *Robinson*.[551] Finally, he was clear that an inventory such as occurred in *Opperman* would be permissible even in the absence of probable cause.[552] Carrying things a bit further, Justice Blackmun's dissent contended that a greater effort on the Government's part to show exigent circumstances might have brought a different result, even in this case.[553] Justice Blackmun would have entertained an argument that the police had to delay their arrest of the first two suspects and seizure of the footlocker so that they might also catch Chadwick in the net. Indeed, if the police had delayed just a moment longer, the car's engine would have been started and they could have searched the footlocker in the course of a warrantless search of the automobile.[554] Justice Blackmun would even have permitted a warrantless search of the footlocker incident to the arrest of the three suspects—insisting that it was so close to them that it must have been in their "control."[555] Having decided that, he would have drawn an analogy from *Chambers* and allowed the agents to move their search to the federal building, which to him provided a more appropriate place to do the work.[556]

Chadwick must be digested with care, and the more so if Justice Blackmun's dissent accurately states alternative theories on which the Government might have won the case and bases for distinguishing it in the future.[557] Indeed, the decision must be read as the exception that proves the rule. For the Burger Court was presented in *Chadwick* with a proposition of fourth amendment law that was no more than a fair gleaning from the Court's own decisions. What other conclusion was the Government to draw from a stream of search and seizure cases that have narrowed the scope of the fourth amendment by denying the citizen's expectation of privacy in various "public" places,[558] denigrated the individual's interest in property divorced from privacy concerns,[559] and excused the failure of the police to obtain prior judicial

---

[548] 433 U.S. at 15 n.9.

[549] *Id.* *But see* United States v. Martin, 562 F.2d 673 (D.C. Cir. 1977) (decided before *Chadwick*) (refusing to permit a warrantless search of a suitcase the police suspected contained a machine gun).

[550] 433 U.S. at 16 n.10.

[551] *Id.* *See* notes 440-49 and accompanying text *supra*.

[552] 433 U.S. at 10 n.5.

[553] Justice Blackmun's essential position was that the Court should read its recent cases on custodial arrest and automobile searches together and hold that "a warrant is not required to seize and search any movable property in the possession of a person properly arrested in a public place." *Id.* at 19. While he condemned the Government's position in the case as "extreme," *id.* at 17, Justice Blackmun's view was really not so different—adding only the circumstance of a warrantless arrest at the time personalty is taken.

[554] *Cf.* Husty v. United States, 282 U.S. 694 (1931) (finding exigent circumstances in a *potentially* mobile car).

[555] 433 U.S. at 23.

[556] 433 U.S. at 19. See notes 499-500 and accompanying text *supra*.

[557] Justice Brennan insisted that Justice Blackmun's suggestions were not supported by Supreme Court precedents. He said it was "by no means clear that locked containers found inside a car are subject to search" under the automobile exception, *see* note 522 *supra*, and that the locked footlocker could not be considered within the suspects' "control" at the time of arrest. 433 U.S. at 17 nn.1-2. *But see* United States v. Stevie, No. 77-1335 (8th Cir., filed Nov. 17, 1977) (distinguishing *Chadwick* and upholding a search of a suitcase found inside a car).

[558] *See* notes 174-201 and accompanying text *supra*.

[559] *See* notes 249-54, 278-312 and accompanying text *supra*.

approval for their actions?[560] I daresay that virtually every search and seizure case the Burger Court has decided in the last seven years has pointed to the proposition fixed to the top of the Government's brief in *Chadwick*. To be sure, it is disquieting that the Federal Government should appear before the Court urging that such a rule be adopted,[561] but it cannot be said that the precedents do not support it. For the moment, the Court is uneasy about what it has wrought. Hence the retreat in *Chadwick*. Whether the truth hurts enough to foster a change of course remains to be seen. If the difference between *Chadwick* and *White*[562] is that footlockers do not have wheels and gasoline engines and are not driven about town under traffic regulations, and the Court is satisfied with that explanation and content to leave the automobile cases in place, then I for one do not see that much has changed.[563] Similarly, if the difference between *Chadwick* and *Robinson*[564] is that two hundred-pound footlockers cannot be kept in an arrestee's breast pocket, and the Court is comfortable with *that* explanation, then again I find nothing to cheer about. In the end, the Court may only have balked at ignoring the warrant requirement in a case involving a double-locked footlocker held in strict security under circumstances in which a warrant could be easily obtained.

To be sure, in departing from the preference for warrants in all but a few exceptional situations, the Burger Court has only responded to long-standing doubts about the courts' ability to supervise criminal investigations. The police have always complained that any requirement that they seek magisterial approval before taking action handcuffs them in their efforts to combat crime, and commentators have maintained that the introduction of judges only complicates and debilitates the police function.[565] Studies have shown that in practice judicial supervision is ineffective in any event.[566] Generally, the police do not seek warrants but act without them and request judicial approval only after the fact. In the few cases in which warrants are sought, they are usually issued perfunctorily by magistrates who see their task as merely rubber-stamping the judgments of law enforcement officers.[567] Indeed, in many cases the affidavits filed by police officers are not even read. In view of the facts, a strong argument can be made that we should drop the "fiction" of judicial supervision before the fact and focus instead on more meaningful judicial review

---

[560] *See* notes 379-84, 400-10, 427-34, 445-80, 491-532 and accompanying text *supra*.

[561] Justice Brennan allowed it was "deeply distressing that the Department of Justice, whose mission is to protect the constitutional liberties of the people . . . should even appear to be seeking to subvert them by extreme and dubious legal arguments." 433 U.S. at 16.

[562] *See* notes 502-05 and accompanying text *supra*.

[563] I will concede that *Chadwick* makes a case for finding a diminished subjective expectation of privacy in automobiles as opposed to luggage, but I reject the underlying premise that the reach of the fourth amendment is to be determined by learned attitudes apart from the Constitution itself. *See* notes 190-201 and accompanying text *supra*.

[564] *See* notes 445-80 and accompanying text *supra*.

[565] *See, e.g.*, Imbau, *Restrictions in the Law of Interrogation and Confessions*, 52 NW. L. REV. 77 (1957) (denying that the courts have authority to supervise the police apart from the enforcement of rules of evidence); Peterson, *Restrictions in the Law of Search and Seizure*, 52 NW. L. REV. 46 (1957).

[566] Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1183 (1952) (showing that "[d]espite the ease with which warrants may be obtained, the Philadelphia police almost never use them").

[567] ARREST, *supra* note 433, at 15-16, 51-53; Miller & Tiffany, *Prosecutor Dominance of the Warrant Decision: A Study of Current Practices*, 1964 WASH. U. L.Q. 1. *See* Reed v. State, 162 Tenn. 643, 39 S.W.2d 749 (1931) (holding that it is for the magistrate to determine whether to read the affidavit provided by the police "plumb to the bottom" or merely to "sketch it over").

later.[568] As Professor Fuller put it in another context, "Sooner or later we must take down some keep off the grass signs and pave some paths cut by trespassing feet."[569]

While I have no doubt that this description of the prevailing attitude is accurate, it does seem to me that the Court has been all too quick to settle for after-the-fact review with its many and obvious shortcomings. At the very least, I should have thought the Court would insist that the police make some record of the evidence upon which they rely before taking action—in order to provide a basis for meaningful review later and to limit the influence of success on the determination whether the police had sufficient grounds for taking action in the first instance.[570] More fundamentally, I frankly doubt that the Court has given judicial supervision a fair chance before finding fault and shelving the idea. I am persuaded that if the Court were to become serious about the warrant requirement and were to insist that the police and judges turn square corners in the warrant process, judicial supervision might yet become effective despite the shortcomings of the past. To date, however, the Court has not so much as demanded that issuing officers be demonstrably qualified for their extraordinarily difficult and important work, and in fact has asked for no more than financial independence.[571] The truth is that by establishing so many exceptions to the warrant requirement the Court has actually discouraged the police from seeking warrants. By tolerating the issuance of rubber-stamp warrants in the rare cases in which they are sought, the Court has made light of the very careful and meaningful prior examination of the facts its rhetoric still occasionally insists is essential to correct decision-making. In a real sense, the Court has simply never committed the American criminal justice system to the principle of judicial supervision, and in the absence of such a commitment the Court is hard put to maintain that the warrant requirement cannot be made to work.

C. The Question of Consequences

Search and seizure questions reach the Supreme Court only in cases in which the Court's treatment of them makes some difference in the result. If it were otherwise, there would be no case or controversy and no jurisdictional basis for the Court's examination. Accordingly, for as long as the Court has grappled with search and seizure issues, it has wrestled as well with the critical question of consequences—what follows from the decision that a search or seizure was unreasonable. Historically, the law of remedies has been brought to bear, and the victim of such police action has been entitled to a judgment in damages[572] or a decree requiring that something

---

[568] *See* LaFave & Remington, *Controlling the Police: The Judge's Role in Making and Reviewing Law Enforcement Decisions*, 63 MICH. L. REV. 987, 991-99 (1965) (suggesting that magistrates may ignore entirely the evidence presented in affidavits so that it may even be true that the police acting without a warrant give the facts in their knowledge closer scrutiny). This is essentially the position taken by Justice Blackmun, dissenting in *Chadwick*. 433 U.S. at 20 (referring to obtaining a warrant as a mere "formality").

[569] Fuller, *Freedom—A Suggested Analysis*, 68 HARV. L. REV. 1305, 1325 (1955), *cited in* Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 940 (1960).

[570] *See* KAMISAR, LAFAVE & ISRAEL, *supra* note 103, at 289.

[571] *E.g.*, Connally v. Georgia, 429 U.S. 245 (1977) (reinforcing the well-settled rule that magistrates cannot depend for their compensation on the number of warrants they issue).

[572] All the British cases were, of course, suits for money damages. *See* notes 23-47 and accompanying text *supra*. *See also* Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971) (recognizing a federal claim for damages against federal officers who violate the plaintiff's fourth amendment rights); Monroe v.

wrongfully taken be returned.[573] Of course, suits for damages against police officers have rarely been successful in this country,[574] and when the object unlawfully seized is contraband the person who possessed it is not entitled to have it back despite the constitutional violation that turned it up.[575] Other proposed remedies, usually contemplating some sort of police discipline, have also proved unsatisfactory in providing the victim of police misconduct any meaningful satisfaction.[576] In the midst of the confusion and controversy, the exclusionary rule has stood for a century—providing not so much an answer to the question of consequences as a source of still more practical and theoretical difficulty.

The literature concerning the rule is enormous, and within it there is substantial

---

Pape, 365 U.S. 167 (1961) (recognizing a federal statutory claim based upon state officers' violation of the due process protection against unreasonable search and seizure).

[573] The *Boyd* and *Weeks* cases were decided on this ground. *See* notes 67-77, 86-97 and accompanying text *supra*.

[574] *See* Monroe v. Pape, 365 U.S. 167, 196 n.5 (1961) (Harlan, J., concurring) (pointing out that even if damage awards are made they will often fail to fully compensate the victim whose intangible constitutional rights have been trampled); Wolf v. Colorado, 338 U.S. 25, 41-44 (1949) (Murphy, J., dissenting); Dellinger, *Of Rights and Remedies: The Constitution as a Sword*, 85 HARV. L. REV. 1532, 1562-63 (1972) (worrying that limiting the victim to an action for damages may encourage the view that the police are like contracting parties who are free to forsake their responsibilities so long as they are prepared to pay damages for the breach); Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955); Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209 (1963) (commenting that individual officers may be judgment proof but a judgment against Government may prompt desirable changes in policy that will diminish future misconduct); Katz, *The Jurisprudence of Remedies: Constitutional Legality and the Law of Torts in Bell v. Hood*, 117 U. PA. L. REV. 1 (1968) (rejecting state tort actions as an answer); Paulsen, *Safeguards in the Law of Search and Seizure*, 52 NW. L. REV. 65, 72 (1957) (concluding that "[b]y the common consent of almost all who have studied the problem, these remedies just do not work").

[575] *Cf.* Clayton v. Shaw, 548 F.2d 1155 (5th Cir. 1977) (holding that a claim for noncontraband property after trial is cognizable in a civil rights action).

