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**THE FOURTH AMENDMENT AND THE FALLACY OF  
COMPOSITION: DETERMINACY VERSUS LEGITIMACY IN  
A REGIME OF BRIGHT-LINE RULES**

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The language of the Fourth Amendment is among the most spacious in the Constitution.<sup>1</sup> This poses two profound challenges for courts obligated to interpret those spacious words. One challenge is legitimacy; courts are not supposed to legislate, and yet in this instance the plain meaning of the text incorporates norms of reasonableness by reference. The second challenge is determinacy; given the volume of search-and-seizure activity and the unappetizing suppression remedy, judges<sup>2</sup> and commentators<sup>3</sup> alike have recognized the impor-

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<sup>1</sup> See, e.g., Anthony Amsterdam, Perspectives on the Fourth Amendment, 58 MICH. L. REV. 349, 395 (1974) (stating that Fourth Amendment's "language is no help and neither is its history.").

<sup>2</sup> See, e.g., Thornton v. United States, 124 S. Ct. 2127, 2132 (2004) (noting the "need for a clear rule, readily understood by police officers"); Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) ("[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review."); United States v. Robinson, 414 U.S. 218, 234-35 (1974) (expressing reluctance to review police arrest and search decisions on an individual basis).

<sup>3</sup> See, e.g., Amsterdam, supra note 1, at 378-391 (1974); Wayne R. LaFare, "Case by Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 S. CT. REV. 127, 141; DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 155-59

tance of supplying police, prosecutors and lower courts with workable, clear-cut doctrine.

Roughly speaking, by determinacy we mean that a high percentage of informed observers would agree on the law's application to particular facts.<sup>4</sup> Roughly speaking, by legitimacy we mean that decisions rest on "reasons that in their generality and their neutrality transcend any immediate result that is involved."<sup>5</sup>

My thesis is not a happy one, for it holds that Fourth Amendment determinacy, with the attendant need for bright-line rules, stands in serious tension with Fourth Amendment legitimacy—the need to base the content of the bright-line rules on conventional sources of constitutional law rather than the personal preferences of judges who happen to be in the majority in any given case. We want determinate bright-line rules to guide the police, and we want these rules to follow

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(2003).

<sup>4</sup> The claim that no body of legal doctrine is determinate has generated considerable debate. See, e.g., Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549 (1993). I am concerned here not with the question of whether the authoritative legal materials justify a unique result in hard cases, but in the more practically important question of whether doctrine once announced effectively guides decisions at lower levels in the legal hierarchy.

<sup>5</sup> Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Wechsler's discussion deserves at least this further quotation in the footnote:

The courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices, as invariably action does. In doing so, however, they are bound to function otherwise than as a naked power organ; they participate as courts of law. This calls for facing how determinations of this kind can be asserted to have any legal quality. The answer, I suggest, inheres primarily in that they are—or are obliged to be—entirely principled. A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.

Id. at 19.

from a fair reading of text, history, and precedent. But legitimate Fourth Amendment doctrine is prone to indeterminacy, and determinate doctrine is prone to illegitimacy. In defending this claim, I shall focus on one significant, and, in my view, representative, area of doctrine—the scope of the so-called warrant requirement.

The Warren Court's criminal procedure revolution, which imposed the Fourth Amendment exclusionary rule on the states, bequeathed to the Burger Court a body of pre-incorporation precedent that the Burger Court accepted as presumptively legitimate. At the heart of the pre-*Mapp* Fourth Amendment jurisprudence was the warrant requirement, the principle that, absent prior judicial authorization, searches and seizures were constitutionally unreasonable *per se*, subject to few carefully defined exceptions.<sup>6</sup>

The dimensions of the warrant requirement, however, urgently call for clear definition. When the police search or arrest without probable cause, the Constitution forbids the search—and it is rather unlikely that the police *ever could have* executed the search or arrest in compliance with constitutional requirements. By contrast, when the police violate the Fourth Amendment when they have probable cause but don't have a warrant, the fruits of the search typically could have been secured for the benefit of the public if only the police had known that the law required a warrant. Forced to give priority either to then-prevailing ideas of legitimacy or to the pragmatic need for determinacy, the Burger Court, after a long struggle, surrendered legitimacy in favor of clarity.<sup>7</sup>

From the standpoint of determinacy the Burger Court's turn to bright-line rules was reasonably successful. Determi-

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<sup>6</sup> See James J. Tomkovicz, *California v. Acevedo: The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1105 (1992) ("Since the 1960s, at least, large majorities of the Court had consistently proclaimed that 'warrantless searches are per se unreasonable'—subject, of course, to exceptions. While the exceptions at times seemed destined to swallow the rule, the rule itself seemed relatively safe—almost untouchable.") (footnotes omitted).

<sup>7</sup> See *infra* text accompanying notes 37-251.

nacy, however, came at a price in legitimacy. The basic methodology of balancing, which runs through the Burger Court's Fourth Amendment cases, is essentially legislative in form. One might argue that in this case, constitutional text delegates this sort of rule-making authority to the courts (a position I myself endorse)<sup>8</sup>, but if one were to design an analytical framework for the very purpose of provoking the charge of legislating from the bench, you could not do much better than a framework that calls upon courts to issue rules based on a balancing of interests.

The troubling subjectivity of interest-balancing did not induce a political outcry, probably because the Court was balancing interests with a thumb on the scales in favor of law enforcement. However, it did induce a reaction within the Court itself. Justice Scalia, rebelling against the subjectivity of rule-making based on interest-balancing, argued that the Court should consult founding-era common-law practice as a guide to Fourth Amendment interpretation.<sup>9</sup> Of late, majorities

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<sup>8</sup> For a classic statement of this view, see Amsterdam, *supra* note 1, at 399:

What we do know, because the language of the fourth amendment says so, is that the framers were disposed to generalize to some extent beyond the evils of the immediate past. No other view is possible in light of the double-barreled construction of the amendment. The second clause, requiring probable cause and particularity in the issuance of warrants, was alone quite sufficient to forbid the general warrants and the writs of assistance that had been the exclusive focus of the pre-constitutional history. But the framers went further. They added . . . a wide provision that the people should be secure in their persons, houses, papers and effects against unreasonable searches and seizures. . . . Nor do I see a reason to conclude that the framers intended the fourth amendment, any more than the rest of the Bill of Rights or the Constitution, to state a principle like the dwarf in Gunter Grass' *Tin Drum*, who suddenly and perversely decided to stop growing because growth was what grownups expected of him.

*Id.* (footnote omitted).

<sup>9</sup> Justice Scalia's early Supreme Court opinions in Fourth Amendment cases took a quite conventional approach, applying an established yet judge-made doctrine to the issues presented. See, e.g., *Arizona v. Hicks*, 480 U.S. 321 (1987). For the story of Justice Scalia's turn to the common law, see David Sklansky, *The Fourth*

of the Court have deployed this common-law methodology in some major cases,<sup>10</sup> but in other cases followed precedents applying or interpreting Court-made rules based on modern views of reasonableness.<sup>11</sup>

If the Rehnquist Court has substituted common-law tradition for *Boyd*-vintage federal precedents and the judicial sense of community values as the test of legitimacy, this Court has

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Amendment and Common Law, 100 COLUM. L. REV. 1739, 1745-61 (2000). I greatly admire Sklansky's article, but I reject his supposition that the turn to the common law was inspired by Justice Scalia's "desire for clarity and stability." *Id.* at 1750. In my view, Professor Sklansky confuses clarity with consistency, when inconsistent rules can be quite clear. For example, to deny police authority to search a container in the passenger compartment of a car absent probable cause, *United States v. Ross*, 456 U.S. 798, 799 (1982), but to grant such authority without any suspicion whatever so long as someone in the car is placed under arrest, *New York v. Belton*, 453 U.S. 454, 457 (1981), can fairly be faulted for inconsistency. The distinction between the *Ross* rule and the *Belton* rule, however, is relatively clear. Indeed it is the very clarity of the two rules that invites the police to circumvent one by triggering the other. My supposition is that, consistent with the views developed in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997), Justice Scalia was troubled less by the uncertainty than by the illegitimacy of the Fourth Amendment rules crafted by the Court in the decades before he joined it.

<sup>10</sup> See Sklansky, *supra* note 9 at 1760. The common law has played a prominent role in the Court's opinions in *United States v. Banks*, 540 U.S. 31 (2003); *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001); *Wilson v. Arkansas*, 514 U.S. 927 (1995). The Court relied on Founding-era legislation in *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999) (holding that *Ross* rule extending automobile exception to warrant requirement to all containers within the vehicle that could hold the suspected item also applies to personal effects of passengers).

<sup>11</sup> See *Illinois v. Lidster*, 124 S. Ct. 885, 888-91 (2004) (upholding highway roadblock after hit-and-run accident; no discussion of common law); *Kirk v. Louisiana*, 536 U.S. 635, 635-38 (2002) (*per curiam*) (applying *Payton* rule requiring warrant for entry of residence to make arrest; no discussion of the common law); *United States v. Drayton*, 536 U.S. 194, 197-208 (2002) (finding no seizure of bus passengers questioned by police; Court applies *Florida v. Bostick*, 501 U.S. 429 (1991) without discussing common law); *Bd. of Educ. v. Earls*, 536 U.S. 822, 828-38 (2002) (upholding suspicionless drug testing of students involved in extracurricular activities against Fourth Amendment challenge; Court applies balancing test without discussing common law).

not yet found a way to reconcile legitimacy with determinacy. Determinacy poses an acute challenge to those who would predicate legitimacy on common-law history. The obvious fact is that the common law did not generate bright-line rules, but rather applied general principles to particular facts in tort cases against government officers. These principles of tort liability were often expressed in different, sometimes contradictory, ways by the common-law authorities. They were always subject to legislative modification by Parliament.