[576] In cases in which the police conduct under attack is an ongoing program of harassment, injunctions can offer the individual prospective relief. *See, e.g.*, Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966); Wheeler v. Goodman, 298 F. Supp. 935 (W.D.N.C. 1969); Note, *The Federal Injunction as a Remedy for Unconstitutional Police Conduct*, 78 YALE L.J. 143 (1968). *But see* Rizzo v. Goode, 423 U.S. 362 (1976) (setting aside broad injunctive relief against supervisory officials). And there has been some talk in the literature of imposing fines upon offending officers and distributing the proceeds to the victim of their actions. *Cf.* LaPrade, *An Alternative to the Exclusionary Rule Presently Administered Under the Fourth Amendment*, 48 CONN. B.J. 100 (1974) (discussing imposing fines on the government). But most other plans, ranging from criminal prosecution of the officers involved through contempt citations to internal police disciplinary measures, are addressed not so much to compensation of the present victim but to avoidance of similar practices in the future. Ultimately, they speak to the different, but in no sense unimportant, question whether some means can be devised for deterring police misconduct. The literature, generally styled as proposing alternatives to the exclusionary rule, is sizable. Illustrations include Blumrosen, *Contempt of Court and Unlawful Police Action*, 11 RUTGERS L. REV. 526 (1957); Edwards, *Criminal Liability for Unreasonable Searches and Seizures*, 41 VA. L. REV. 621 (1955); Note, *Administration of Complaints by Civilians Against the Police*, 77 HARV. L. REV. 499 (1964). The most popular proposal in recent years has been that legislatures or police departments themselves develop exhaustive rules to guide officers in the field. *E.g.*, COLLEGE OF LAW OF ARIZONA STATE UNIVERSITY & POLICE FOUNDATION, MODEL RULES FOR LAW ENFORCEMENT (Project on Law Enforcement Policy and Rulemaking series 1974). Then, departures from the rules can be punished even though they do not rise to constitutional violations. *E.g.*, K. DAVIS, POLICE DISCRETION (1975); McGowan, *Rule-Making and the Police*, 70 MICH. L. REV. 659 (1972); Quinn, *The Effect of Police Rulemaking on the Scope of Fourth Amendment Rights*, 52 J. URBAN L. 25 (1974) (collecting the authorities). *But see* Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62 (1976). Indeed, Professor Amsterdam has gone so far as to suggest that the fourth amendment may compel the development of such rules. Amsterdam, *supra* note 1, at 416. Despite the Burger Court's apparent rejection of that view in Rizzo v. Goode, 423 U.S. 362 (1976), I am persuaded that without at least some prodding from the courts, police departments and legislatures will not be moved to adopt such rules very soon. *See* LaFave, *Improving Police Performance Through the Exclusionary Rule—Part II: Defining the Norms and Training the Police*, 30 Mo. L. REV. 566 (1965) (commenting that legislators view the enforcement of the fourth amendment as a judicial concern). While rules are clearly the best available means of preventing violations of fourth amendment rights, the recurring truth is that those rights are simply not respected by decision-makers whose principal concern is the control of criminal behavior.

disagreement over its theoretical foundations, its practical effects, and certainly its desirability. Indeed, there is very little agreement about the rule at all. It is understood that it has roots in the common law of replevin,[577] and, despite unfortunate but recurring references in the literature, it is widely understood that it is *not* a *remedy*—at least in the ordinary sense. That is, it does not compensate the victim of police misconduct or in any wise make him or her whole, and it only indirectly penalizes the perpetrator of the wrong so as to satisfy the victim that things have somehow been made even.[578] Yet, any further propositions offered concerning the rule elicit immediate objections from those with views of their own. The best work I know on the subject comes from Professors Schrock and Welsh.[579] They identify two models. The unitary model sees all the events in a criminal prosecution as parts of a single transaction for which government is ultimately responsible. It is just as important to the fourth amendment whether a court takes account of the fruits of a search as it is whether the intrusion that discovered the evidence was lawful. The unitary model harbors two rationales for the exclusionary rule. First, it can be deemed part of the individual's personal constitutional right against unreasonable search and seizure. If the trial court were to sanction unlawful police action in the field by making use of the illicit fruits, the court would forsake its fundamental responsibility to respect the individual's constitutional rights. On this view, the trial court does not merely condemn the unconstitutional acts of the police by refusing to admit illegally seized evidence, but rather fails to perpetuate the wrong begun in the field but continuing throughout the proceeding. By excluding such evidence, the court only exercises its power of judicial review, ensuring that the individual is treated constitutionally by all arms of government—including the court itself.[580] This is the view of the exclusionary rule taken in the *Weeks* case.[581] Second, the exclusionary rule can be considered a judicially created rule of evidence, non- or quasi-constitutional in origin,[582] instituted to avoid impugning the integrity of the court by the introduction of unlawfully seized evidence. While under this rationale the court is viewed as sharing responsibility with the police for the individual's treatment under the Constitution, the focus is still on the court's separate interest in maintaining its image of integrity.[583] The view partakes of the equitable notion that litigants desiring favorable action must appear in court with clean hands, so that in offering relief the court does not soil its own. The best illustrations of this

---

[577] *See* text at notes 91-97 *supra.*

[578] *E.g.,* Friendly, *The Bill of Rights as a Code of Criminal Procedure,* 53 CAL. L. REV. 929, 951 (1965); Traynor, *Mapp v. Ohio At Large in the Fifty States,* 1962 DUKE L.J. 319, 335; Comment, *Judicial Control of Illegal Search and Seizure,* 58 YALE L.J. 144, 153 (1948).

[579] Schrock & Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement,* 59 MINN. L. REV. 251 (1974).

[580] *Id.* at 257.

[581] *See* note 90 and accompanying text *supra;* McNabb v. United States, 318 U.S. 332, 339-40 (1943); Byars v. United States, 273 U.S. 28, 29-30 (1927) (reading *Weeks* to have announced a firm constitutional proposition). Cf. Dodge v. United States, 272 U.S. 530, 532 (1926) (contending that the exclusion of evidence avoids further infringement on constitutional rights) (opinion of Holmes, J.).

[582] *See* Hill, *The Bill of Rights and the Supervisory Power,* 69 COLUM. L. REV. 181 (1969). Note, *The Supervisory Power of the Federal Courts,* 76 HARV. L. REV. 1656 (1963).

[583] Schrock and Welsh recognize that to the extent the Court defends itself from the excesses of the police under the judicial integrity rationale, there is an overlap with the fragmentary model. Schrock & Welsh, *supra* note 579, at 371-72. *See* notes 579-81 and accompanying text *supra.*

thinking appear in the Holmes and Brandeis opinions in *Silverthorne*[584] and *Olmstead*.[585]

The second model denies that the fourth amendment is concerned with all stages of a criminal prosecution and insists that it governs only police action in the field. The only obligation of the trial court is to ensure a fair trial, and so long as the method by which evidence is obtained is not so outrageous as to deprive the entire proceeding of fundamental fairness,[586] the court has no duty to exclude evidence merely because it is the product of unlawful police action. Certainly nothing in the Constitution demands that course. If unlawfully seized evidence is excluded, it is because it is thought that some societal interest that outweighs the base line interest in correct fact-finding at trial will be served. That interest, of course, is the privacy of other, perhaps innocent people whose homes may be invaded if the police are not deterred from further misconduct by the exclusionary rule. This fragmentary model separates the police intrusion against which the individual has a fourth amendment *right* from the proceedings at trial in which the question is merely one of *remedy*—not a personal remedy for the victim but a collective remedy for the broader social problem. It rejects out of hand the proposition that the individual defendant has any personal right to exclude illegally seized evidence and doubts, too, that judicial integrity is threatened by conduct outside the courtroom. Ultimately, this model seizes upon the deterrence rationale and embraces the exclusionary rule as a judge-made rule of evidence, or better said, a species of privilege,[587] thought for the moment at least to serve the society's interest in avoiding police misconduct in the future. The fragmentary model is, of course, illustrated by Justice Frankfurter's opinion in the *Wolf* case.[588]

During the Warren years, the Court largely ignored the theoretically necessary choice between the unitary and fragmentary models. In *Mapp*,[589] when the Court set *Wolf* aside and relied heavily upon passages from *Weeks* and *Olmstead*,[590] the issue was clouded by the incorporation wars and attention was diverted to the question of federalism. The opinion was ambiguous. Some language disparaged the notion that the rule was "one of evidence"[591] rather than "part and parcel"[592] of the fourth amendment, but other language referred to it as merely a "sanction"[593] for the constitutional violation tied up in the police intrusion. Nowhere did the Court squarely embrace either the unitary or fragmentary models. Indeed, it ultimately fastened the exclusionary rule on the states in reliance upon *all* the rationales thus far proposed. Thus the Court said that the exclusionary rule is "an essential

---

[584] *See* notes 93-94 and accompanying text *supra*. Writing for the Court, Justice Holmes labeled the police action in the case an "outrage." 251 U.S. at 391.

[585] *See* notes 102-03 and accompanying text *supra*.

[586] *E.g.*, Rochin v. California, 342 U.S. 165 (1952), *discussed in* notes 124-30 and accompanying text *supra*.

[587] *See* McCormick, *The Scope of Privilege in the Law of Evidence*, 16 TEX. L. REV. 447 (1938) (viewing the exclusionary rule as analogous to various privileges in the law of evidence that actually retard the pursuit of truth at trial in order to further societal interests thought to be of superior importance).

[588] *See* notes 119-23 and accompanying text *supra*.

[589] *See* notes 133-40 and accompanying text *supra*.

[590] Mapp v. Ohio, 367 U.S. 643, 648-49 (1961), *quoting* Weeks v. United States, 232 U.S. 383, 392 (1914) *and* Olmstead v. United States, 277 U.S. 438, 462 (1928).

[591] 367 U.S. at 649.

[592] *Id.* at 651.

[593] *Id.* at 655.

part"[594] of the individual's personal rights under the fourth and fourteenth amendments, that it gives to the courts "that judicial integrity so necessary in the true administration of justice,"[595] and also that its purpose " 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' "[596]

The reaction to *Mapp* is well known. Criticism mounted immediately. The arguments are familiar and need not be treated in detail here. It has been said that the rule was never contemplated by the framers and was at best the creation of judges too anxious to exercise nonconstitutional supervisory power over the lower courts,[597] and that it lets the "criminal . . . go free because the constable has blundered"[598] and thus only compounds error rather than correcting it.[599] It has also been said that the rule corrupts the police and prosecutors by encouraging them to falsify reports in order to avoid the rule,[600] penalizes the wrong officials too late in the process to affect those really at fault,[601] handcuffs a highly professional police force in this country that really needs no such check,[602] detracts from the determina-

---

[594] *Id.* at 657.

[595] *Id.* at 660.

[596] *Id.* at 656, *quoting* Elkins v. United States, 364 U.S. 206, 217 (1960). In fairness, it should be said that the Warren Court was not always so circumspect. At times, the Court was even eloquent in embracing more lofty propositions than any found in the deterrence rationale:

> Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions . . . . A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence . . . .

Terry v. Ohio, 392 U.S. 1, 13 (1968).

[597] The most recent illustration appears in Kaplan, *The Limits of the Exclusionary Rule,* 26 STAN. L. REV. 1027 (1974). Without the slightest inquiry into counterarguments, Kaplan baldly states that it "is merely one arbitrary point on a continuum between deterrence of illegal police activity and conviction of guilty persons." *Id.* at 1030. In the end, he contends that the argument for the rule "must stand or fall simply on the basis of its demonstrated utility." *Id.* at 1029.

[598] People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926).

[599] Dean Wigmore's famous hypothetical made the point:

> 'Titus, you have been found guilty of conducting a lottery; Flavius, you have confessedly violated the Constitution. Titus ought to suffer imprisonment for crime and Flavius for contempt. But no! We shall not punish Flavius directly, but shall do so by reversing Titus' conviction. This is our way of teaching people like Flavius to behave, and of teaching people like Titus to behave, and incidentally of securing respect for the Constitution. Our way of upholding the Constitution is not to strike at the man who breaks it, but to let off somebody else who broke something else.'

WIGMORE, *supra* note 79, at § 2184, at 31.

[600] Essentially, the argument is that the police find the exclusionary rule so inconsistent with good police work, indeed rational criminal investigation, that they view it as merely something to get around in some fashion rather than an aspect of law to be respected. In any particular case, the police may shade the truth just enough to satisfy the court, which itself may be considered a hypercritical overseer that fails to understand the reality of investigations in the field. *See* People v. McMurty, 64 Misc. 2d 63, 314 N.Y.S.2d 194 (N.Y. Crim. Ct. 1970); Sevilla, *The Exclusionary Rule and Police Perjury,* 11 SAN DIEGO L. REV. 839 (1974); Comment, *Police Perjury in the Narcotics "Dropsy" Cases: A New Credibility Gap,* 60 GEO. L.J. 507 (1971).

[601] The rule is felt most keenly, of course, by the prosecutor at trial, who may have very little control over police conduct in the field. The officers who committed the violation often never hear of the outcome of the case and thus never feel personal disappointment. Going on, it is argued that search and seizure doctrine is so complex in any event that, even if the police were affected by exclusion and wished to conform to the law, they would be unable to do so. *E.g.,* Burns, *Mapp v. Ohio: An All American Mistake,* 19 DEPAUL L. REV. 80, 100 (1969) (suggesting that not even an officer with a Ph.D. who goes to law school at night can understand his or her responsibilities); Wright, *Must the Criminal Go Free if the Constable Blunders?,* 50 TEX. L. REV. 736, 737-40 (1972).

[602] While, so far as I know anyway, no one has contended that the police need no supervision at all, there certainly are those who would prefer only internal controls. They emphasize the practical necessity of broad police powers of investigation—particularly if low-visibility, victimless crime is to be kept under control. *E.g.,* Coakley, *Restrictions in the Law of Arrest,* 52 NW. L. REV. 2 (1957).

tion of guilt,[603] causes delays,[604] creates conflict between state and federal courts,[605] breeds popular disrespect for the criminal justice system,[606] protects only the guilty whose property is seized rather than the innocent who may be injured but not prosecuted,[607] discourages the development of less Draconian remedies,[608] and finally leads to the dilution of substantive fourth amendment standards by judges attempting to avoid so severe a sanction.[609]

No question, these are weighty concerns. In response to them, the Warren Court played on American utilitarianism by gradually increasing its reliance on the deter-

---

[603] This was one of Justice Black's complaints: "For me the importance of bringing guilty criminals to book is a far more crucial consideration than the desirability of giving defendants every possible assistance in their attempts to invoke an evidentiary rule which itself can result in the exclusion of highly relevant evidence." Simmons v. United States, 390 U.S. 377, 397 (1968) (Black, J., concurring and dissenting). *See* Barrett, *Exclusion of Evidence Obtained by Illegal Searches—A Comment on People v. Cahan,* 43 CAL. L. REV. 565 (1955); Wingo, *Growing Disillusionment with the Exclusionary Rule,* 25 SW. L.J. 573 (1971).

[604] ABA SECTION OF JUDICIAL ADMINISTRATION, MAJORITY REPORT OF THE COMMITTEE ON FEDERAL LEGISLATION (studying S. 2657, 92d Cong., 1st Sess. (1971)), *reprinted in* 119 CONG. REC. 4237-40 (1973).

[605] *Id.*

[606] Here, the Chief Justice has said:

> As a result of the way in which the public hears about suppression cases a majority of laymen tend to accept and sympathize with the policeman's view of the matter rather than that of the courts . . . . The impact of the doctrine is dramatic and easily understood, while the important reasons underlying it are almost beyond comprehension to most laymen, including most police officers. This is one of the major causes of popular discontent with the administration of the criminal law.

Burger, *Who Will Watch the Watchman?,* 14 AM. U. L. REV. 1, 12 (1964).

[607] Dissenting in Brinegar v. United States, 338 U.S. 160, 181 (1949), Justice Jackson said:

> Only occasional and more flagrant abuses come to the attention of the courts, and then only those where the search and seizure yields incriminating evidence and the defendant is at least sufficiently compromised to be indicted. If the officers raid a home, an office, or stop and search an automobile but find nothing incriminating, this invasion of the personal liberty of the innocent too often finds no practical redress. There may be, and I am convinced that there are, many unlawful searches of homes and automobiles of innocent people which turn up nothing incriminating, in which no arrest is made, about which the courts do nothing, and about which we never hear.

Accord, Terry v. Ohio, 392 U.S. 1, 13-14 (1968). *See* NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON LAWLESSNESS IN LAW ENFORCEMENT 156 (1931).

[608] Professor Oaks has suggested:

> The enormous concentration and reliance upon the exclusionary rule may forestall the development of alternative mechanisms for controlling improper behavior by the police. By a peculiar form of federal preemption, the *Mapp* decision may sap state officials' energy and determination to control law enforcement officials in alternative ways that might prove just as effective and even more comprehensive than the exclusionary rule.

Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665, 753 (1970).

[609] Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure,* 1961 U. ILL. L.F. 78, 145. State judges in particular have taken every opportunity to avoid applying the rule. And certainly, at least until quite recently, little interest has been shown in using the various state constitutions to exclude evidence the Federal Constitution would admit. *Compare* Collings, *Toward Workable Rules of Search and Seizure: An Amicus Curiae Brief,* 50 CAL. L. REV. 421 (1962) *with* Wilkes, *A Most Deplorable Paradox: Admitting Illegally Obtained Evidence in Georgia—Past, Present, and Future,* 11 GA. L. REV. 105 (1976). Of course, all the state constitutions contain search and seizure provisions that parallel the fourth amendment, 35 CORNELL L.Q. 625, 626 n.9 (1950) (collecting them), and it is possible that, with sufficient prodding from Justices Marshall and Brennan, the state courts may yet take a more active role. *See* Oregon v. Mathiason, 97 S. Ct. 711, 714 (1977) (Marshall, J., dissenting); Baxter v. Palmigiano, 425 U.S. 308, 338-39 (1976) (Brennan, J., dissenting); Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977). Indeed, after the Supreme Court upheld the inventory inspection in South Dakota v. Opperman, 428 U.S. 364 (1976), against a fourth amendment challenge, the South Dakota court excluded the evidence on remand by referring to state law. State v. Opperman, ... S.D. ...., 247 N.W.2d 673 (S.D. 1976). While I am inclined to say it is too soon to tell whether a trend is developing, others have noted a revival of interest in state law in at least some jurisdictions. *See, e.g.,* Howard, *State Courts and Constitutional Rights in the Day of the Burger Court,* 62 VA. L. REV. 873 (1976); Wilkes, *The New Federalism in Criminal Procedure: State Court Evasion of the Burger Court,* 62 KY. L.J. 421 (1974); Wilkes, *More on the New Federalism in Criminal Procedure,* 63 KY. L.J. 873 (1975).

rence rationale. In *Linkletter,*[610] for example, the Court held the *Mapp* decision to be prospective only, because the deterrent purpose would not be advanced by upsetting convictions obtained before *Mapp* was decided. In addition, the Warren Court found various excuses for restricting the rule's application. It refused to apply the rule when the defendant lacked "standing" to complain,[611] when the evidence was offered only to impeach testimony at trial,[612] and when the connection between the unlawful police intrusion and the evidence introduced was attenuated.[613] The change had its casualties. If the rule was applied not to conform to the fourth amendment in the case at bar but rather to deter unreasonable search and seizure in *other* cases, it was difficult to contend that the individual defendant had any personal right to it. Rather, any particular defendant must be only a private attorney general who is entitled to relief only for the benefit of others.[614] Perhaps in recognition of the point, the Court gradually let the personal right rationale disappear from its decisions. Similarly, if in some identifiable cases the Court would not allow the defendant the benefit of the rule despite a showing that the police had misbehaved, then it appeared that judicial integrity must not be offended by the mere admission of illegally seized evidence and that the critical issue was always the effect of exclusion on future events. Unlike the personal right rationale, judicial integrity did not fall out of the cases altogether. Nevertheless, it was demonstrably reduced to a make-weight concern next to the primary, deterrent purpose of the rule.[615]

---

[610] Linkletter v. Walker, 381 U.S. 618 (1965). *See* Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp v. Ohio,* 110 U. PA. L. REV. 650 (1962) (urging in a pre-*Linkletter* argument that retrospective application would not serve the deterrent purpose).

[611] *E.g.,* Wong Sun v. United States, 371 U.S. 471 (1963). *See Section 2255, supra* note 170, at 389-90; Comment, *Standing to Object to an Unreasonable Search and Seizure,* 34 U. CHI. L. REV. 342 (1967) [hereinafter cited as *Standing*]. Of course, the Court recognized that an accused has a sufficient stake in the admission of evidence at trial to satisfy article III, and the Court's "standing" rules are not in any sense mandated by the Constitution. Alderman v. United States, 394 U.S. 165, 175 (1969). *See* Sedler, *Standing to Assert Constitutional Jus Tertii in the Supreme Court,* 71 YALE L.J. 599, 656-58 (1962).

[612] *E.g.,* Walder v. United States, 347 U.S. 62 (1954). Although *Walder* came early and perhaps cannot fairly be considered a Warren Court decision, the case was not repudiated in the 1960s but rather continued to serve as a basis for avoiding the distasteful rule. Nor did the Court depart from Frisbie v. Collins, 342 U.S. 519 (1952) (holding that the trial court will not inquire into the means by which the Government produces the accused in court). *See* Scott, *Criminal Jurisdiction of a State over a Defendant Based upon Presence Secured by Force or Fraud,* 37 MINN. L. REV. 91 (1953). The *Frisbie* doctrine, too, provided an excuse for avoiding the rule. *But see* United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (refusing to permit the Government to produce a suspect for trial through cruel and unusual conduct amounting to a patent violation of due process).

[613] Wong Sun v. United States, 371 U.S. 471 (1963). *See Section 2255, supra* note 170, at 389-90; Note, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria,* 115 U. PA. L. REV. 1136 (1967).

[614] *See* Burger, *supra* note 606, at 12.

[615] *E.g.,* Elkins v. United States, 364 U.S. 206 (1960). *See* Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule,* 20 U.C.L.A. L. REV. 1129 (1973). The evidence on whether the rule actually does deter police misconduct is at best inconclusive. Comparative studies of Canada and the United Kingdom, where the rule is not followed, are undercut by differences in the substantive law in those societies. Spiotto, for example, must concede that his study of the Canadian experience may say little about what abandonment of the rule here would bring—since Canada still recognizes writs of assistance. It may well be that other remedies suffice when the substantive restrictions upon the police are relaxed. *See* Spiotto, *The Search and Seizure Problem—Two Approaches: The Canadian Tort Remedy and the United States Exclusionary Rule,* 1 J.P.S. & AD. 36 41-42 (1973). It is equally dangerous to infer from an increase in motions to suppress following *Mapp* that the police have become even more lawless. For the increase can be explained as easily, and certainly more persuasively, as indicating that defense counsel have now come to recognize the substantial benefits to their clients in raising search and seizure issues. Nagel, *Testing the Effects of Excluding Illegally Seized Evidence,* 1965 WIS. L. REV. 283, 289. Various other empirical studies have turned up little hard evidence one way or the other. *E.g.,* P. CHEVIGNY, POLICE POWER: POLICE ABUSES IN NEW YORK CITY (1969); B. COHEN, THE POLICE INTERNAL ADMINISTRATION OF JUSTICE IN NEW YORK CITY (1970); K. DAVIS, DISCRETIONARY JUSTICE IN EUROPE AND AMERICA (1975); A. REISS, THE POLICE AND THE PUBLIC (1971);

The Burger Court has amplified doubts about the rule and set about building upon the exceptions to its applcation.[616] In a series of opinions, the Court has refused to apply the rule in grand jury proceedings,[617] civil forfeiture matters,[618] and federal habeas corpus cases in which the petitioner has had a full and fair opportunity to litigate the search and seizure claim in state court.[619] More fundamentally, this Court has reached deeper into the underlying theory. In *Calandra*,[620] Justice

---

J. RUBENSTEIN, CITY POLICE (1973); J. SKOLNICK, JUSTICE WITHOUT TRIAL (1966); J. WILSON, VARIETIES OF POLICE BEHAVIOR (1968). *See* Batey, *Deterring Fourth Amendment Violations Through Police Disciplinary Reform*, 14 AM. CRIM. L. REV. 245 (1976) (collecting the authorities). The truth is that no one has really improved upon Professor Oaks' monumental work. Oaks, *supra* note 608. The only intuitive argument I have ever found persuasive is that, whether or not the rule deters police misconduct, any sudden departure from it would send entirely the wrong signal to officers who have never been fond of search and seizure restrictions. Even the Chief Justice agrees. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 421 (1971) (dissenting opinion).