The institutional, legal and remedial differences between the eighteenth and twenty-first centuries make it difficult to draw any but predetermined analogies between the search-and-seizure law of the two periods. The historical turn therefore adds little to the legitimacy of judicial decisions in this area; history controls only after today's judges make a long sequence of contemporary judgments about what counts as history. History, at this level of particularity, could control decisions only if we are willing to overthrow the very foundations of the current Fourth Amendment regime—the substitution of abstract ideals of privacy and liberty for the common law tort categories of trespass and false imprisonment, the articulation of doctrine as bright-line rules rather than tort-type standards, and reliance on the exclusionary rule rather than tort actions for enforcement.

This the Court seems unwilling to do.<sup>12</sup> Yet deriving specific rules from specific common-law practices detaches common-law practice from its context. Perhaps worse, identifying the rule by reference to how the common-law judges understood the police practice at issue detaches the contemporary rule announced by the Court from *its* context—a web of other court-made Fourth Amendment rules, each with its own arbitrary margins. To adopt an evolutionary simile, transplanting selected common-law practices into the current constitutional criminal-procedure regime is like doing a skin graft from a zebra to a horse.

Determinacy is also in tension, albeit a more manageable

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See, e.g., *supra* note 10 and accompanying text.

tension, with understandings of legitimacy based on contemporary social norms.<sup>13</sup> All rules are arbitrary in some of their applications, and rules surely are a desirable feature in Fourth Amendment jurisprudence. Here the problem is not that of grafting selected tidbits of common-law practice into a profoundly different legal context. Rather, from the shared values perspective the problem is that the intersection of the rules can produce unexpected consequences, very much at odds with the purported justifications of the rules.

In his *Sophistical Refutations*, Aristotle described what has come to be known as the fallacy of composition, *i.e.*, confusing the distributive and collective senses of a class.<sup>14</sup> He gives several examples. A sitting man can walk, and a walking man can stand; ergo a man can walk and sit at the same time.<sup>15</sup> A man can carry each of several burdens; ergo he can carry all

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<sup>13</sup> Much modern doctrine reflects the shared-values perspective. A conspicuous example is the Katz test that asks whether the citizen had a subjective expectation of privacy that society deems reasonable. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 34 (2001) (holding that reasonable expectation of privacy exists against use of thermal-imaging device to reveal heat sources inside private home); *California v. Greenwood*, 486 U.S. 35, 40 (1988) (finding no reasonable expectation of privacy in discarded garbage). The shared-values perspective also informs a strong strand in the legal literature. See, e.g., Amsterdam, *supra* note 1. Some scholars have sought to give the idea of contemporary reasonableness more analytical rigor than either a naked appeal to intuition or a survey-type assessment of popular opinion. See Scott E. Sundby, "Everyman's Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?", 94 COLUM. L. REV. 1751, 1811 (1994) (proposing turn to metaphor of citizen/government trust to guide Fourth Amendment adjudication); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 556 (1992) (explaining Court's "special needs" cases as situations in which reasonable citizens would agree to the government's search policy rather than invite alternative policies which, although legal, would make the search victims worse off).

<sup>14</sup> Aristotle, *On Sophistical Refutations*, in *ON SOPHISTICAL REFUTATIONS; ON COMING-TO-BE AND PASSING AWAY; ON THE COSMOS* 21 (E.S. Forster & D.J. Furley trans., Harvard Univ. Press 1955).

<sup>15</sup> *Id.*

of them at once.<sup>16</sup> I shall argue that the Supreme Court has committed this logical error in both of the ways it lately has sought to respond to the challenges of legitimacy and determinacy.

To be concrete, it is not unreasonable to say that, official motive should play no role in Fourth Amendment law. It is not unreasonable to say that, incident to a lawful arrest of a motorist, the police may search the passenger compartment of the vehicle, containers included. It is not unreasonable to say that the police may make a custodial arrest for any criminal offense, traffic included. But to say that there shall be no inquiry into the motives of police who make custodial arrests for exceeding the speed limit by four miles per hour and then peruse every file in a laptop computer found in the backseat of the vehicle is more than a little like saying that a man can sit and walk at the same time. This state of affairs, moreover, should be just as disturbing to those who predicate legitimacy on history as to those who predicate it on contemporary norms of reasonableness. The *bete noir* of the founders was the practice of general searches by government agents insulated from tort liability. The Court's automobile cases countenance this very practice.

Part I describes the Supreme Court's turn to bright-line rules during the days of the Burger Court. Part II takes a closer look at Burger Court doctrine with respect to when the police are required to obtain warrants with respect to citizens outside of private premises, principally on the road. The Court at this point understood the warrant requirement as an established feature of legitimate constitutional law, but came to subvert that so-called requirement for the sake of a determinate jurisprudence to govern a high volume of litigation. Part III explains how the Rehnquist Court, while purporting to shift the criterion of legitimacy from shared values to common-law pedigree, likewise, has given priority to determinacy at the expense of legitimacy.

Part IV makes a fairly banal point—that current Fourth

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Id.



Amendment law conditions automobile usage—the dominant mode of personal transportation, both for local and for interstate travel—on liability to arrest and search at the whim of the police. This result is at odds with any criterion of legitimacy known to Fourth Amendment caselaw or, to my knowledge, commentary. Indeed, just this past term, in *Thornton v. United States*, several of the justices themselves expressed their disquiet with the scope of the power to search automobiles incident to arrest without probable cause, let alone a warrant.<sup>17</sup>

What I claim to add to the general disquiet over the scope of police powers over motorists is to locate the roots of the legitimacy deficit in the felt necessity of determinacy, and more particularly, in the intersection of the various rules adopted by the Court. The legitimacy deficit is partly the product of the Court's unfortunate historical turn, and partly the natural tendency of overinclusive rules, leveraged together, to yield all-inclusive rules.

The Court, I suggest, has little hope of working out a corpus of Fourth Amendment law that reconciles legitimacy with determinacy so long as it persists in the project of surgically removing a rule of the common law, and then surgically grafting the same onto the body of modern doctrine. Yet even a methodological focus on widely-shared contemporary values to generate particular rules out of particular cases runs a troubling risk of perverse synergy. Part V acknowledges the difficulty of the problems posed by the Fourth Amendment's capacious language, and suggests a number of strategies for dealing with the emerging problem posed by the interaction of rules generated through the process of adjudication.

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<sup>17</sup> See *Thornton v. United States*, 124 S. Ct. 2127, 2133 (2004) (O'Connor, J., concurring); see also *id.* (Scalia, J., concurring).

I. FOURTH AMENDMENT CHALLENGES AND DOCTRINAL  
RESPONSES: A PRELIMINARY OVERVIEW

As it was in *Bordeaux*, so it was in constitutional criminal procedure; the year of the century was 1961. That year saw the landmark decision in *Mapp v. Ohio*,<sup>18</sup> imposing against the states not just the Fourth Amendment (which had been part of Fourteenth Amendment due process, at least in theory, since 1949)<sup>19</sup> but the exclusionary remedy as well.<sup>20</sup> *Mapp* had dramatic consequences, both for the search-and-seizure practices of state and local police, but also for the body of Fourth Amendment law fashioned by the Supreme Court in federal cases up to that time.

*Mapp* changed the subject matter of Fourth Amendment law along at least three dimensions. First, the sheer scale of activity regulated by Fourth Amendment jurisprudence grew overnight by, roughly speaking, an order of magnitude. State and local police did then, and still do, the great majority of the nation's law enforcement.<sup>21</sup> Doctrine that once applied only to those few cases investigated by the FBI and the Treasury Department now applied to the Chicago police and the Tallageda County Sheriff's office.

Second, not only did the Fourth Amendment's coverage grow dramatically in scope, it also changed its character. The traditional felonies are typically state offenses. Doctrine that once constrained the enforcement of the revenue and narcotics laws now constrained the enforcement of laws against murder,

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<sup>18</sup> 367 U.S. 643 (1961).

<sup>19</sup> See *Wolf v. Colorado*, 338 U.S. 25 (1949), overruled by *Mapp*, 367 U.S. at 653.

<sup>20</sup> *Mapp*, 367 U.S. at 655.

<sup>21</sup> As Professor Stuntz points out, even after decades of growth in federal law enforcement responsibility, "while local police have primary responsibility for the mass of crime control, FBI agents have primary responsibility for very little." William J. Stuntz, *Terrorism, Federalism, and Police Misconduct*, 25 HARV. J.L. & PUB. POL'Y 665, 673 (2002).

rape and robbery.<sup>22</sup>

If a vastly larger and significantly more urgent docket of Fourth Amendment cases now reached the courts, a final important change had to do with the peculiar character of the exclusionary rule. It was the only instrument available to the judicial hand that might have enforced the Fourth Amendment as a practical matter, but suppression “rubs our noses” in the fact that limiting police authority necessarily enables dangerous wrongdoers to escape their just deserts.<sup>23</sup> One index of the degree of change incorporation entailed was the Warren Court's refusal to give *Mapp* retroactive effect; retroactive application would have opened the prison gates to no apparent purpose. Even a liberal majority was disturbed by the prospect of recasting law-enforcement across the country in the federal mold, especially if this was to be accomplished by the exclusion of reliable evidence.

The scope of the differences between the state and federal dockets at the time of *Mapp* had another corollary; the federal law had not been designed with state cases in mind. Federal agents did not do much in the way of routine patrol. A state's attorney or a police administrator who wanted to know the scope of police power to detain for investigation or to search incident to arrest—the two most common incidents of seizures and searches respectively—could not have found much guidance in the pages of the United States Reports. The stop for

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<sup>22</sup> The pre-*Mapp* federal cases typically involved prohibition or narcotics. See, e.g., *Walder v. United States*, 347 U.S. 62 (1954) (narcotics); *Olmstead v. United States*, 277 U.S. 438 (1928) (involving liquor), overruled in part by *Katz v. United States*, 389 U.S. 347 (1967), and *Berger v. New York*, 388 U.S. 41 (1967); *Agnello v. United States*, 269 U.S. 20 (1925) (involving cocaine); *Carroll v. United States*, 267 U.S. 132 (1925) (involving liquor). Post-*Mapp* cases brought more prosecutions for more violent crimes into the Court's docket. See, e.g., *Minnesota v. Olson*, 495 U.S. 91 (1990) (involving murder, armed robbery and assault); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (involving murder); *Terry v. Ohio*, 392 U.S. 1 (1968) (involving carrying a concealed weapon).