[616] The Chief Justice has taken the lead both on and off the Court. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443, 492-93 (1971) (Burger, C.J., dissenting); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 411-12 (1971) (Burger, C.J., dissenting); Burger, *supra* note 606.

[617] *E.g.*, United States v. Calandra, 414 U.S. 338 (1974).

[618] *E.g.*, United States v. Janis, 428 U.S. 433 (1976).

[619] *E.g.*, Stone v. Powell, 428 U.S. 465 (1976). *See* Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) (Powell, J., concurring) (making an earlier "covert attack" on the exclusionary rule). Cover & Aleinihoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035 (1977); Note, *Federal Habeas Corpus for State Prisoners and the Fourth Amendment*, 52 N.C. L. REV. 633, 643 (1974). Very recently, the Court has suggested but not yet squarely adopted another exception to the rule—the "inevitable discovery" doctrine. The notion that illegally seized evidence should nevertheless be admitted if, had the unlawful police conduct not occurred, the evidence would have been turned up lawfully, has appeared from time to time in the lower courts. *E.g.*, Somer v. United States, 138 F.2d 790 (2d Cir. 1943) (opinion of Hand, J.). *See generally* Comment, *The Inevitable Discovery Exception to the Constitutional Exclusionary Rules*, 74 COLUM. L. REV. 88 (1974). The doctrine is worrisome, of course, because it relaxes the protection of the fourth amendment in "the very cases in which by the government's own admission, there is no reason for an unlawful search." United States v. Paroutian, 299 F.2d 486, 489 (2d Cir. 1962). On the other hand, it is not all so different from the "independent source" rule, *see* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), or, for that matter, the harmless error doctrine. *See also* Fahy v. Connecticut, 375 U.S. 85 (1963). Accordingly, it came as no surprise when last Term in Brewer v. Williams, 430 U.S. 387 (1977), the Court implied that the inevitable discovery doctrine might be recognized. In *Brewer*, the Court held that the suspect's answers to questions put by the police in defiance of counsel's instructions must be excluded under the sixth amendment. But in a footnote, the Court said that it dealt only with the admissibility of the suspect's statements—telling the police where the victim's body could be found. It left open the question of whether, on retrial, the prosecution might introduce "evidence of where the body was found and its condition." That information, the Court implied, might come in on the theory "that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams." *Id.* at 406-07 n.12. The quoted language, together with a citation to Killough v. United States, 336 F.2d 929 (D.C. Cir. 1964) (embracing the inevitable discovery doctrine), may indicate that the Supreme Court is about to recognize yet another exception to the exclusionary rule. *Compare* Owens v. Twomey, 508 F.2d 858 (7th Cir. 1974) (embracing the inevitable discovery doctrine) *with* United States v. Kelly, 547 F.2d 82 (8th Cir. 1977) (leaving the question open). *But see* Parker v. Estelle, 498 F.2d 625, 629-30 n.12 (5th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

Given the Court's demonstrable attitude toward the exclusionary rule in recent years, I suspect it is useless to urge reconsideration. Nevertheless, there are good reasons to view this new animal with caution. First, the very idea that unlawfully obtained evidence would *inevitably* have been discovered by lawful means is at best conjectural—much more so even than the harmless error doctrine, I would guess. But even putting that to one side, the Court should understand that at least in some inevitable discovery cases its emerging position that evidence seized in a "flagrantly abusive" manner must be excluded will logically have to apply. The obvious example is a case in which one police officer storms unannounced into a suspect's home and terrorizes an entire family while conducting a particularly intrusive search. Even if a second officer arrives at the door with a valid search warrant just as the first finishes, it seems clear that by the Court's own reasoning the evidence must be kept out. Exclusion will, in this sort of case, act as a deterrent to the first officer, who knew or should have known that the brutal, warrantless search was unlawful. And that, after all, is *why* the Burger Court still recognizes the exclusionary rule—to specifically deter affected officers. *See* notes 618-19 and accompanying text *infra*. *Cf.* United States v. Ragsdale, 470 F.2d 24, 32-33 (5th Cir. 1972) (Rives, J., concurring) (insisting that "the mandate of the exclusionary rule is not directed to the collective intellect of an amorphous government entity, but to the individual searching officer").

[620] United States v. Calandra, 414 U.S. 338 (1974).

Powell's opinion for the Court embraced the fragmentary model, clearly distinguishing between the individual's fourth amendment right against unreasonable search and seizure and the exclusionary rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved."[621] Going on, in *Peltier*,[622] Justice Rehnquist's majority opinion made explicit the inferences about the judicial integrity rationale that had been lurking in the background for some time. He conceded that the maintenance of judicial integrity remains a purpose of the exclusionary rule. Yet, the various exceptions to the rule's application indicate that judicial integrity is offended, not by the mere admission of unlawfully seized evidence, but by judicial conduct that encourages further police misconduct. That, in turn, occurs only when the admission of such evidence provides an incentive to unreasonable search and seizure or, to put it another way, when application of the rule deters such practices.[623] Rehnquist thus collapsed the "imperative of judicial integrity"[624] into the deterrence rationale—to be satisfied so long as the exclusionary rule is used so as to maximize its deterrent effect. Taking the matter a step further, he implied that the only case in which the rule can be expected to deter, and thus the only case in which this Court will continue to apply it, is one in which the police have acted willfully or at least negligently to violate the defendant's fourth amendment rights.[625] *That* is the sort of case in which the exclusion of evidence may affect conscious police decisions in the field. The essential difference is between good and bad faith police actions. The Court is prepared to exclude evidence obtained by "flagrantly abusive" means, but it appears that "technical" violations of the fourth amendment will no longer invoke the rule.[626]

The Court's emerging position is not unexpected, really. To the extent it finds significance in the police "purpose" or "motive" it is consistent with related Burger

---

[621] *Id.* at 348.

[622] United States v. Peltier, 422 U.S. 531 (1975).

[623] *Id.* at 536-39.

[624] *Id.* at 537, *quoting* Elkins v. United States, 364 U.S. 206, 222 (1960).

[625] 422 U.S. at 539, *citing* Michigan v. Tucker, 417 U.S. 433, 447 (1974) (treating a retroactivity question concerning the *Miranda* rules). *Cf.* Schwartz, *Retroactivity, Reliability, and Due Process: A Reply to Professor Mishkin*, 33 U. CHI. L. REV. 719, 751 (1966) (insisting that Holmes and Brandeis were concerned only with "clear and inexcusable abuses").

[626] See Brown v. Illinois, 422 U.S. 590, 607-12 (1975) (Powell, J., concurring). I read Powell's concurring opinion in *Brown*, joined by Justice Rehnquist, to be a fair statement of the Burger Court's present position with regard to the exclusionary rule. To be sure, no majority opinion has yet employed it in a direct review case to suspend the rule when *Mapp* would have it apply. But it obviously speaks for the two Justices whose names it bears, and the Chief Justice and Justice Blackmun are on record with even stronger antirule positions. *See* Brewer v. Williams, 430 U.S. 387, 416-17 (1977) (Burger, C.J., dissenting) (taking the view that the rule should not be applied to nonegregious police conduct); Coolidge v. New Hampshire, 403 U.S. 443, 510 (1971) (Blackmun, J., dissenting) (agreeing with Justice Black that "the Fourth Amendment supports no exclusionary rule" whatever). It is worth noting that Blackmun's opinion for the Court in *Brown* excluded a confession obtained through an unlawful arrest only after making it clear that the illegality in the case "had a quality of purposefulness." 422 U.S. at 605. And Justice White, whose views on the scope and standards questions have resulted in less rather than more protection for the individual, concurred in the judgment only insofar as the Court held that a confession is inadmissible if obtained by officers who "knew or should have known" that they were acting without probable cause. *Id.* at 606. *Accord,* Stone v. Powell, 428 U.S. 465, 536 (1976) (White, J., dissenting) (proposing that the exclusionary rule be "modified so as to prevent its application in those many circumstances where the evidence at issue was seized by an officer acting in the good faith belief that his conduct comported with existing law and having reasonable grounds for his belief"). White may now be listed with the Nixon appointees, and it appears that the proposition that suppression of evidence is the ordinary consequence of unreasonable search and seizure no longer has five votes.

Court innovations of late.[627] Indeed, it may only bring the scope of the exclusionary rule into line with general principles of police liability for unconstitutional action now taking shape in the cases.[628] Nor, certainly, is it radical. The Scottish courts have adopted essentially the same case-by-case approach to the matter,[629] and commentators in this country have been urging a "substantial violation"[630] test for years.[631] The same sort of thing has been proposed in the Congress[632] and adopted

---

[627] *E.g.*, Village of Arlington Heights v. Metropolitan Hous. Development Corp., 429 U.S. 252 (1977) (holding that a purpose to discriminate must be the motivating factor in equal protection cases); Mount Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977) (extending the "motivating factor" analysis to first amendment cases); Estelle v. Gamble, 429 U.S. 97 (1976) (holding that in order to state a cognizable claim under the eighth amendment a prisoner must allege "acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs"); Washington v. Davis, 426 U.S. 229 (1976) (holding that proof of racially discriminatory intent or purpose is required to show a violation of equal protection). Of course, *Doyle, Arlington Heights, Gamble,* and *Davis* indicate that improper motive is part and parcel of the underlying right against a denial of equal protection, suppression of protected expression, or cruel and unusual punishment. In the exclusionary rule cases, the Court has not suggested that "technical" missteps by the police are for that reason not violations of the fourth amendment at all. It is only proposed that when *violations* are "technical" the rule should not apply—because its deterrent purpose would not be served. Thus the Court's emerging position regarding the exclusionary rule tracks its handling of the potential liability of the police for money damages. *Cf.* Estelle v. Gamble, 429 U.S. at 116 (Stevens, J., dissenting) (arguing that subjective motivation relates only to a determination of the appropriate remedy and not to the substantive question whether the eighth amendment has been violated).

Any emphasis upon the subjective state of the officer's mind raises enormous problems of proof, not to mention perplexing substantive questions. What if Whitely v. Warden, 401 U.S. 560 (1971), should arise again? Can an officer who believes and acts upon a radio report that other officers have obtained an arrest warrant now insist that evidence seized incident to the arrest is admissible even though it turns out that the report was incorrect? Justice Brennan has offered an even more troubling case—one in which an officer acts lawfully in obtaining evidence but thinks his or her conduct is unconstitutional. United States v. Peltier, 422 U.S. 531, 560-61 (1975) (dissenting opinion). *Cf.* United States v. Hellman, 556 F.2d 442 (9th Cir. 1977) (rejecting the contention that an automobile search was justifiable as an inventory when the officer involved testified that he had impounded the car for the *purpose* of conducting an investigatory search).

[628] While the Court has not allowed the police the absolute immunity it has afforded prosecutors, *see* Imbler v. Pachtman, 424 U.S. 409 (1976), it has enthusiastically embraced the qualified immunity of police officers recognized in Monroe v. Pape, 365 U.S. 167 (1961). In cases evidently controlling whenever executive officers are sued for allegedly violating constitutional rights, the Court held in Wood v. Strickland, 420 U.S. 308 (1975) and Scheuer v. Rhodes, 416 U.S. 232 (1974) that such officials have a two-part defense. No liability can be found if the defendant proves that he or she did not act from malice and that the conduct under attack did not violate "clearly settled constitutional rights," justifying an inference of malice. *Developments in the Law—Section 1983 and Federalism,* 90 HARV. L. REV. 1133, 1214 (1977) [hereinafter cited as *Developments*]. Summing up in *Scheuer,* the Court said that "[i]t is the existence of reasonable grounds for the belief formed at the time and in light of all the circumstances coupled with good-faith belief, that affords a basis for qualified immunity." 416 U.S. at 247-48.

[629] *E.g.*, Lawrie v. Muier, [1950] Scots Sess. Cas. 19, 27 (H.C.J. 1949):

> Whether any given irregularity ought to be excused depends upon the nature of the irregularity and the circumstances under which it was committed. In particular, the case may bring into play the discretionary principle of fairness to the accused which has been developed so fully in our law in relation to the admission in evidence of confessions or admissions by a person suspected or charged with crime. That principle would obviously require consideration in any case in which the departure from the strict procedure had been adopted deliberately with a view to securing the admission of evidence obtained by an unfair trick.