<sup>23</sup> The metaphor originated in John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1037 (1974).

investigation was a novel problem to the Court that decided *Terry v. Ohio*.<sup>24</sup> There was a line of pre-*Mapp* search-incident cases, but they conflicted with one another to such an extent that they were cited as examples of how confused and uncertain the Court's Fourth Amendment law had become.<sup>25</sup>

The situation placed the police in a difficult situation. They were called upon to conform to legal standards under circumstances when good lawyers disagreed about what those uncertain standards required; and police who guessed wrong jeopardized the public safety by triggering the exclusionary rule. Anthony Amsterdam, certainly no right-winger, called upon the Court to conceive of the Fourth Amendment as a vehicle for regulating the police, rather than, as it stood before *Mapp*, as a guarantee of a zone of personal privacy that trumped collective considerations of public security.<sup>26</sup> The Burger Court, which assumed the responsibility of Fourth Amendment adjudication about the same time as Amsterdam's famous Holmes Lectures, was, to put it as blandly as possible, somewhere to the right of Professor Amsterdam.

A working majority of the Burger Court undertook a three-

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<sup>24</sup> As Chief Justice Warren's law clerk for the Terry litigation later remarked:

I recall not being surprised by the vote to affirm in Terry, though I was taken a bit aback by its initial unanimity. (Justice Douglas voted at first with the majority but later changed his vote.) This unanimity, I soon learned, masked an almost complete lack of consensus about just how simultaneously to recognize and to cabin this new police authority. The Court's fumbling effort to find a satisfactory solution to this problem, and the evident difficulty of that effort, are for the most part plain on the face of the published opinions.

Earl C. Dudley, Jr., *Terry v. Ohio, the Warren Court and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 893-894 (1998).

<sup>25</sup> See *Chimel v. California*, 395 U.S. 752, 755 (1969) ("The decisions of this Court bearing [on the permissible scope of search incident to arrest] have been far from consistent, as even the most cursory review makes evident.").

<sup>26</sup> See Amsterdam, *supra* note 1, at 367 (contrasting "regulatory" and "atomistic" views of the Fourth Amendment and urging judicial adoption of the regulatory perspective).

pronged offensive in support of the police. At the level of definition, the Court frequently abdicated the role of regulating the police by declaring the challenged investigative technique as something other than a search or a seizure.<sup>27</sup> At the level of remedying infractions, the Court recognized a long list of exceptions to the application of the exclusionary rule.<sup>28</sup> In between—in the area of police behavior covered by the Fourth Amendment and enforced by the exclusionary rule—the Court worked hard (and surprisingly successfully) to define Fourth Amendment doctrine in the form of bright-line rules.<sup>29</sup> Police who violate clear limits, the sentiment seemed to be, have only themselves to blame.

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<sup>27</sup> See, e.g., *United States v. Place*, 462 U.S. 696, 707 (1983) (holding that a dog sniff for narcotics was not a search); *Smith v. Maryland*, 442 U.S. 735, 745-46 (1979) (holding that police use of pen register was not a search); *United States v. White*, 401 U.S. 745, 754 (1971) (holding that an electronic recording of suspect's conversation with undercover agent was not a search); Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 *WAKE FOREST L. REV.* 307, 316-36 (1998) (describing the shift from property to privacy based understanding and subsequent curtailment of privacy conception).

<sup>28</sup> See, e.g., *United States v. Leon*, 468 U.S. 897, 926 (1984) (holding that exclusionary rule does not apply to evidence obtained by police who execute a warrant unsupported by probable cause, absent police perjury in application, a magistrate not acting neutrally, or application so lacking in indicia of probable cause that no well-trained officer would believe the warrant to be lawful); *United States v. Havens*, 446 U.S. 620, 627-28 (1980) (holding that illegally-seized evidence was admissible to impeach defendant's testimony, even when government elicited the testimony to be impeached on direct examination); *United States v. Janis*, 428 U.S. 433, 459-60 (1976) (holding that exclusionary rule does not apply in civil proceedings, forfeiture excepted).

<sup>29</sup> See, e.g., *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (setting presumptive forty-eight hour limit on detention following warrantless arrest without post-arrest judicial determination of probable cause); *California v. Carney*, 471 U.S. 386, 394 (1985) (holding that automobile exception to warrant requirement applies even when vehicle to be searched is proximate to court house where warrants can be sought); *New York v. Belton*, 453 U.S. 454, 460 (1981) (holding that police may search passenger compartment and any containers therein incident to arrest of motorist).

Liberal critics objected to the narrow understanding of “searches and seizures” and to the exceptions to the exclusionary rule.<sup>30</sup> They accepted, however, the broader idea that the Fourth Amendment called upon the Court to implement its general purposes by making (as in “make up”) Fourth Amendment doctrine in light of contemporary needs.<sup>31</sup> With a few notable exceptions, the commentators also endorsed the desirability of formulating clear rules to guide the police.<sup>32</sup>

The process of formulating rules based on a balancing of interests has the appearance of judicial legislation. The Burger Court, however, crafted rules tending generally to give law enforcement an advantage. *Miranda* was a lightning-rod, but no more legislative in character than the Court's output in such decisions as *McLaughlin* or *Belton*. Off the bench, the Court's liberal critics accepted the form, but opposed the content, of the prevailing methodology. The Court's conservative critics accepted the content and went along with the form.

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<sup>30</sup> For a sampling with titles that can do double-duty as parentheticals, see, for example, John M. Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151 (1979); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984); Steven Wisotsky, *Crackdown: The Emerging “Drug Exception” to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

<sup>31</sup> I hasten to add that I agree with this basic project. For prominent examples in the legal literature, see 4 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 9.1(d), at 10-14 (3d ed. 1996) (arguing that the reasonableness clause authorizes some searches and seizures not supported by probable cause, but that application of the balancing test should proceed by formulating rules or standards to govern recurring categories of cases); Amsterdam, *supra* note 1, at 381-409 (arguing that Fourth Amendment requirements ought to vary from context to context in light of modern conditions, but also must be articulated as rules that the police can follow). Professor Amsterdam thought the best solution might be for courts to require the police to make regulations of their own, see Amsterdam, *supra* note 1, at 416-29, while Professor LaFave, who certainly favors police rule-making, thought the Supreme Court itself could do so. LAFAYE, *supra*, § 9.1(d), at 10-14.

<sup>32</sup> See DRIPPS, *supra* note 3, at 155-59, for a review of the academic bright-line rules debate.

The tension between determinacy and legitimacy, however, did not go away. It only waited the proper Jeremiah to denounce it. Enter Justice Scalia, who began complaining about the subjectivity of Fourth Amendment jurisprudence and pointing to common-law practice as the appropriate reference point to resolve the indeterminacy challenge.<sup>33</sup>

Now each of the moves the Justices have made is a genuine response to a genuine challenge. The need for clarity is real; the authoritative legal materials (text and history) are unclear. In suggesting that none of the moves thus far attempted has succeeded in achieving determinacy and legitimacy together, I also readily acknowledge how difficult the task of constitutional adjudication can be.<sup>34</sup> Courts are multi-member panels subject to the laws of collective decision theory.<sup>35</sup> They can decide only the cases that come before them, not hypothetical cases that might make better law than the actual cases. Still further, they are constrained by the arguments the parties choose to make or to omit.

One may, I believe, give full weight to these important caveats, and still suggest that courts can do better than they have in this area. Indeed, it is fair to say that much of what has gone wrong with Fourth Amendment jurisprudence reflects the procedural disadvantages of judge-made law. How to compensate for those disadvantages is a subject taken up in Part V. My basic thesis, however, has been described but not yet fully defended. To make my case that the Court's concern for clarity has undermined legitimacy, I focus on one important area of doctrine: the so-called warrant requirement, especially as it pertains to stops, searches, and arrests of motorists.

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<sup>33</sup> See Sklansky, *supra* note 9, at 1745-61.

<sup>34</sup> For a summary of the limitations on courts as policy-making bodies, see Amsterdam, *supra* note 1, at 350-52.

<sup>35</sup> See, e.g., Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (applying Arrow's Theorem to the Supreme Court). See generally Herbert Hovenkamp, *Arrow's Theorem: Ordinalism and Republican Government*, 75 IOWA L. REV. 949 (1990), for an account of Arrow's Theorem.

## II. DETERMINACY AND LEGITIMACY IN THE BURGER COURT

By the time *Mapp* imposed the exclusionary rule on the states in 1961, the federal courts had developed what might be called a warrant-clause model of the Fourth Amendment. The model's underlying assumption held that the police may not do more without judicial authorization than they may do with it. From this premise followed the principle that a search was presumptively "unreasonable" unless authorized by a warrant that met the standards of the warrant clause—probable cause, particularity, and sworn support. Exceptions for searches-incident-to-arrest and automobile searches were characterized as illustrations of the general principle that genuine exigency could excuse the failure to obtain a warrant.

Some modern scholars have little empathy for the Court's focus on warrants.<sup>36</sup> Empirical evidence indicates that warrant applications are only rarely denied; their role as safeguards of individual rights lies in the costs they impose on the police by way of the application process.<sup>37</sup> The founders surely detested general warrants, but specific warrants are plainly approved of by the text of the warrant clause.<sup>38</sup>

However one resolves the historical debate about the founders' views, there is no question that the Court's long struggle with the warrant requirement reflects the shared belief of the Justices that a warrant or very good reasons why

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<sup>36</sup> See, e.g., TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION: SEARCH, SEIZURE, AND SURVEILLANCE AND FAIR TRIAL AND FREE PRESS 41 (1967) (arguing that the Framers viewed all warrants as "an enemy"); Akhil Reed Amar, Fourth Amendment First Principles, 107 HARV. L. REV. 757, 771-80 (1994) (same).

<sup>37</sup> See Donald Dripps, Living with Leon, 95 YALE L.J. 906, 922-30 (1986) (reviewing empirical research on the search warrant process).

<sup>38</sup> See, e.g., Thomas Y. Davies, Recovering the Original Fourth Amendment, 98 MICH. L. REV. 547, 583-90 (discussing framers' views of specific warrants); Amsterdam, *supra* note 1, at 411 ("The framers of the [F]ourth [A]mendment accepted specific warrants as reasonable: the second clause of the [A]mendment tells us so.").



one could not be had supplied the touchstone of Fourth Amendment legitimacy. From *Weeks*<sup>39</sup> through *Hicks*,<sup>40</sup> not a single Justice has questioned the proposition that the Fourth Amendment sometimes requires warrants. This was not simply the view of icons like Holmes and Brandeis, or of liberals like Murphy and Douglas, but also of Justices sensitive to both history and the needs of law enforcement. Justice Harlan, for example, found the warrant requirement implicit in the constitutional text; Justice White, who read the Fourth Amendment as requiring only reasonableness, also deemed warrants essential to reasonableness, albeit in fewer cases than did Justice Harlan. Ultimately, I argue, these same justices felt obliged by the need for clarity to abandon the warrant requirement they viewed as the touchstone of legitimacy.

Prior to *Mapp*, the federal courts accommodated the warrant requirement with law enforcement interests by taking a narrow, trespass-based view of the meaning of "searches,"<sup>41</sup> and generously interpreting the search-incident-to-arrest doctrine. Police having probable cause to arrest the suspect, but unable or unwilling to obtain a search warrant for his abode, could generally arrange a lawful arrest of the suspect at his residence. The Supreme Court's cases, although inconsistent, generally supported a broad search of the premises incident to the arrest.<sup>42</sup>

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<sup>39</sup> *Weeks v. United States*, 232 U.S. 383 (1914). *Weeks* is famous for the birth of the exclusionary rule, but the reason why the evidence was tainted was that the United States marshal had entered private premises without a warrant. *Weeks*, 232 U.S. at 386.

<sup>40</sup> *Arizona v. Hicks*, 480 U.S. 321, 326 (1987) (holding that after exigency justifying initial warrantless entry has ceased to exist, police must leave and obtain a warrant before any further searching absent some other "recognized exceptions to the warrant requirement").

<sup>41</sup> See, e.g., *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (holding that wiretapping was not a search because suspect was not the victim of any trespass by government agents).

<sup>42</sup> For a broad discussion, see *Chimel v. California*, 395 U.S. 752 (1969).

The Warren Court for a time tried to apply the warrant requirement embedded in the pre-*Mapp* federal cases without modification. *Aguilar*<sup>43</sup> reflects the rigors of the requirements set out in the warrant clause, and *Hoffa*<sup>44</sup> reflects the narrow interpretation of "searches." State law-enforcement officers often could arrest on probable cause for vagrancy and like offenses, and then take advantage of the search-incident-to-arrest doctrine. This accommodation of the competing interests, however, was living on borrowed time.

The building inspection cases hold that searches not conforming to the warrant clause can be "reasonable,"<sup>45</sup> and *Terry*<sup>46</sup> extended this principle to police work. *Katz*<sup>47</sup> opened the door to classifying a wider variety of police methods as searches. The invalidation of broad vagrancy ordinances<sup>48</sup> greatly reduced the utility of search-incident to arrest to circumvent the warrant requirement.

The Court thus imposed an increasing price for judicial insistence on warrants supported by probable cause. As more police methods became subject to the Fourth Amendment, and the search-incident exception became less global, the warrant clause became an increasing obstacle to law enforcement. The need for clear guidance for police is especially urgent in the

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<sup>43</sup> *Aguilar v. Texas*, 378 U.S. 108, 115 (1964) (holding that affidavit reciting conclusory tip failed to establish probable cause).

<sup>44</sup> *Hoffa v. United States*, 385 U.S. 293, 303 (1966) (holding that government's forgiveness of suspect's old friends' crimes in exchange for friend's spying on suspect was not a search).

<sup>45</sup> See, e.g., *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967) (holding that governmental interest justifies search without a warrant if "reasonable legislative or administrative standards for conducting an area inspection" apply to dwellings).

<sup>46</sup> *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding "stop-and-frisk" performed without a warrant was reasonable).

<sup>47</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967) (holding all warrantless searches of the home as "per se unreasonable").

<sup>48</sup> See, e.g., *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972) (invalidating vagrancy ordinance as unconstitutionally vague).

context of the warrant requirement. When police make an error about probable cause or reasonable suspicion, it is less than certain that they ever would have established probable cause or reasonable suspicion. Suppressing the fruits when it turns out that the police lacked adequate justifying suspicion therefore deprives the public of a case that could not have been made by law-abiding police. By contrast, when the police have probable cause but fail to obtain a warrant, suppressing the fruits costs the public a case which could have made by law-abiding police.

For a decade after Warren Burger took his seat, the Court was closely and inconsistently divided between the warrant-based approach, championed by Justices Harlan and Stewart, and an *ad hoc* approach focused on reasonableness championed by Justice White. Eventually the Court came down decisively in favor of a reasonableness model expressed in the form of bright-line rules, the very model now under attack by common-law historical methodology.

Early in 1969, while Warren was still Chief Justice, Harlan wrote the Court's opinion in *Spinelli v. United States*.<sup>49</sup> *Spinelli* formalized the *Aguilar* Court's approach to search warrants based on an informant's tip into a "two-pronged test".<sup>50</sup> The affidavits supporting the warrant application must aver both that the informant is reliable, and disclose the informant's basis for believing that the search would secure evidence of crime.<sup>51</sup>

Later that term, the Court clarified, and probably narrowed, the scope of the search-incident-to-arrest doctrine. Search-incident is the most commonly-invoked exception to the warrant requirement. The prevailing rule permitted the police to search the immediate area of a person lawfully arrested without a warrant, although applications of this rule varied widely. In *Chimel v. California* the Court, per Justice Stewart, based the exception on the risk that the suspect might destroy

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<sup>49</sup> 393 U.S. 410 (1969).

<sup>50</sup> *Spinelli*, 393 U.S. at 413.

<sup>51</sup> *Id.*

incriminating evidence or forcibly resist. Thus, any search that went beyond areas into which the suspect might reach, absent a warrant, was unreasonable.<sup>52</sup>

The warrant approach and the reasonableness approach were both in evidence early in 1970. In one case, *Vale v. Louisiana*,<sup>53</sup> the Court followed the warrant approach. Vale was a suspected narcotics dealer for whose arrest the police had warrants.<sup>54</sup> They had information that he could be found at his mother's house, which they placed under surveillance.<sup>55</sup> A known narcotics user drove up to the house; the driver honked, and Vale left the house, looked carefully up and down the street, and had a brief conversation with the driver.<sup>56</sup> The police arrested both men, then searched the house.<sup>57</sup> Evidence was found in a bedroom.<sup>58</sup>

The Supreme Court suppressed the evidence because the police had no search warrant.<sup>59</sup> The search was not incident to the arrest, because Vale was arrested outside and obviously could not, under the *Chimel* test, "grab" anything out of the bedroom.<sup>60</sup> Vale had given no consent to the search.<sup>61</sup> There was no emergency that might justify dispensing with a warrant, because the police had established that no one else was in the house well before they searched the bedroom for drugs.<sup>62</sup> Indeed, the majority indicated that the police, without a warrant, could not so much as enter the house to make sure that a confederate of Vale's was not within, poised to destroy

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<sup>52</sup> *Chimel v. California*, 395 U.S. 752, 763 (1969).  
<sup>53</sup> 399 U.S. 30 (1970).  
<sup>54</sup> *Vale*, 399 U.S. at 36.  
<sup>55</sup> *Id.* at 36.  
<sup>56</sup> *Id.* at 37.  
<sup>57</sup> *Id.*  
<sup>58</sup> *Id.* at 33.  
<sup>59</sup> *Id.*  
<sup>60</sup> *Id.* at 33-34.  
<sup>61</sup> *Id.* at 35.  
<sup>62</sup> *Id.* at 34.

the evidence.<sup>63</sup>

In *Chambers v. Maroney*,<sup>64</sup> decided the same day as *Vale*, the Court upheld the warrantless search of an automobile that had been impounded by the police.<sup>65</sup> The long-recognized automobile exception was predicated on the mobility of cars and the inconvenience attending forcing motorists to wait while a warrant is sought. But these considerations were absent in *Chambers*.<sup>66</sup>

Justice White reasoned that so long as the police had probable cause for the search, “there is little to choose in terms of practical consequences between an immediate search without a warrant and the car’s immobilization until a warrant is obtained.”<sup>67</sup> This is true, so far as it goes; but it neglects the possibility that probable cause might be debatable. In such a case, having a judge make the call rather than the police is precisely what the warrant requirement is all about. Put another way, if probable cause is simply assumed, there is equally “little to choose” between searching a *house* without a warrant now, and searching it with a warrant later.

Justice Harlan, the lone dissenter, clung to the warrant-clause model. Fidelity to the warrant requirement meant that “where exceptions are made to accommodate the exigencies of particular situations, those exceptions be no broader than necessitated by the circumstances presented.”<sup>68</sup> That *Vale* and *Chambers* could issue from the same Court on the same day demonstrates the depth of the Justices’ ambivalence about the warrant clause.