Accord, M'Govern v. H.M. Advocate, [1950] Scots Sess. Cas. 33 (H.C.J. 1949) (excluding evidence because "it would have been very simple for the police to have adopted the appropriate procedure in relation to a search of [the suspect's] person"). *See* H. FRIENDLY, BENCHMARKS 260-61 (1967).

[630] Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives,* 1975 WASH. U. L.Q. 621, 686.

[631] *E.g.*, Bator & Vorenberg, *Arrest, Detention, Interrogation and the Right to Counsel: Basic Problems and Possible Legislative Solutions,* 66 COLUM. L. REV. 62, 77 (1966) (proposing that exclusion should not be mandated "where the officer did not know and had no reason to know that in some minor technicality he was violating a rule"); Hill, *supra* note 582, at 184; Wright, *supra* note 601, at 744. *See* Kamisar, *supra* note 609, at 144 (emphasis in original) (noting that "[t]he trouble is that 'illegal' arrests and 'unreasonable' searches signify many different things: *barely, mildly* illegal, *clearly* illegal, *flagrantly, outrageously* illegal").

[632] Senator Bentsen introduced bills in both the 92d, S. 2657, 92d Cong., 1st Sess. (1971), and 93d

by the American Law Institute.[633] On the other hand, there are real and serious difficulties with the course the Burger Court has chosen. At the outset, by accepting the fragmentary model the Court has taken the theoretical step the Warren Court avoided—putting some distance between the rule and the Constitution itself. That alone would seem to dispose of both the personal right and judicial integrity rationales, but the Court goes on to expressly reject the one and to blur the other with the deterrence rationale. Having relegated the exclusionary rule to the murky status of a judicially-created federal rule of evidence, the Court then applies it where it will—in cases in which the police action under attack was "flagrantly abusive." Various objections come to mind.

First, the Court has offered no intellectually satisfying justification for resurrecting the *Wolf* dichotomy between right and remedy and for rejecting the model embraced by *Weeks* and some language in *Mapp*. To be sure, the Court can fairly re-examine precedents by calling attention to intermediate decisions that undermine their basic tenets,[634] but in the exclusionary rule cases the Burger Court has gone too far too fast. It is not enough simply to announce that there is no personal right to the rule without explaining wherein *Weeks* was in error. Nor is it enough to announce that judicial integrity is not offended by the admission of illegally seized evidence without explaining the justifications for the exceptions to the rule the Warren Court began and this Court has continued. Surely it must be clear that Justice Frankfurter fashioned the fragmentary model in *Wolf* only in response to the incorporationists in dissent[635] and that the recent emphasis on deterrence and increasing the exceptions to the rule's application has come in response to pressures that can only be described as political.[636] The Court must be realistic, of course, but above all it must be principled. In rejecting the unitary model and resting the rule entirely upon the deterrence rationale, the Court has unnecessarily launched itself into the very judicial legislation it so desperately wishes to avoid. Federal common law it may be,[637] but

---

Congresses, S. 881, 93d Cong., 1st Sess. (1973). His proposals were made in response to Chief Justice Burger's suggestion in his dissent in Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), and were supported by the Division of Judicial Administration of the American Bar Association. *See* 119 CONG. REC. 4236-40 (remarks of Senator Bentsen and Majority Report of the Committee on Federal Legislation). The bills received mixed reviews, *compare* Comment, *The Exclusionary Rule in Search and Seizure: Examination and Prognosis*, 20 KAN. L. REV. 768 (1972) *with* Comment, *Excluding the Exclusionary Rule: Congressional Assault on Mapp v. Ohio*, 61 GEO. L.J. 1453 (1973), and never won passage. Further legislative activity on the Bentsen model would seem unlikely now that the Burger Court has swung round to the position taken in the bills without the help of the Congress. On the other hand, Congress has amended the Federal Tort Claims Act to make the government independently liable for any "assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution" committed by a federal law enforcement officer. 28 U.S.C. § 2680(h) (Supp. IV 1974). The legislative history indicates that the change was prompted by *Bivens*. *See* Gilligan, *The Federal Tort Claims Act—An Alternative to the Exclusionary Rule?*, 66 J. CRIM. L. & CRIMINOLOGY 1 (1975).

[633] ALI MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.2(2) (1975).

[634] There are days when I think the Burger Court's loose talk about the limits of the exclusionary rule is designed to lay the groundwork for outright rejection of *Mapp* in precisely this way. *See* Israel, *Gideon v. Wainwright: The "Art" of Overruling*, 1963 SUP. CT. REV. 211.

[635] *See* notes 119-23 and accompanying text *supra*; Katz, *The Supreme Court and the States: An Inquiry into Mapp v. Ohio in North Carolina. The Model, the Study and the Implications*, 45 N.C. L. REV. 119 (1966).

[636] Or practical. It hardly need be noted that the turn to deterrence in *Linkletter* was a very convenient way in which to avoid opening the jailhouse door to countless prisoners convicted prior to *Mapp*.

[637] *See* Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975). While Professor Monaghan concedes his own doubts about the earlier analysis, he places responsibility for the deconstitutionalization of the exclusionary rule squarely on the shoulders of the Burger Court. To be sure, analogies to other suppression doctrines, certainly the *Miranda* rules and the yet-to-be-discarded rules governing the admission of eye-witness identifications, lend support to the

the exclusionary rule is ever so better justified as "part and parcel" of the fourth amendment itself—resting upon the familiar principle of judicial review.

Second, even if the deterrence rationale is accepted as the primary ground of the exclusionary rule, the Court has offered no justification for emphasizing specific as opposed to general deterrence in its analysis. The Warren Court never supposed that particular police officers would be deterred from misconduct by the application of the rule, but rather viewed the rule as operating more generally to discourage unreasonable search and seizure by removing the incentive for such practices.[638] The idea has always been that the existence of the rule will build respect for the fourth amendment into criminal investigatons, perhaps resulting in more top-down control of questionable search practices in order to develop standard police procedures that will ensure the admissibility of any evidence obtained.[639] The truth is that the rule has never been thought to affect the constable who blunders; the evil with which it has been concerned is departmental policy that encourages, even rewards, unconstitutional search and seizure. The Burger Court's focus on specific deterrence simply misses the point.[640]

Third, the Court's impending rejection of the rule in many, if not most, cases jeopardizes its own ability to consider applying it in any. For it is plain that the rule has always been the principal vehicle for getting fourth amendment issues to

---

thesis that the rule is not itself part of the Constitution. Yet in those cases the Court was clear that if the Congress or perhaps even state legislatures were to take a hand and develop some equally effective procedure the rules fashioned by the Court might not have to be followed. United States v. Wade, 388 U.S. 218, 239 (1967); Miranda v. Arizona, 384 U.S. 436, 467 (1966). The fourth amendment rule announced in *Boyd* and *Weeks* did not come wrapped in such conciliatory language. Only in *Wolf* was there talk of legislative action affecting the rule, *see* note 123 *supra,* and that is hardly a decision upon which to build an argument as to the foundation of the rule since *Mapp.*

[638] United States v. Peltier, 422 U.S. 531, 556-57 (1975) (Brennan, J., dissenting). *Accord,* Amsterdam, *supra* note 1, at 431; Oaks, *supra* note 608, at 709-10.

[639] The constable has in all probability not blundered at all but followed departmental policy, written or unwritten, in violating the Constitution in order to obtain evidence. It makes very little sense to limit the exclusionary rule to those cases in which the individual officer knows or should know the wrongfulness of his or her conduct, that is, to put a premium on constitutional ignorance. We have little enough incentive for police departments to teach their operatives how to work within the law. The fault in all this lies in the very superficial, and result-serving, notion that what counts is what the officer in the field thinks. In a real sense, he or she cannot think at all but must make split-second decisions on how to proceed—decisions that are most difficult to criticize in hindsight. *See* Wong Sun v. United States, 371 U.S. 471, 499 (1963) (Clark, J., dissenting). On the other hand, police captains can and must think if we are to have meaningful protection from arbitrary searches and seizures. That is where application of the exclusionary rule may bring pressure.

[640] Of course, it can be argued that even if the deterrence rationale is substituted for the personal right and judicial integrity approaches, the exclusionary rule still should apply to all illegally seized evidence. If deterrence is the goal, then what is important is the state of mind of the police. And the exclusion of evidence in any case in which the police overstep their bounds arguably serves the purpose. *But see Section 2255, supra* note 170 (suggesting that the rule need be applied only in enough cases to keep the police guessing). *Cf.* Bumper v. North Carolina, 391 U.S. 543, 560-61 (1968) (Black, J., dissenting) (proposing that the harmless error doctrine be applied in at least some exclusionary rule cases); Chapman v. California, 386 U.S. 18, 44 n.2 (1967) (Stewart, J., concurring) (same). Calling up what amounts to the regulatory model of the fourth amendment, *see* notes 161-71 and accompanying text *supra,* some recent works have contended that emphasis upon deterrence should logically lead to the rejection of the "standing" exception to the rule. If by applying the rule in any case the Court hopes only to affect the thinking of the police, then it should make no difference *who* calls attention to police misconduct. The effect—on the police—is the same. *E.g., Standing, supra* note 611. *See* People v. Martin, 45 Cal. 2d 755, ..., 290 P.2d 855, 857 (1955) (adopting a "vicarious standing" position). *Cf.* Allen, *supra* note 123, at 22 (suggesting that the standing rules in search and seizure stem from the historical intermingling of fourth and fifth amendment analysis). On the other hand, it is to avoid the personal right and judicial integrity rationales, which would have the rule apply in any case in which a court is asked to approve unlawful police conduct by admitting its fruits into evidence, that the Burger Court emphasizes specific deterrence. Having come this far, the Court is hardly likely to expand the rule's application to reach any case in which an argument for deterrence can be made.

the Court. Application of the rule provides an occasion for judicial review that may well disappear if the Court is left to expound on search and seizure doctrine only in civil actions.[641] Indeed, assuming the Court means to apply the rule only when the officer involved willfully violated the fourth amendment and that no such finding is possible unless there is a clear precedent condemning a search on identical facts, Justice Brennan has suggested that the emerging position "could stop dead in its tracks judicial development of Fourth Amendment rights."[642] For if no such precedent can be found, the trial court's "first duty . . . will be to deny the accused's motion to suppress" because, irrespective of the outcome of a fourth amendment analysis in the particular case, the rule cannot apply and the evidence must be admitted in any event.[643]

However all that may be, the real criticism of the Court's new approach is that it boils down to yet another dimension of the flexible, case-by-case approach to constitutional adjudication for which the Burger Court reaches in virtually every fourth amendment context. The Court does not reject the exclusionary rule out of hand but merely limits its application to cases in which the police undertake flagrant and abusive searches and seizures, when they know or should know that what they do is invalid but do it nevertheless in bad faith. At bottom, the Court cares very little whether the fourth amendment is violated. Rather, it is concerned with just how bad the police conduct really is. That, it seems to me, is essentially the position the Court takes in dealing with the other fundamental problems regarding search and seizure—the questions of scope and standards.[644] The Court simply sifts the facts of the particular case, weighing and balancing the competing interests, and applies the exclusionary rule or not according to the character of the police action under attack. Ultimately, the fourth amendment analysis at the consequences stage, like that employed in determining whether the fourth amendment applies or whether it has been violated, is fundamentally indistinguishable from the fact-oriented approach associated with flexible due process. Illegally seized evidence is to be excluded only when "fundamental fairness" demands it. While the Court finds the *Wolf* approach to the exclusionary rule a convenient escape from the theoretical bases of *Weeks* and to some lesser extent *Mapp*, the key case here, as elsewhere, is *Rochin*.[645]

---

[641] *See* note 97 and accompanying text *supra;* Oaks, *supra* note 608, at 756.

[642] United States v. Peltier, 422 U.S. 531, 554 (1975) (dissenting opinion).