The approach taken in *Chambers* would eventually prevail. Nonetheless, the warrant-centered approach was a long time dying. In *Coolidge v. New Hampshire*,<sup>69</sup> Justices Douglas,

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<sup>63</sup>

Id.

<sup>64</sup>

399 U.S. 42 (1970).

<sup>65</sup>

*Chambers*, 399 U.S. at 48.

<sup>66</sup>

Id. at 42.

<sup>67</sup>

Id. at 52 (footnote omitted).

<sup>68</sup>

Id. at 61 (Harlan, J., dissenting).

<sup>69</sup>

403 U.S. 443 (1971).

Brennan and Marshall joined Justice Stewart in reversing a murder conviction because the state courts had admitted evidence obtained by forensic tests performed on the defendant's automobile.<sup>70</sup> Police, following the arrest of the defendant, had seized the car pursuant to a search warrant; and the majority did not hold that the supporting affidavits failed to establish probable cause.<sup>71</sup>

Rather, the Court threw out the warrant because it had been issued by the State Attorney General, sitting as a justice of the peace, while he was directing the investigation into the crime.<sup>72</sup> "Since he was not the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all."<sup>73</sup>

Justice Stewart then methodically disposed of the state's contention that the search fell into at least one of three distinct exceptions to the warrant requirement.<sup>74</sup> The search was not incident to the arrest, because once an "accused is under arrest and in custody, then a search [of his car] made at another place, without a warrant, is simply not incident to the arrest."<sup>75</sup> Nor was the evidence in plain view, for its discovery was the fruit of the warrantless seizure of the automobile.<sup>76</sup>

[N]o amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not

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<sup>70</sup> Coolidge, 403 U.S. at 449.

<sup>71</sup> Id. at 450.

<sup>72</sup> Id. at 453.

<sup>73</sup> Id.

<sup>74</sup> Id.

<sup>75</sup> Id. at 457 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)) (bracketed material supplied by the Coolidge Court).

<sup>76</sup> Id. at 464-73.

enter and make a warrantless seizure.

From the perspective of the warrant clause, it was quite straightforward.

As for the automobile exception:

The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears . . . . In short, by no possible stretch of the legal imagination can this be made into a case in where "it is not practicable to secure a warrant," and the "automobile exception," despite its label, is simply irrelevant.<sup>78</sup>

The defendant was under arrest and the vehicle was being watched by officers, there was no excuse for the failure of the police to obtain a genuine judicial warrant.<sup>79</sup> Justice Stewart acknowledged *Chambers*,<sup>80</sup> but gave no hint of how that case could be distinguished.<sup>81</sup>

In truth, *Chambers* had disregarded the pre-*Mapp* cases' focus on the warrant clause, so that Justice Stewart had a preponderance of precedent on his side. Nonetheless, the holding was supported, against the vigorous and even bitter dissents of four Justices, only by the ambivalent concurrence of Justice Harlan.<sup>82</sup> In Harlan's view, though not without some reservation, Stewart had correctly insisted on the primacy of the warrant clause in construing the Fourth Amendment, and the illegality of the search that followed.<sup>83</sup> But Harlan did not

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<sup>77</sup> Id. at 468 (citations omitted).

<sup>78</sup> Id. at 461-62 (citations omitted).

<sup>79</sup> Id. at 447.

<sup>80</sup> Id. at 458.

<sup>81</sup> Justice White, dissenting, agreed the *Chambers* did not control, but only because the car was searched after having been impounded indefinitely. See id. at 523 (White, J., dissenting). Justice Stewart did not take this line, prompting White to record that "I disagree strongly with the majority's reasoning for refusing to apply" *Chambers*. Id.

<sup>82</sup> Id. at 490-91 (Harlan, J., concurring).

<sup>83</sup> Id. at 491. Harlan might not have agreed with Stewart's treatment

believe that “anything the State did in this case could be said to offend those values which are at the core of the Fourth Amendment.”<sup>84</sup>

*Mapp* and *Ker v. California*,<sup>85</sup> which had applied the existing federal law of search and seizure to the states without modification or exception, laid at the basis of Harlan's disquiet with the result in *Coolidge*.<sup>86</sup> The Fourth Amendment itself imposed standards so high that the states should not be bound by them, especially when exclusion of evidence was the price of error. So long as the law required state police to comply with the federal standard, however, Harlan was “unwilling to lend [his] support to setting back the trend of [the Court's] recent decisions”, principally *Chimel*.<sup>87</sup> To do so would “go far toward relegating the warrant requirement of the Fourth Amendment to a position of little consequence in federal search and seizure law . . . .”<sup>88</sup>

The trend Harlan wrote of was about to be checked. Dissenting in *Coolidge*, Chief Justice Burger decried “the monstrous price we pay for the exclusionary rule in which we seem to have imprisoned ourselves.”<sup>89</sup> Justice Black dissented, both on the ground that the evidence, if illegally seized, should have been admitted anyway; and on the ground that the search matched all three of the exceptions rejected by Stewart.<sup>90</sup> In his view, predictably, the root of the problem was not incorporation, but the willingness of his colleagues to decree unsavory results not

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of the search-incident theory under pre-*Chimel* cases, which the plurality thought to govern *Coolidge*'s case. In his view, however, *Chimel* applied retroactively. See *id.* at 491 n.\*.

<sup>84</sup> *Id.* at 491 (quoting *Wolf v. Colorado*, 338 U.S. 25, 25 (1949), overruled by *Mapp v. Ohio*, 367 U.S. 643 (1961)).

<sup>85</sup> 374 U.S. 23 (1963).

<sup>86</sup> *Coolidge*, 403 U.S. at 491.

<sup>87</sup> *Id.* at 492.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 493 (Burger, C.J., dissenting).

<sup>90</sup> *Id.* at 493 (Black, J., dissenting).



intended by the framers.<sup>91</sup> Justice White dissented on plain-view grounds, and Justice Blackmun joined the exclusionary rule portion of Black's opinion.<sup>92</sup>

After *Coolidge*, the momentum shifted, albeit gradually and erratically, away from a warrant-clause model and toward a model based on unconstrained notions of reasonableness. The watershed decision was *United States v. Robinson*.<sup>93</sup> A District of Columbia police officer named Jenks arrested Robinson for driving without a license.<sup>94</sup> Department policy called for searching the person of any person arrested, and Jenks followed the policy.<sup>95</sup> In the course of the search, he felt a crumpled cigarette pack in the suspect's coat pocket.<sup>96</sup> In the pack were objects that were not cigarettes.<sup>97</sup> Pulling the pack from Robinson's pocket, the officer opened the pack, revealing fourteen gelatine capsules of heroin.<sup>98</sup>

Robinson sought to suppress the heroin as the fruit of an illegal search.<sup>99</sup> The long-recognized authority to search an arrested person without a warrant, he argued, was cabined by exigency.<sup>100</sup> *Chimel* had limited the area that might be searched incident to an arrest to those areas from which the suspect might snatch either evidence or a weapon.<sup>101</sup> If Jenks had no reason to believe that weapons or evidence might be on Robinson's person, then the reasoning of *Chimel* required holding the search unreasonable for want of both probable cause and a warrant.<sup>102</sup>

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91           Id. at 496.  
92           Id. at 510.  
93           414 U.S. 218 (1973).  
94           Robinson, 414 U.S. at 219.  
95           Id. at 221-22.  
96           Id. at 223.  
97           Id.  
98           Id.  
99           Id. at 220.  
100          Id.  
101          Id.  
102          Id. at 227.

The majority rejected Robinson's claim, and the warrant-clause model along with it. Justices Rehnquist and Powell had replaced Justices Black and Harlan; and Justice Rehnquist wrote for the majority. The authority to search incident to arrest did not, the majority wrote, derive from exigency in particular cases.<sup>103</sup> Rather, the need for immediate search in even a few cases justified the authority to search in every case.<sup>104</sup>

The Court registered its "fundamental disagreement" with the suggestion that,

there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest. . . . A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.<sup>105</sup>

Thus, the need for bright-line rules was married to the reasonableness model of the Fourth Amendment, and the Burger Court had found its paradigm for searches and seizures.

What went undecided in *Robinson* was the question of whether the police could make full-blown arrests whenever the police

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<sup>103</sup> Id. at 236.

<sup>104</sup> Id. at 235.

<sup>105</sup> Id. at 235. In a companion case, *Gustafson v. Florida*, 414 U.S. 260 (1973), the Court held that this passage means what it says. Florida conceded that Gustafson was not searched pursuant to a general police policy, that he was not dangerous, and that the crime for which he was arrested (driving without a license) was neither violent nor susceptible to proof by evidence that might be discovered during a pat-down search. *Gustafson*, 414 U.S. at 265. None of that mattered; given that Gustafson was lawfully arrested, his person could lawfully be searched. Id. at 266.

had probable cause to believe that the suspect has committed even a trivial criminal offense. In *Robinson*, police regulations apparently required police to arrest, rather than simply cite, those stopped for driving without a license,<sup>106</sup> and the court of appeals had concluded that the arrest had not been made for the ulterior purpose of searching for narcotics.<sup>107</sup> In the companion case of *Gustafson v. Florida*, however, “the officer . . . was not required to take the petitioner into custody by police regulations as was in *Robinson* . . . .”<sup>108</sup> Justice Powell and Justice Stewart each wrote separately to express the view that Gustafson had not challenged the validity of the underlying arrest, leaving open the question—later resolved so unhappily in *Atwater*—of whether the Fourth Amendment permits custodial arrests for all offenses however trivial.<sup>109</sup>

The search-incident exception would not matter so much if the Fourth Amendment required *arrest* warrants whenever the police “seize” the suspect’s “person”. If, on the other hand, the Fourth Amendment permitted the police to force entry into a suspect’s residence without either a search warrant for the

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<sup>106</sup> See *Robinson*, 414 U.S. 222 n.2.