[643] *Id.* The point is that while the Supreme Court can select the *issues* it will consider, *see, e.g.,* United States v. Chadwick, 433 U.S. 1, 7 n.3 (1977), *discussed in* note 539 *supra;* United States v. Miller, 425 U.S. 435 (1976) (dealing with the substantive fourth amendment issue and failing to reach the exclusion question), a trial court can only decide *cases.*

[644] *See* notes 200-01, 232-35, 333-35, 434, 473, 522 and accompanying text *supra.*

[645] I say even this with caution. While it has never been clear that the operating analysis is a suppression doctrine, it has, I think, been generally assumed that a nonharmless denial of due process fairness vitiates a criminal conviction. That was the crux of *Rochin,* where the brutality of the stomach-pumping permeated the entire proceeding. Yet last Term, in United States v. Wong, 431 U.S. 174 (1977), the Court indicated some doubt. In an opinion by the Chief Justice, the Court held that neither the fifth amendment privilege against self-incrimination nor the due process clause required that a suspect's grand jury testimony must be excluded from a subsequent trial for perjury, because at the time he appeared before the grand jury he had been under investigation for criminal activity and had not been given the *Miranda* warnings. The circuit court had also rejected the fifth amendment claim but had held for the defendant on the due process ground. In passing, and without further elaboration, the Chief Justice dropped a most troubling footnote: "The Court of Appeals did not suggest why, assuming a due process violation had occurred, suppression of respondent's testimony was constitutionally required." *Id.* at 179 n.6. Whether the Court will expand upon this comment and consider admitting evidence obtained in a fundamentally unfair manner is anything but clear. If that is what Chief Justice Burger has in mind, then even the diluted version of the exclusionary rule emerging from *Calandra, Peltier,* and *Brown* may have a questionable future.

III. CONCLUSION

Summing up, the Burger Court has substantially merged fourth amendment doctrine with the flexible approach to constitutional adjudication associated with due process. In deciding whether the fourth amendment applies, whether given its application it has been violated, and whether given a violation the fruits should be admissible in evidence, the Court rejects the more structured search and seizure analysis begun in the early years and developed during the Warren era and replaces it with a fact-oriented, case-by-case approach indistinguishable in most respects from the "fundamental fairness" inquiry conducted by the Court just prior to the practical triumph of incorporation theory. With few exceptions, this Court is concerned only that criminal investigations be conducted in a manner that befits a fair-minded, reasonable people. The analysis is unprincipled and unpredictable, leaving it to the lower courts to judge the essential fairness of the police conduct under attack in the particular case—subject only to occasional review in the Supreme Court itself. The reasons for the Court's departures in search and seizure cases are by no means clear, but some plausible explanations are suggested in the decisions.

First, this Court is less enamored than was its immediate predecessor of the Court's role as the defender of minority and individual rights against, in Phillip Kurland's phrase, "the incursions of the Leviathan."[646] For the first century and a half of our history, the Supreme Court was seen as the champion of property interests against the perceived threat posed by the masses and their democratically elected representatives.[647] With the coming of the Roosevelt appointees the Court assumed a new and entirely different character, permitting the legislative and executive branches substantial leeway in ordering economic affairs and concerning itself instead with protecting the individual from majoritarian tyranny.[648] This fundamental change in the Court's perception of itself in turn formed the philosophical background for the Warren Court's criminal procedure decisions. It was in criminal prosecutions that the power of the state was arrayed most clearly against the individual.[649] The Burger Court, in contrast, seems less persuaded that the Court fulfills its assigned function by protecting the individual from the excesses of majoritarian power. While there certainly has been no discernible revival of the old Court's

---

[646] Kurland, *1970 Term: Notes on the Emergence of the Burger Court,* 1971 SUP. CT. REV. 265, 321.

[647] In a 1908 speech the President of Yale, Arthur Twining Hadley, put the matter bluntly:

> The fundamental division of powers in the Constitution of the United States is between the voters on the one hand and property owners on the other. The forces of democracy on the one side, divided between the executive and the legislature, are set over against the forces of property on the other side, with the judiciary as arbiter between them; the Constitution itself not only forbidding the legislature and the executive to trench upon the rights of property, but compelling the judiciary to define and uphold those rights in a manner provided by the Constitution itself . . . . This theory of American politics has not been often stated. But it has been universally acted upon.

Hadley, *The Constitutional Position of Property in America,* 64 THE INDEPENDENT 838 (1908). General authorities on the period and its jurisprudence are legion. *See, e.g.,* F. RODELL, NINE MEN (1955).

[648] Again, the materials are well known. *See* GUNTHER, *supra* note 118, at 564-96.

[649] *See* Allen, *supra* note 123, at 2:

> The conviction has steadily grown that, in protecting and vindicating basic individual freedoms and immunities, the Court performs its most vital function, and that in this field the Court may justifiably abandon many of the self-imposed limitations on judicial power generally recognized in other types of constitutional adjudication. There is no want of evidence that the Court, itself—or, at least, many of its members—has proceeded on much the same assumption.

See generally C. BLACK, THE PEOPLE AND THE COURT (1960); Rostow, *The Democratic Character of Judicial Review,* 66 HARV. L. REV. 193 (1952).

preoccupation with economic liberty,[650] it is demonstrably true that the Burger Court is extremely deferential to other branches of government in its individual liberty cases.[651] I count the Court's general approval of regulatory inspection schemes, its deference to legislative statements as to the power of the police, and its move toward legislatively defined sanctions for police misconduct as ready examples.

While deference to democratic majorities hardly offends ordinary notions of American government, coming from the Supreme Court it is disturbing at best. For, in this country at least, legislative majorities have been notoriously insensitive to individual liberty. The very existence of the Bill of Rights and its analogue, the fourteenth amendment, attests to the truth that the majority must be held in check if individual liberty is to be preserved. The only institution that can make constitutional guarantees meaningful is the Court. Free in large measure from the day-to-day political pressures that may cloud the vision of legislators, the Court can take the long view and come to principled decisions that serve the ultimate ends of a free society by maintaining firm safeguards for the individual. If the Burger Court means to forsake its task, we can expect ever-expanding inroads upon individual liberty before new members appear to take it up again. I daresay that the executive and legislative branches stand ready to eat up any slack this Court gives them. It must be recalled that it was the Attorneys General of California and Ohio who asked the Court to approve the extraordinary abuses in *Rochin* and *Mapp*.[652] More recently, it was the Solicitor General who appeared at bar in *Chadwick* to propose a view of the fourth amendment even the dissenters thought "extreme."[653] If anything, the legislatures have even dimmer records. The new criminal procedure codes cropping up in most states and the rules proposed to guide the police seem invariably to seek the constitutional floor—permitting, even encouraging, the police to consider the bare minimum constitutional standards as the norm.[654] Defending the Warren Court's decisions some years ago, Professor Amsterdam referred to "a vast abnegation of responsibility" by the executive and legislative branches. "Of course, the Court has responded by being 'activist,'" he said, "it has had to."[655] It appears the Burger Court does not agree. The cost of that disagreement, I am afraid, will be borne by the individual.

Second, the Burger Court recognizes that the rising crime rate that plagues modern American life generates widespread public demand for efficiency in the criminal justice system.[656] Responding to that demand, the Court has distinguished

---

[650] *See, e.g.*, New Orleans v. Dukes, 427 U.S. 297 (1976) (noting that the Court has invalidated a wholly economic regulation solely on equal protection grounds in only one case in the past half-century and taking the opportunity to set that decision aside).

[651] Rydell, *Mr. Justice Rehnquist and Judicial Self-Restraint*, 26 HASTINGS L. REV. 875 (1975).

[652] *See* notes 125, 134 and accompanying text *supra*.

[653] *See* note 553 *supra*.

[654] To support this apparently bold assertion, I suggest a close reading of the commentary accompanying the American Law Institute's newly-completed Model Code of Pre-Arraignment Procedure. All too often, it seems to me, the commentary indicates that the rules are designed to meet only minimum constitutional requirements. To be sure, clarity in rules is a necessity, and the police can hardly be expected to understand the Court's constitutional line-drawing. But I should have thought that if legislative bodies are genuinely interested in assuming some of the burden of striking the proper balance between the individual and state power, the rules devised would do more than simply clarify existing constitutional doctrine.

[655] Amsterdam, *The Supreme Court and the Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785, 790 (1970).

[656] NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON POLICE 1-2 (1973); R. HARRIS, FEAR OF CRIME (1968); Bazelon, *Civil Liberties—Protecting Old Values in the*

between constitutional safeguards necessary to ensure correct fact-finding at trial and those that have to do, not with the guilt or innocence of the accused, but the protection of extraneous interests—such as those protected by the fourth amendment.[657] In cases in which there is substantial doubt as to the defendant's criminal responsibility, the Court still musters sensitivity.[658] But when the constitutional values the defendant insists upon actually retard the pursuit of truth—as when there is an attempt to exclude reliable evidence because it was seized unlawfully—the Court increasingly turns a deaf ear. Plainly, the Burger Court believes that the Nation can no longer afford procedural niceties and expansive interpretations of the Bill of Rights. Rather, the focus in criminal cases has come to a hard-minded concern for guilt or innocence of the defendant in the dock.

Once again, there is reason for pause. This Court's apparent acceptance of the Crime Control model[659] is in the last analysis at war with the Bill of Rights. The Court trusts the police to exercise good judgment even without judicial supervision and often even assumes that their excesses affect only guilty suspects.[660] The Bill of Rights, on the other hand, reflects a basic distrust of law enforcement authorities and assumes in the absence of unanswerable evidence that suspects are innocent.[661] Indeed, in order to foster the sort of climate in which respect for individual liberty can flourish, the Bill of Rights offers the guilty quite the same safeguards afforded the innocent.[662] It is hardly accidental that most of the Bill of Rights safeguards

---

New Century, 51 N.Y.U. L. REV. 505, 509 (1976) (contending that "street crime has replaced anarchism and communism as our cause for alarm"). *See* Lamb, *The Making of a Chief Justice: Warren Burger on Criminal Procedure, 1956-1969*, 60 CORNELL L. REV. 743 (1975) (surveying Burger's work on the court of appeals and identifying his definite pro-prosecution bent).

[657] *E.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973). *See* Stephens, *The Burger Court: New Dimensions in Criminal Justice*, 60 GEO. L.J. 249, 270 (1971) (identifying a "growing resistance to the rigorous application of fourth amendment standards in defense of privacy").

[658] *E.g.*, Mullaney v. Wilbur, 421 U.S. 684 (1975) (holding under the due process clause that the prosecution must prove the absence of mitigating factors as an element of higher grades of homicide); Chambers v. Mississippi, 410 U.S. 284 (1973) (using a due process analysis to invalidate a conviction when the accused was not permitted to cross-examine a key witness and the local hearsay rule excluded other exculpating evidence).

[659] I will concede that I over-generalize. But in my judgment the Burger Court's approach to these problems comes much closer to Professor Packer's Crime Control Model than to its opposite, the Due Process Model. *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION (1968).

[660] In the *White* case, for example, the Court rested its decision on the proposition that "one contemplating illegal activities" takes the risk that what he or she says to a confederate will reach the wrong ears. *See* note 184 and accompanying text *supra*. *Cf.* United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923) (opinion of Hand, J.) (insisting that the innocent man convicted is a myth and that the task is to avoid formalism and other barriers to efficient prosecution of criminals).

[661] *In re* Winship, 397 U.S. 358 (1970) (holding that proof beyond a reasonable doubt is required by due process before an individual can be convicted of a crime). *See* United States v. Martinez-Fuerte, 428 U.S. 543, 573 n.4 (1976) (Brennan, J., dissenting) (insisting that good faith on the part of the police "has never sufficed in this tribunal to substitute as a safeguard for personal freedoms or to remit our duty to effectuate constitutional guarantees"); Terry v. Ohio, 392 U.S. 1, 22 (1968) (stating that "good faith on the part of the arresting officer is not enough"); Beck v. Ohio, 379 U.S. 89, 97 (1964) (same).