<sup>107</sup> See *id.* at 222 n.1.

<sup>108</sup> *Gustafson*, 414 U.S. at 265.

<sup>109</sup> Justice Stewart stated:

It seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments. But no such claim has been made. Instead, the petitioner has fully conceded the constitutional validity of his custodial arrest.

*Id.* at 266-67 (Stewart, J., concurring). Justice Powell agreed Gustafson might have been able to challenge the validity of his arrest:

In *Gustafson* . . . the petitioner conceded the validity of the custodial arrest, although that conclusion was not as self-evident as in *Robinson*. Gustafson would have presented a different question if the petitioner could have proved that he was taken into custody only to afford a pretext for a search actually undertaken for collateral objectives. But no such question is before us.

*Id.* at 238 n.2 (citations omitted).

premises or an arrest warrant for the person, the warrant requirement would be a virtual dead letter. Probable cause to search and probable cause to arrest are distinct, but the two species of probable cause frequently coincide, especially in cases involving possession of contraband.

The solution to the problem of warrantless arrests mirrored the solution that would more slowly emerge for warrantless searches. In February of 1975, the Court dealt with a challenge to pretrial confinement of Florida suspects who had been arrested absent warrants (at least so far as the record showed) and then charged by information.<sup>110</sup> Thus, the only officials who had passed on the question of probable cause to hold them for trial were the police and the prosecutor. Some of the detainees filed a class action civil rights suit in federal court, seeking an order compelling the state to test the probable cause issue at a judicial hearing.<sup>111</sup> The lower federal courts held that the state must test probable cause at an adversary judicial hearing at which the suspect is represented by counsel.<sup>112</sup>

If the Supreme Court had agreed with this holding, the warrant requirement might have faded into irrelevance in the arrest context. Why trouble with an *ex parte*, high-volume procedure to obtain an arrest warrant, when an arrested person would soon enough be able to test probable cause at a full-blown adversary hearing? And if a judge has issued a warrant before arrest, why revisit the probable cause issue once again? If, on the other hand, the Supreme Court had agreed with the state's position that a judicial determination of probable cause to hold for trial is unnecessary, why should any officer ever have to obtain an arrest warrant?

In *Gerstein*, the Court split the difference by holding that an individual arrested without a warrant has a Fourth Amendment right to a prompt judicial determination of probable cause, but not at an adversary hearing.<sup>113</sup> All that was required after

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<sup>110</sup> Gerstein v. Pugh, 420 U.S. 103, 105 (1974).

<sup>111</sup> Gerstein, 420 U.S. at 106-07.

<sup>112</sup> Id. at 107.

<sup>113</sup> Id. at 125-26.

arrest was an appearance before a neutral and detached magistrate.<sup>114</sup> The first appearance was not a “critical stage” of the proceedings at which the right to counsel applied.<sup>115</sup>

In effect, the only difference between the constitutionally-required first appearance and an application for an arrest warrant is the presence of the suspect at the former. Indeed, suspects arrested on warrants have no right to another judicial determination of probable cause. The Court required only that the state “provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest.”<sup>116</sup>

Gerstein prepared the way for the decision, in the following year, of *United States v. Watson*.<sup>117</sup> *Watson* held that the Fourth Amendment's warrant requirement does not apply to arrests effected in a public place when the crime for which the arrest is made is a felony, or is a misdemeanor committed in the officer's presence.<sup>118</sup> Justice White wrote the Court's opinion, and relied heavily on the historical practice, reflected in both state and federal statutes, permitting warrantless arrests.<sup>119</sup> Justice Powell, concurring, succinctly captured the difficulty: “Since the Fourth Amendment speaks equally to both searches and seizures, and since an arrest, the taking hold of one's person, is quintessentially a seizure, it would seem that the constitutional provision should impose the same limitations upon arrests that it does upon searches.”<sup>120</sup>

If that were so, then arrest warrants, like search warrants, would be required except in narrowly-defined categories predicated on exigency. Justice Powell himself, however, acknowledged that “historical and policy reasons . . . justify the Court's

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<sup>114</sup> Id. at 114.

<sup>115</sup> Id. at 122.

<sup>116</sup> Id. at 125.

<sup>117</sup> 423 U.S. 411 (1976).

<sup>118</sup> *Watson*, 423 U.S. at 418.

<sup>119</sup> Id.

<sup>120</sup> Id. at 428.

sustaining of a warrantless arrest upon probable cause, despite the resulting divergence between the constitutional rule governing searches and that now held applicable to seizures of the person.<sup>121</sup> Even Justice Stewart, the strongest supporter of search warrants, concurred in *Watson*.<sup>122</sup> He wrote separately solely to reserve the question of whether an officer might need a warrant to enter private premises to effect an arrest.<sup>123</sup> Only Brennan and Marshall dissented.<sup>124</sup>

*Robinson* and *Watson* emboldened the Ford Administration's Solicitor General's Office to attack the warrant requirement for searches. A perfect case was at hand: *United States v. Chadwick*.<sup>125</sup> Amtrak workers in San Diego became suspicious of two Boston-bound passengers, Machado and Leary, who had loaded a heavy footlocker, leaking talcum powder, onto a train.<sup>126</sup> The pair behaved suspiciously, the trunk was unusually heavy, and the railroad workers knew that talcum was used to mask the scent of marijuana and hashish.<sup>127</sup> They notified authorities, and federal narcotics agents, accompanied by a drug-sniffing dog, met the train in Boston.<sup>128</sup>

Machado and Leary moved the footlocker by baggage cart into the departure area.<sup>129</sup> The dog conveyed to the agents the presence of illegal drugs within; but Machado and Leary were not put wise.<sup>130</sup> Instead, Chadwick met the two smugglers and helped them load the footlocker into the trunk of Chadwick's car.<sup>131</sup> The agents placed the three men under arrest while the

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<sup>121</sup> Id. at 432.  
<sup>122</sup> Id. at 433 (Stewart, J., concurring).  
<sup>123</sup> Id. at 433 (Stewart, J., dissenting).  
<sup>124</sup> Id. at 433 (Marshall, J., dissenting).  
<sup>125</sup> 433 U.S. 1 (1977).  
<sup>126</sup> Chadwick, 433 U.S. at 3.  
<sup>127</sup> Id.  
<sup>128</sup> Id.  
<sup>129</sup> Id. at 4.  
<sup>130</sup> Id.  
<sup>131</sup> Id.

automobile trunk was still open.<sup>132</sup> The two-hundred pound footlocker was removed to the federal building, where agents either opened or broke the lock and discovered marijuana.<sup>133</sup> They had not bothered to obtain a warrant.<sup>134</sup>

The district court and the First Circuit rejected the government's invocation of the search-incident-to-arrest and automobile exceptions to the warrant requirement. The government then petitioned the First Circuit for a rehearing, raising the argument that would take the case to the Supreme Court: that the Fourth Amendment was about reasonableness, not about warrants. The cases in which reasonableness depended on a warrant, the government argued, were the exceptions rather than the rule.

The First Circuit rejected this submission, and the case came to the Supreme Court on the government's petition for certiorari. In a brief prepared by, among others, Robert Bork and Frank Easterbrook, the government asked the Court to apply the reasoning of *Robinson* and *Watson* to the search of personal effects seized from a person on the street or from a vehicle. The government's theoretical premise was "that the guiding standard of the Fourth Amendment is reasonableness . . . and that not all interferences with a person's liberty or privacy are of equal magnitude or demand equal protection."<sup>135</sup> The operational implication was that warrants are required only when searches invade "core privacy interests" such as "homes, offices, or private communications."<sup>136</sup> Only then are "the particular privacy interest[s] at stake . . . sufficiently important that any intrusion must be justified not only by probable cause but also by a determination of probable cause by a neutral and detached magistrate in advance of the search."<sup>137</sup>

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<sup>132</sup> Id.

<sup>133</sup> Id.

<sup>134</sup> Id.

<sup>135</sup> Brief for Petitioner, at \*9, *United States v. Chadwick*, 433 U.S. 1 (1977) (No. 75-1721), available at 1977 WL 189820.

<sup>136</sup> Id. at \*12.

<sup>137</sup> Id. at \*10.

The government invoked history, policy and precedent in support of its theory. Historically, there was no evidence indicating that at the time of Fourth Amendment's adoption warrants were required to search personal effects. History was in any event quite clear that the founders saw warrants themselves as instruments of oppression. From the policy standpoint, warrants cost time and trouble to obtain, and enforcing the warrant requirement implies losing convictions because of inevitable police errors about when a warrant is required and when the search-incident or automobile exceptions apply. Precedent approved warrantless automobile searches and warrantless arrests, even absent exigent circumstances. Were not effects just as mobile as people and vehicles? Was there not a diminished expectation of privacy in containers carried about on the street, as opposed to the contents of the home?

As often happens when the batter swings for the fences, the government struck out. The Court unanimously rejected the government's theory. Chief Justice Burger, who had decried the "monstrous price" of the exclusionary rule in *Coolidge*, wrote a majority opinion stoutly asserting that "the protections a judicial warrant offers against erroneous governmental intrusions are effective whether applied in or out of the home."<sup>138</sup> The Fourth Amendment in terms protects "persons, houses, papers, and effects"; the "absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America";<sup>139</sup> and in any event the Framers "intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth."<sup>140</sup>

With respect to the instant case, people put locks on their luggage precisely to safeguard its privacy. The automobile exception did not extend to locked containers inside vehicles, because "a person's expectations of privacy in personal luggage

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<sup>138</sup> Chadwick, 433 U.S. at 9-10.

<sup>139</sup> Id. at 8.

<sup>140</sup> Id. at 9.



are substantially greater than in an automobile."<sup>141</sup> The search-incident claim was foreclosed by *Chimel*. There being no exigency, such as might have existed if the police suspected explosives, rather than cannabis, in the footlocker, the warrantless search was illegal even though supported by probable cause.

Justice Blackmun and Justice Brennan wrote separately to castigate the Solicitor General's office for advancing its novel theory. Blackmun, dissenting, found it "unfortunate that the Government sought a reversal in this case primarily to vindicate an extreme view of the Fourth Amendment that would restrict the protection of the Warrant Clause to private dwellings and a few other 'high privacy' areas."<sup>142</sup> Blackmun, who was joined by Rehnquist, quite agreed with the Court about the government's theory; but in his view the government's submission distracted attention from the applicability of the search-incident exception, which the Justice thought justified a warrantless search.<sup>143</sup>

Brennan, concurring, found it "deeply distressing that the Department of Justice, whose mission is to protect the constitutional liberties of the people of the United States, should even appear to be seeking to subvert them by extreme and dubious legal arguments."<sup>144</sup> He found it "gratifying that the Court today unanimously rejects the government's position."<sup>145</sup>

Two years later, in *Arkansas v. Sanders*,<sup>146</sup> the Court reaffirmed the *Chadwick* holding. A reliable informant told Little Rock police that a man named Sanders would arrive on an American Airlines flight at 4:35 that afternoon, carrying a green suitcase containing marijuana.<sup>147</sup> Sanders arrived as predicted, met another man, and the pair took a cab from the airport after

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<sup>141</sup> Id. at 13.  
<sup>142</sup> Id. at 17 (Blackmun, J., dissenting).  
<sup>143</sup> Id. at 19 (Blackmun, J., dissenting).  
<sup>144</sup> Id. at 16 (Brennan, J., concurring).  
<sup>145</sup> Id. (Brennan, J., concurring).  
<sup>146</sup> 442 U.S. 753 (1979).  
<sup>147</sup> *Sanders*, 442 U.S. at 755.

placing the suitcase in the trunk of the taxi.<sup>148</sup> The police pulled the taxi over and searched the suitcase, discovering marijuana.<sup>149</sup> Following *Chadwick*, the Supreme Court of Arkansas suppressed the evidence, and the Supreme Court affirmed.<sup>150</sup>

Justice Powell's majority opinion admitted that the Little Rock "police acted properly—indeed commendably—in apprehending respondent and his luggage."<sup>151</sup> They did not, however, act *reasonably* when they searched the suitcase without a warrant. The state "failed to carry its burden of demonstrating the need for warrantless searches of luggage properly taken from automobiles."<sup>152</sup>

Justice Blackmun dissented, joined only by Rehnquist.<sup>153</sup> Blackmun doubted the value of the warrant requirement: "Since the police, by hypothesis, have probable cause to seize the property, we can assume that a warrant will be routinely forthcoming in the overwhelming majority of cases."<sup>154</sup> On the other side of the scales, the indeterminacy of the distinction between the automobile (which could be searched without a warrant, given probable cause) and objects within it (at least some of which could not be searched without a warrant) would baffle the police.<sup>155</sup>

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<sup>148</sup>

Id.

<sup>149</sup>

Id.

<sup>150</sup>

Id. at 756.

<sup>151</sup>

Id. at 761.

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Id. at 763. The state failed despite the efforts of its then-former Attorney General, Bill Clinton, who worked on the brief for Arkansas. Id.

<sup>153</sup>

Id. at 768 (Blackmun, J., dissenting).

<sup>154</sup>

Id. at 770 (Blackmun, J., dissenting).

<sup>155</sup>

Id. at 772 (Blackmun, J., dissenting).

Or suppose the arresting officer opens the car's trunk and finds that it contains an array of containers—an orange crate, a lunch bucket, an attaché case, a duffelbag, a cardboard box, a backpack, a totebag, and a paper bag. Which of these may be searched immediately, and which are so "personal" that they must be impounded for future search only pursuant to a warrant? . . . The lines that will be drawn will not make much sense in

The Chief Justice concurred, and replied to Blackmun's argument.<sup>156</sup> The Court's failure to adopt "a 'clear' rule [was] not cause for lament, however desirable it might be to fashion a universal prescription governing the myriad Fourth Amendment cases that might arise. The Court is construing the Constitution, not writing a statute or a manual for law enforcement officers."<sup>157</sup>

The enthusiasm for warrants was not limited to searches, but included arrests as well. In *Payton v. New York*<sup>158</sup> the Justices resolved the issue left open in *Watson*: whether police, having probable cause but no warrant to arrest the suspect for a felony, may force entry to private premises to effect the arrest. Payton was convicted of murder; some of the evidence against him was seized in plain view by officers who had arrested him inside his house after forcing the door with pry-bars.<sup>159</sup> The police had no warrant, but a state statute authorized warrantless entries of the suspect's home, and the New York Court of Appeals upheld the constitutionality of the statute.<sup>160</sup> The Supreme Court reversed.<sup>161</sup>

Justice Stevens wrote for a six-justice majority. The majority reasoned that if a warrant is required to search a house for evidence, a warrant logically must also be obtained to enter the house to arrest.<sup>162</sup> The trouble with this syllogism was history: warrantless entries to arrest had been approved by American

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terms of the policies of the Fourth and Fourteenth Amendments. And the heightened possibilities for error will mean that many convictions will be overturned, highly relevant evidence again will be excluded, and guilty persons will be set free in return for little apparent gain in precise and clearly understood constitutional analysis.

Id. at 772. (Blackmun, J., dissenting).

<sup>156</sup> Id. at 766 (Burger, C.J., concurring).

<sup>157</sup> Id. at 768 (Burger, C.J., concurring).

<sup>158</sup> 445 U.S. 573 (1980).

<sup>159</sup> Payton, 445 U.S. at 566-67.

<sup>160</sup> Id. at 577.

<sup>161</sup> Id. at 576.

<sup>162</sup> Id. at 589.

courts for hundreds of years. Justice Stevens made a valiant effort to characterize the common-law rule at the time of the Fourth Amendment's adoption as uncertain; but there was nothing uncertain about American practice in the two hundred years since.<sup>163</sup> Forced to choose between logic and history, the majority chose logic.

The choice reflects the odd historical position of the warrant requirement. The framers saw warrants as immunizing officers against actions for false arrest or trespass. The common-law supplied the citizen's protection against government agents, and warrants took that protection away. Indeed, as Justice White pointed out in his *Payton* dissent, the original version of the Fourth Amendment did not contain the clause forbidding unreasonable searches, but simply forbade warrants that were general, lacked probable cause, or were unsupported by oath.<sup>164</sup> The founders, in other words, thought that the common-law tort remedy would ensure the reasonableness of warrantless searches (they certainly had no preference for general warrantless searches over general warrants; the vice of the latter was that they abrogated the serious penalties applicable to the former).<sup>165</sup> Thus the constitutional provision need only restrain the government's resort to warrants.

Only with the recognition, in the twentieth century, that the tort remedy had become ineffectual, did a warrant requirement begin to make sense. If the common law had lost its teeth, the exclusionary rule offered constitutional fangs to replace them. Until the 1984 decision in *United States v. Leon*,<sup>166</sup> however, warrants were not thought to immunize searches or arrests

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<sup>163</sup> Id. at 598.

<sup>164</sup> Id. at 610 (White, J., dissenting).

<sup>165</sup> See Davies, *supra* note 38. Professor Davies makes the point that some founding-era authorities held that trespass liability might still attach to the witnesses who supported the warrant application (which in some cases would include the executing officers themselves) when a search under warrant failed to find the suspected items. Id. at 589. Thus it is not quite right to say that warrants eliminated liability for trespass; but they did sharply limit it. See id.

<sup>166</sup> 468 U.S. 897 (1984).

against motions to suppress. The rise of the warrant requirement during Prohibition and then under Justice Jackson's post-Nuremberg influence reflects a judicial admission that the exclusionary rule had replaced common-law tort actions as the primary remedy for illegal searches and seizures.

If history is set aside, the majority's position seems very strong. If the police needed a warrant to break into Chadwick's footlocker, how could they break into Payton's house without one? Strictly speaking, police entering the suspect's home to arrest him engage in two, rather than one, Fourth Amendment events. They are searching the house for the suspect, whom they hope to seize. But, the *Payton* Court concluded that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."<sup>167</sup> *Chimel* would govern the scope of any warrantless search that took place incident to the arrest.

Does an arrest warrant "implicitly" carry any further power to search? A year after *Payton*, in *Steagald v. United States*,<sup>168</sup> the Court answered this question in the negative. Police with a warrant to arrest Lyons had probable cause to believe that Lyons was in the abode of Steagald.<sup>169</sup> Lyons was not, but drugs in plain view were.<sup>170</sup> The Court held that the arrest warrant did not authorize entry of a third-party's residence.<sup>171</sup> Police in such a situation must obtain a search warrant supported by a probable cause to believe that the suspect is to be found in the third party's house. Justice Marshall, for the majority, pointed out that an arrest warrant could otherwise operate as a general search warrant, citing a case in which police were finally enjoined from continuing a search for two fugitives that had invaded three hundred houses.<sup>172</sup> Only Justices Rehnquist and

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<sup>167</sup> *Payton*, 445 U.S. at 603.

<sup>168</sup> 451 U.S. 204 (1981).

<sup>169</sup> *Steagald*, 451 U.S. at 206.

<sup>170</sup> *Id.* at 206-07.

<sup>171</sup> *Id.* at 222.

<sup>172</sup> *Id.* at 215 (citing *Lankford v. Gelston*, 364 F.2d 197 (4th Cir.

White dissented.<sup>173</sup>

The warrant-clause model never seemed more robust. Justice White, the chief proponent of a reasonableness model, had joined the majority in *Chadwick* and *Sanders*. The Chief Justice, a bitter critic of the exclusionary rule, had written *Chadwick* himself, and indicated in *Sanders* that the police would either have to guess about the limits on their authority or take the time and trouble of getting a warrant. The tide, however, was about to turn again, this time to run out.