[662] *See* United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (offering that "the safeguards of liberty have frequently been forged in controversies involving not very nice people"); Watts v. State, 282 Ala. 245, 248, 210 So. 2d 805, 808 (1968) (insisting that the "worst wretch that walks the earth is entitled to a fair trial"). On the bright side of things, it appears that Mr. Ford's only appointee to the Court, Mr. Justice Stevens, is in agreement. *E.g.*, Codd v. Velger, 97 S. Ct. 882, 886 n.2 (1977) (Stevens, J., dissenting) (quoting with approval Justice Douglas' famous comment that "[w]hen we deny even the most degraded person the rudiments of a fair trial, we endanger the liberties of everyone"). Indeed, Stevens has evidenced some concern about the majority's willingness to trust the police. *E.g.*, United States v. Lovasco, 429 U.S. 884 (1977) (Stevens, J., dissenting) (taking exception to the Court's failure to find a denial of due process in a delayed arrest and suggesting that the police be made to justify such delay); Pennsylvania v. Mimms, 98 S. Ct. 330 (1977) (Stevens, J., dissenting) (insisting

speak to criminal investigation and trials. For the liberty of Americans is tested most obviously and directly by the process of singling out certain persons for punishment by the state. In that process, it makes all the difference in the world whether the Constitution is seen as only a loose structure for the processing of guilty persons by objective authorities, or as establishing stringent guidelines for holding overzealous officials in check.[663] Assumptions about guilt and insensitivity to larger libertarian ideals undermine a free society. While I certainly do not mean to minimize the need for effective law enforcement and efficient criminal prosecutions, we can hardly pay a price for them that debilitates the American democracy the criminal justice system is designed to protect.[664]

Third, it is apparent that the Burger Court brings to its constitutional decisions a renewed appreciation for the concept of federalism. The Nixon appointees are on record not merely with the obligatory nod in the direction of decentralized government, but with sweeping statements on the merit of federalism as a fundamental tenet of the American scheme.[665] To be sure, the Court has always paid lip service to federalism even as civil liberties have been increasingly nationalized, but this Court has built surprising, even startling, decisions on the notion.[666] The criminal procedure cases provide numerous illustrations. While the Warren Court undoubtedly distrusted state criminal process and accordingly used its power of judicial review to impose minimum standards on state trials, the Burger Court at times demonstrates a preference for state proceedings.[667] This Court evidently would deconstitutionalize some issues altogether and farm others out to the state forum

---

that the police be asked to justify requiring motorists to get out of their cars—because, for example, a "woman stopped at night may fear for her own safety; a person in poor health may object to standing in the cold or rain; another who left home in haste to drive children or spouse to school or to the train may not be fully dressed").

[663] *See* United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (commenting that "where one comes out on a case depends on where one goes in").

[664] *See* Edwards, *Order and Civil Liberties: A Complex Role for the Police*, 64 MICH. L. REV. 47 (1965) (maintaining that there is no necessary inconsistency between court decisions protecting the individual and the society's need to combat urban crime).

[665] I have treated the matter elsewhere. Yackle, *supra* note 4, at 526-29. *See generally Developments, supra* note 628.

[666] *See, e.g.*, National League of Cities v. Usery, 426 U.S. 833 (1976) (holding the 1974 Amendments to the Fair Labor Standards Act unconstitutional on the theory that in extending federal minimum wage and maximum hour regulations to state employees Congress had interfered with the prerogatives of the states); Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 HARV. L. REV. 1065 (1977) (finding in the case support for doctrinal departures I suspect, and Professor Tribe concedes, the Court does not contemplate). *See* Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977).

[667] *E.g.*, Patterson v. New York, 432 U.S. 197, 201 (1977): "It goes without saying that preventing and dealing with crime is much more the business of the States than it is the Federal Government . . . and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *See* Juidice v. Vail, 430 U.S. 327 (1977) (the most recent in the Younger v. Harris, 401 U.S. 37 (1971), line of access decisions); Stone v. Powell, 428 U.S. 465 (1976) (the habeas corpus case); *Causes of Popular Dissatisfaction with the Administration of Justice: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong., 2d Sess. 64-68 (1976) (testimony of Aryeh Neier and Burt Neuborne); SOCIETY OF AMERICAN LAW TEACHERS, SUPREME COURT DENIAL OF CITIZEN ACCESS TO FEDERAL COURTS TO CHALLENGE UNCONSTITUTIONAL OR OTHER UNLAWFUL ACTIONS: THE RECORD OF THE BURGER COURT (1976); Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that the federal forum is generally superior to state courts and that the Burger Court's decisions favoring the latter may have an effect on substantive decision-making); *Developments, supra* note 628, at 1282 (offering forum allocation as a possible explanation of the Court's access decisions). *Cf.* Anderson, *The Line Between Federal and State Court Jurisdiction*, 63 MICH. L. REV. 1203 (1965) (suggesting that to avoid conflict between two court systems most business might be handled by a unified system of *federal* courts).

whenever possible. Perhaps most significantly with regard to search and seizure issues, there is abundant evidence that the Court's most recent appointees would never have joined the Warren Court's adoption, however selective, of Justice Black's incorporation theory.[668] This Court's persistent yearning for the *Twining* approach to decision-making may thus evidence an inarticulate revitalization of pre-incorporationist thinking.

It is true, of course, that discussions of individual rights in this country have often been submerged in concerns for federalism.[669] The *Barron* decision[670] and the ambiguity surrounding the fourteenth amendment ensured that. The Frankfurter due process opinions that have so influenced the Burger Court were written in an obvious attempt to strike the proper balance between state and federal power as much as to build meaningful doctrine for the protection of the individual from either. When the Warren Court rejected that approach and chose selective incorporration instead, the dissenters insisted that "states rights" would suffer even as "individual rights" prevailed.[671] All that is accepted history, and it must be expected that the newly-constituted Court will take account of it. The difficulty comes in this Court's apparent willingness to permit federalism to go on obscuring individual liberty questions. With due respect to those who think otherwise, I must say that federalism in American constitutional law is in most respects a fraud. We live, after all, in the latter half of the twentieth century, and the serious governmental organization questions are transnational. Viewed from the bridge of Spaceship Earth, the United States is neither a very large nor populous nation state, and internal talk of decentralization seems at best unrealistic. Why is it that a nation that is necessarily more cohesive as time goes on should attach such significance to the historical accident of settlement by disparate bands of displaced people whose authorization came from different European monarchs? To be sure, ample evidence supports the conventional wisdom that the framers foresaw a "federal" government. But, again, the Court can hardly let us be governed by the generation-bound notions of eighteenth century men. Just as the Court has allowed federal arms to reach further than the framers intended in other fields, it can and must recognize the necessity of national standards for police conduct.[672]

Make no mistake. I carry no brief against decentralization in any form. My only concern is that the Burger Court seems to value federalism in the air, federalism detached from empirical evidence that it serves identifiable human or governmental interests. I would have the Court take a closer look and identify those fields in which

---

[668] *E.g.*, Taylor v. Louisiana, 419 U.S. 522, 538 (1975) (Rehnquist, J., dissenting); Apodaca v. Oregon, 406 U.S. 404, 369 (1972) (Powell, J., concurring) (opinion found in text of Johnson v. Louisiana, 406 U.S. 356 (1972)).

[669] *See* B. MARSHALL, FEDERALISM AND CIVIL RIGHTS (1964); Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1 (1956); *Developments, supra* note 628, at 1135.

[670] Barron v. Mayor and City Council of Baltimore, 32 U.S. (7 Pet.) 243 (1833).

[671] *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145, 171 (1968) (Harlan, J., dissenting).

[672] It comes to mind here that some observers, and particularly Justices Brandeis and Harlan, have contended that uniformity would abrogate the states' capacity to serve as laboratories for the testing of different approaches to the problems that face them. *See* Duncan v. Louisiana, 391 U.S. 145, 193 (1968) (Harlan, J., dissenting); New State Ice Co. v. Liebmann, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting). I should have thought the states' record on that account would lay the argument to rest. So far as I am aware, at least in the field of criminal procedure, the states have conducted few "experiments"; and those that have been undertaken have hardly advanced the individual's interests. *See, e.g.*, Apodaca v. Oregon, 406 U.S. 404 (1972) (approving a less-than-unanimous verdict); Williams v. Florida, 399 U.S. 78 (1970) (approving a six-member jury).

decentralized control serves a real purpose. I should have thought, for example, that the most telling criticism of the proposed new Federal Criminal Code is not that it may contain a few questionable provisions on espionage,[673] but that it contains so many on much less glamorous criminal activity. While I fully agree that what criminal statutes the federal government has should be collected in an accessible code, I do not agree at all that we need so much federal substantive criminal law overlapping parallel state law. Such a federal code makes necessary a national police force with untold resources for intruding upon liberty in the investigation of federal crime and, to think dark thoughts as we surely must in this field, for restricting individual liberty in some other ways should the national government one day determine that greater regimentation in society serves its own interests. I would prefer the relative safety of a diffused law enforcement mechanism. On the other hand, I would be delighted with a federal procedure code that lays down procedural safeguards effective against both state and federal authorities.[674] In lieu of interest on this front from the executive and legislative branches, I am content to build something of the sort from the Bill of Rights.[675] The point is, of course, that national uniformity that serves individual liberty brings with it many advantages and none of the risks associated with the centralization of governmental power.

None of these explanations is completely satisfying. The Burger Court's deference to the other branches of government and its concern about the crime rate do not explain the Court's choice of analytical tools, and its renewed appreciation for federalism does not explain the use of the same tools in both state and federal cases. Something more is needed. I judge it to be a new mood, a neo-conservatism that is fast having its effect on this Court and all that look to it for guidance. It has become fashionable of late to worry in print over what is seen as the politization of the Supreme Court.[676] The line-drawing done by the Warren Court, criticized enough at the time, has come under new scrutiny.[677] It is true, of course, that when the Warren Court offered up doctrinal innovations to deal with the problems of the criminal justice system, it engaged in judicial legislation.[678] Anyone who pauses to reflect on the cases sees, for example, the practical engineering behind the introduction of the fifth amendment privilege into the stationhouse and counsel into line-ups. The Court wanted desperately to reduce the incidence of coerced confessions in the one case and misidentifications in the other. When due process, the obvious constitutional standard, proved unsuccessful, the Court fashioned an alternative structure that

---

[673] At this writing, it appears that Chapter 11 of the proposed code, which has been the subject of some substantial criticism from civil libertarians, has been amended to simply readopt present law. *See* S. 1437, 95th Cong., 1st Sess. (April 28, 1977).

[674] Professor Cox, at least, has suggested that the Congress might impose such a code on the states through its enforcement power under § 5 of the fourteenth amendment. Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights,* 80 HARV. L. REV. 91, 108 (1966).

[675] Judge Friendly, like so many others, permits blind faith in federalism to cloud the underlying individual liberty issues. *See* Friendly, *supra* note 578.

[676] *E.g.,* Strong, *Bicentennial Benchmark: Two Centuries of Evolution of Constitutional Process,* 55 N.C. L. REV. 1 (1976) (expressing concern that the modern Court may be doing for personal liberty what the old Court did for economic liberty and property rights).

[677] A. COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT (1976); Cox, *The New Dimensions of Constitutional Adjudication,* 51 WASH. L. REV. 791 (1976) (worrying over class action decisions in which broad-ranging "systemic" relief is sought).

[678] *See* Friendly, *The Constitution,* in U.S. DEP'T OF JUSTICE BICENTENNIAL LECTURE SERIES, EQUAL JUSTICE UNDER LAW (1976).

would bring results. The same can be said of the Warren Court's work in the search and seizure field. Certainly, I should have thought, *Mapp* can fairly be lumped with *Miranda*[679] and *Wade-Gilbert*.[680] To some, those decisions now seem troubling. The mood of many, including, I think, a majority of the Justices now sitting, is that this is a time for less legislating and more judging.

The Court's attitude is born of the Realist movement in the middle third of this century.[681] When people recognize that the language of the Constitution itself is far too ambiguous to serve as more than a point of departure, they understandably hesitate over far-reaching decisions that extend the constitutional text in directions of their own choosing. Small wonder, indeed, that this Court prefers to sift the facts and considerations in the individual case and arrive at a just resolution of the dispute between the litigants at bar.[682] But the very statement of what the Court attempts to do signals its essential inadequacy. For, to put the matter plainly, the only post-1925 understanding of Supreme Court adjudication that can fairly lay claim to realism is one that views the cases and controversies that reach the Court as no more than convenient vehicles for pronouncements upon the law.[683] In a time

---

[679] Miranda v. Arizona, 384 U.S. 436 (1966).

[680] United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967).

[681] This is, of course, no place for any fair description of Realism in American law, as it began among young law teachers at Columbia and Yale in the 1920s or certainly as it has progressed to the point that we are all realists of some shade. Let only a few citations suffice. *E.g.*, B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112-14 (1921); M. COHEN, LAW AND SOCIAL ORDER 112-47 (1933); W. TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 1-83 (1973); Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934). A recent work sketches the bridge between Dean Pound and Professor Llewellyn. White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999 (1972).

[682] New York v. Earl, 431 U.S. 943 (1977), is a good example. The facts presented a relatively routine opportunity for the application of the *Terry-Adams* "stop and frisk" analysis. The state court found fault, and New York sought review in the Supreme Court. As anyone might have predicted, the Court's majority saw nothing earth-shaking in the case and denied the writ—without, of course, commenting on the merits. The Chief Justice, however, wrote a dissenting opinion, joined by Justices Blackmun and Rehnquist, in which he did little more than set forth the facts and insist that the state court had misapplied settled law. He identified no innovative issue lurking beneath the surface. Nor, indeed, did he offer any basis for reviewing the case save his view that the lower court had been wrong. The last paragraph was most telling. The Chief Justice conceded that the Court's docket is crowded and that it certainly cannot hear every erroneous holding it comes across. But in this case, he said, the departure from prior law was so "clear," and the issue so "squarely presented by the petition for certiorari and the response," that "the matter could be easily resolved in a summary fashion." *Id.* at 949. Nothing could be plainer. While other members of the Court passed over *Earl* to reach cases in which law could be "made," the Chief and two other Nixon appointees were prepared to spend at least some time seeing that *this* case was correctly decided. *See also* Coker v. Georgia, 433 U.S. 584, 607 (1977) (Burger, C.J., dissenting) (contending that the issue should be narrowed to the "question actually presented: Does the Eighth Amendment's ban against cruel and unusual punishment prohibit the State of Georgia from executing a person who has, within the space of three years, raped three separate women, killing one and attempting to kill another, who is serving prison terms exceeding his probable lifetime and who has not hesitated to escape confinement at the first available opportunity?"); N.Y. Times, July 4, 1971, at 20, col. 1 (interview with Chief Justice Burger in which he stated that his conception of the primary role of the Court is "to decide cases").

[683] The best statement of the point I know comes from a layman. R. KLUGER, SIMPLE JUSTICE at x (1976):

> It is to these insulated nine men, then, that the nation has increasingly brought its most vexing social and political problems. They come in the guise of private disputes between only the litigating parties, but everybody understands that this is a legal fiction and merely a convenient political device. American society thus reduces its most troubling controversies to the scope—and translates them into the language—of a lawsuit. In no other way has the nation contrived to frame these problems for a definitive judgment that applies to a vast land, a varied people, a whole age.

It has not been entirely lost on the Burger Court. *See, e.g.*, Bounds v. Smith, 430 U.S. 817, 827 (1977) (noting that "a court addressing a discretionary review petition is not primarily concerned with the correctness of the judgment below," but rather "review is generally granted only if a case raises an issue of significant public interest or jurisprudential importance or conflicts with controlling precedent").

when the Court controls its own docket and thus carefully chooses fact situations in which to elaborate on the meaning of the Constitution, it makes no sense whatever to conceive of the judicial task in such cases as doing justice—to the particular parties fortunate enough to appear in Washington.[684] If the interests of the parties were paramount, there would be little to choose among the thousands of petitions the Court receives every year. Professor Freund pointed out some time ago that it is a paradox of the Court's work that its constitutional power depends upon the existence of a concrete case or controversy, while the 1925 Act and practicality limit its consideration to those that raise issues of broad concern the society over.[685] In the latter half of this century we have finally put to one side the silly notion that the Supreme Court does not make law.[686] We have faced the reality that it does and must. The continuation of the case or controversy base serves now only as a vehicle for presenting important issues to the Court, providing the Court with information and argument necessary for intelligent decision-making and, in some cases, an opportunity to say only so much and no more.

If this realist sense of Supreme Court decision-making does violence to Article III, then so be it. There is quite simply no way to avoid it, and in this light the Burger Court's extraordinary record of denying constitutional questions a federal forum is all the more astonishing. It is as though the Court has suddenly realized that it can make law, that it in fact does make law, and that it indeed is expected to make law. In sheer terror the Court has withdrawn from the fray. Confronted with its awesome responsibility as the third branch of the national government, the Court is understandably hesitant to work its way on the public. Isaiah Berlin was once

---

[684] *See* Gressman, *Much Ado About Certiorari*, 52 GEO. L.J. 742, 744 (1964) (contending that the Court has been generally successful in "selecting for review, among the many filings, those cases and issues which have permitted the tribunal to come to full flower as arbiter of constitutional and legal problems of national import"); *Jurisdiction of Circuit Court of Appeals and Supreme Court: Hearings Before the House Comm. on the Judiciary*, 67th Cong., 2d Sess., ser. 33, at 2 (1922) (comments of Chief Justice Taft).

[685] P. FREUND, THE SUPREME COURT OF THE UNITED STATES 16 (1961). *See* LaFave, *supra* note 576, at 590 (commenting that when an appellate court lays down a search and seizure "rule" that reaches beyond the facts of the immediate case it becomes involved in legislation for which it is not equipped, but when it grooms its lawmaking to the facts it provides little guidance to the police). *But see* Wright, *The Role of the Supreme Court in a Democratic Society—Judicial Activism or Restraint?*, 54 CORNELL L. REV. 1, 24 (1968) (insisting that in criminal procedure cases the Court has a "special competence and a special responsibility"). In demanding more analysis from the Burger Court, I need not revive the debate over whether there are or can be "neutral principles of constitutional law" that govern adjudication in the Supreme Court. *Compare* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) *and* Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959) *with* Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959) (assailing Wechsler) *and* Arnold, *The Theology of Professor Hart*, 73 HARV. L. REV. 1298 (1960) (attacking Hart). *See generally* Mueller & Schwartz, *The Principle of Neutral Principles*, 7 U.C.L.A. L. REV. 571 (1960) (keeping the score). I need only assert that the Supreme Court is not merely another "power organ," Monaghan, Book Review, 90 HARV. L. REV. 1362, 1363 n.6 (1977), but rather an institution limited by reason in its lawmaking function. I do not for a moment believe that the Court can or should set about resolving the great questions of the day in a value-free atmosphere. But I most certainly do believe that if it performs its vital function well, it will do its very best to set down for all to see the value judgments it necessarily makes as it goes along. *See* Miller & Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 682 (1960). In my view, Charles Black has always taken the best approach. *See* Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421 (1960).

[686] *See* Linkletter v. Walker, 381 U.S. 618, 622-29 (1965) (justifying prospective overruling on the understanding that new decisions change prior law); Burger, *Rulemaking by Judicial Decision: A Critical Review, reprinted in Hearings on the Nomination of Warren E. Burger Before the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 39 (1969) (stating that in deciding cases and controversies courts "frequently 'make' law").

heard to say that there is an apparent shortage of sages in the world.[687] I suspect the Court senses that shortage in its Friday conferences.[688] Nevertheless, the Court is called upon to do what must be done. In a time when social problems of enormous complexity and consequence press for resolution and answers stubbornly evade our grasp, there is something to be said for a system that selects out a few outstanding persons and engages in the fiction that they can succeed where others fail. The Supreme Court decides questions not because it can but because it must, because the questions demand answers. When the Court comes to a judgment the public in large measure accepts it, again not because it is correct but because there is no alternative. In this scheme, the fiction that the Court is not a committee of nine men but an institution smoothes the way of public acceptance. The Nation needs the fiction much more than the truth, because the fiction makes it possible to accept Supreme Court judgments that so desperately need acceptance.

There is no room in all this for a narrow focus on the facts of the case at hand—that is, in fourth amendment cases, the guilt or innocence of the accused. There is no room for judicial opinions groomed to the circumstances of the particular case, law for this day and this case only. The Supreme Court of the United States simply does not sit to decide whether, in the particular case, the accused received a fair trial. The Court chooses the cases it decides; it orchestrates its exercise of the federal judicial power. The cases are merely vehicles for broad statements to guide not only the parties directly involved but lower courts, prosecutors and defense counsel, the police, and ultimately the rest of us. What is required is principled decision-making. The Court is not the Congress, fumbling its way through compromise after compromise toward passage of some bit of legislation, nor Mr. Vance, leaping from crisis to crisis in foreign policy in a desperate attempt to hold the world together for another day. The Court speaks rarely. It simply must speak meaningfully.

This Article has become an over-long defense of what is perhaps an unremarkable thesis. In all I have written, I have attempted merely to say that the Burger Court has forsaken its critical law declaration function and left the participants in the criminal justice system adrift without guidance in grappling with search and seizure issues. Told that the horse it is attempting to draw will inevitably emerge as a camel, this Court has given up trying. The result is lawlessness, no less. For while each of us knows that at some point reason will fail us and the logical consistency of our models will falter, we at the same time know intuitively that a rudderless meander through our problems promises much worse. To the extent the Burger Court defers to the other branches of government, emphasizes the control of crime over competing individual liberty values, exalts the notion of federalism over protection of those values, and reduces its opinions to murky ad hoc balancing, the Court fails to come to grips with its responsibility. In consequence, the ordering of the individual's relations with government we have come to expect and revere in this society is put in the gravest jeopardy. There was a time when the Supreme Court understood its task. It adopted a value-oriented model that permitted the fourth

---

[687] *See* Freund, *Mr. Justice Brandeis: A Centennial Memoir*, 70 HARV. L. REV. 769, 791 (1957). In a similar vein, Judge Hand's aversion to being ruled by a "bevy of Platonic Guardians" is well known. HAND, *supra* note 5, at 73.

[688] *See, e.g.*, Rehnquist, *supra* note 9, at 704 (conceding that his judgment is very likely no better than that of anyone else who might find a way to the Supreme Court bench).

amendment to speak to new threats not foreseen by the original draftsmen, developed the principle of judicial supervision in order to control police discretion, and embraced the exclusionary rule to build into the system a fundamental respect not only for the individual defendant's constitutional rights but for the vicarious interests of all Americans. Above all, the Court recognized that when it spoke in a search and seizure case it spoke not only for the litigants at bar but for the public at large.[689] The Burger Court, in contrast, has blurred the lines drawn by its predecessors and generally uprooted the search and seizure doctrine of the past.[690] In its place, this Court has offered only a search for rough fairness in the particular case. When government's interest in order is balanced against the individual's constitutional safeguards, it is order that invariably wins out.[691] The present posture of search and seizure law is untenable. Dramatic change simply must come—and promptly. I do not discount the difficulty of the task. But I must protest the Court's failure even to attempt it.

---

[689] *See* notes 31, 47, 68 and accompanying text *supra*. For Warren Court examples, my mind runs to *Chimel, Coolidge,* and *Terry*. Unsettling as the technique may have been at the time, when the Court in those cases skipped over the threshold question whether the police had properly arrested or stopped the suspect and passed on to a discussion of the subsequent search, it showed clearly enough that it understood full well *why* those cases had been brought to the Supreme Court for decision. It certainly was not to put an end to relatively trifling disputes between the litigants. *See* notes 358, 374, and 421 *supra*.

[690] I should say at this point that I do not wish to be understood as insisting that the Burger Court adhere to Warren Court precedents on the principle of stare decisis. While I have made clear my preferences on that score in this paper, I have no quarrel with this Court's occasional statements that constitutional interpretations are more subject to re-examination than, for example, constructions of federal statutes. *E.g.*, Edelman v. Jordan, 415 U.S. 651, 671 (1974). And I will concede that some decisions I would retain may appropriately be set aside by the newly-constituted Court in the present period of "unsettlement." Douglas, *Stare Decisis,* 49 COLUM. L. REV. 735 (1949). What I do insist upon, however, is that Warren Court precedents be fairly treated. In the Burger Court, it is not that precedents are consolidated behind a single principle unclear in the precedents themselves, or that the cases are narrowed and circumscribed and artfully distinguished, or even that they are forthrightly overruled. They are simply, and far too often, ignored. *See* LEVY, *supra* note 3, at 138; Shapiro, *supra* note 450. Nor do I mean to reject the obvious truth that public law issues are always reducible to a balancing of individual and governmental interests. My point is that if there must be balancing let it be *definitional* rather than *ad hoc*. *See* Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy,* 56 CAL. L. REV. 935 (1968).

[691] *See* Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149 (1960); Pound, *A Survey of Social Interests,* 57 HARV. L. REV. 1 (1943).