The harbinger of the sea-change was *New York v. Belton*.<sup>174</sup> A New York state trooper stopped a car for speeding.<sup>175</sup> Belton was one of four men in the car.<sup>176</sup> The trooper determined that none of the people in the car either owned it or were related to the owner.<sup>177</sup> He also smelled marijuana, and saw an envelope on the floor of the car marked "Supergold."<sup>178</sup> He ordered the men out of the car, informed them that they were under arrest for possessing marijuana and then searched each of them.<sup>179</sup> He also searched the passenger compartment of the car, the glove compartment, and a black leather jacket lying in the back seat.<sup>180</sup>

The jacket had a zippered pocket.<sup>181</sup> The trooper opened it, and discovered cocaine.<sup>182</sup> The jacket was Belton's, and he later moved to suppress the cocaine.<sup>183</sup> The New York Court of Appeals ruled that the cocaine was illegally seized, because, under *Chimel*, none of the suspects had access to the jacket at the time

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1966)).

<sup>173</sup> Id. at 223 (Rehnquist, J., dissenting).

<sup>174</sup> *New York v. Belton*, 453 U.S. 454 (1981).

<sup>175</sup> *Belton*, 453 U.S. at 455.

<sup>176</sup> Id.

<sup>177</sup> Id.

<sup>178</sup> Id. at 455-56.

<sup>179</sup> Id. at 456.

<sup>180</sup> Id.

<sup>181</sup> Id.

<sup>182</sup> Id.

<sup>183</sup> Id.

of the search.<sup>184</sup>

The Supreme Court reversed, holding that “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.”<sup>185</sup> And it “follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach.”<sup>186</sup>

This rule applies whether or not the police have any reason to suppose that a weapon might be hidden in the vehicle or in a container, and whether or not the container is open, closed, or even locked.<sup>187</sup> Just as in *Robinson*, “the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have.”<sup>188</sup>

The explanation for the turnaround does not lie with any change in judicial personnel. Quite to the contrary, Justice Stewart, long a staunch defender of the warrant requirement, not only joined the majority but actually wrote the opinion. Justice White, the chief promoter of a reasonableness model, dissented, pointing out that the Court's new rule permits searches of private containers not only without a warrant, but also without probable cause.<sup>189</sup>

The proposition that a search incident to arrest might be “reasonable” without either probable cause or a warrant was a Rubicon the Court had crossed in *Robinson*. Just as in *Robin-*

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<sup>184</sup> Id.

<sup>185</sup> Id. at 460 (footnote omitted).

<sup>186</sup> Id.

<sup>187</sup> Id. at 461.

<sup>188</sup> Id.

<sup>189</sup> Id. at 472 (White, J., dissenting) (“Here, searches of luggage, briefcases, and other containers in the interior of an auto are authorized in the absence of any suspicion whatsoever that they contain anything in which the police have a legitimate interest.”).

son, the justification for the new approach lay in the need for clarity. The Court embraced Professor LaFave's plea for bright-line rules,<sup>190</sup> reasoning that the police cannot comply with a constitutional standard without knowing what it requires.

But the fact that a line must be drawn somewhere does not justify drawing it anywhere. Professor LaFave, for one, endorsed the claim of Justice Brennan that *Chimel* "is not nearly as difficult to apply as the Court suggests" and in fact provided "a sound, workable rule for determining the constitutionality of a warrantless search incident to arrest."<sup>191</sup> In LaFave's view, there was nothing unclear about *Chimel* in the context of searching motorists incident to arrest: Once the suspect is out of the vehicle, *Chimel* and *Robinson* authorize a search of the person, but not of the car.<sup>192</sup> Any search of the car could take

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<sup>190</sup> Id. at 458.

Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."

LaFave, *supra* note 3, at 142.

<sup>191</sup> New York v. Belton, 453 U.S. 454, 471 (1981) (Brennan, J., dissenting).

<sup>192</sup> Wayne LaFave, The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith", 43 U. PITT. L. REV. 307, 330 (1982):

Indeed, it is fair to say that applying the traditional search-incident-to-arrest rule . . . is easier in automobile cases than in most other circumstances because the police can, and typically do, immediately remove the arrestee from the vehicle. Once that has been done, it is not difficult to take another step, such as moving him farther from the car, handcuffing him, or closing the car door, thus ensuring the nonexistence of circumstances in which the arrestee's "control" of the car is in doubt. In other words, the "difficulty" and "disarray" the Belton majority alluded to has been more a product of the police seeing how much they could get away with (by not following the just-



place without a warrant, because of the automobile exception, but must be supported by probable cause. Under *Chadwick* and *Sanders*, any private container in the car could be searched only after police obtain a warrant.

As LaFave admitted, there *was* considerable confusion over when effects found within vehicles were governed by *Chadwick* and *Sanders* and when they were governed by *Chambers*. The “problems the Court responded to in *Belton*, by revamping the search-incident-arrest rule are actually attributable to the tension between some of the Court's recent cases on the dimensions of the search warrant requirement as to vehicles and their contents.”<sup>193</sup> Unfortunately, in a companion case to *Belton*, the Justices further confused the law governing the automobile exception to the warrant requirement.

In *Robbins v. California*,<sup>194</sup> police stopped Robbins's car after observing him driving erratically.<sup>195</sup> Robbins got out of his station wagon and walked toward the police.<sup>196</sup> When asked for identification, Robbins fumbled with his wallet.<sup>197</sup> The police smelled marijuana smoke when Robbins opened the car to retrieve the vehicle registration certificate.<sup>198</sup> Robbins was placed under arrest, and the police then searched the car.<sup>199</sup> Inside a recessed luggage well in the rear of the station wagon, accessible only by turning a handle, they discovered a tote bag and two cigar-box sized parcels, wrapped in opaque plastic.<sup>200</sup> When the police opened the packages, they discovered that each

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mentioned procedures) than of their being confronted with inherently ambiguous situations.

Id. (footnote omitted) (emphasis in original).

<sup>193</sup> Id. at 330-31 (footnote omitted).

<sup>194</sup> 453 U.S. 420 (1981) (plurality opinion).

<sup>195</sup> Robbins, 453 U.S. at 422.

<sup>196</sup> Id.

<sup>197</sup> Id.

<sup>198</sup> Id.

<sup>199</sup> Id.

<sup>200</sup> Id.

contained fifteen pounds of marijuana.<sup>201</sup>

The Court held that the police could not open the packages without a warrant.<sup>202</sup> According to a plurality of four, who joined an opinion by Justice Stewart, the key fact was that the packages were wrapped so as to occlude their contents.<sup>203</sup> Chadwick's footlocker and Sanders' suitcase "were immune from a warrantless search because they had been placed within a closed, opaque container and because Chadwick and Sanders had thereby reasonably manifested an expectation that the contents would remain free from public examination."<sup>204</sup> From this perspective, no distinction could be drawn between locked luggage and paper bags, or even loose wrapping in newspaper.

Justice Powell concurred, but wrote separately to express the view that,

Chadwick and Sanders require police to obtain a warrant to search the contents of a container only when the container is one that generally serves as a repository for personal effects or that has been sealed in a manner manifesting a reasonable expectation that the contents will not be open to public scrutiny.<sup>205</sup>

Chief Justice Burger concurred, without joining either the opinion of either Powell or the plurality.<sup>206</sup>

As the plurality put it, the Court granted certiorari in *Robbins* "[b]ecause of continuing uncertainty as to whether closed containers found during a lawful warrantless search of an automobile may themselves be searched without a warrant[.]"<sup>207</sup> Treble confusion was the result. Justice Powell's opinion seemingly had the very purpose of muddying the waters; bricks

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<sup>201</sup>

Id.

<sup>202</sup>

Id. at 428.

<sup>203</sup>

Id. at 426.

<sup>204</sup>

Id. at 425 (quoting *United States v. Chadwick*, 433 U.S. 1, 11 (1977)).

<sup>205</sup>

Id. at 432 (Powell, J., concurring).

<sup>206</sup>

Id. at 429.

<sup>207</sup>

Id. at 423.

of marijuana wrapped in plastic were hardly the sort of luggage that deserved more constitutional protection than the automobile from which they were seized. But the bricks were protected because they were "sealed in a manner manifesting a reasonable expectation" of privacy. So viewed, *any* opaque container would enjoy the protections of the warrant requirement; but if that were so, why had Powell written separately?

Justice Stewart then added his retirement to Powell's inscrutability and Burger's silence. The Court had clarified the search-incident rule and further clouded the automobile exception, when the search-incident rule had already been reasonably clear but the automobile exception thoroughly confused. The police needed both probable cause and a warrant to open Robbin's parcels of marijuana, but neither probable cause nor a warrant to open Belton's jacket. Given that a zippered pocket in a jacket seems more intimately private than wrapped packages, *Belton* and *Robbins* were two scorpions in a small bottle. One or the other had a distinctly limited life expectancy.

As it happened, *Belton* stung *Robbins*. The Court handed down *United States v. Ross*<sup>208</sup> just eleven months after the decisions in *Belton* and *Robbins*, in a volume of the U.S. reports that begins with the Court's tribute to the retirement of Potter Stewart. In *Ross*, District of Columbia police received a tip from an informant who had previously supplied reliable information.<sup>209</sup> The informant indicated that a man called Bandit was selling drugs out of a maroon Chevrolet Malibu parked at 439 Ridge Street, that the informant had just witnessed a sale, and that Bandit had told the informant that there were more drugs in the trunk of the car.<sup>210</sup>

Police responded to the tip and discovered a maroon Malibu parked at 439 Ridge Street.<sup>211</sup> A records check revealed that it belonged to one Albert Ross, that Ross met the description the

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<sup>208</sup> 456 U.S. 798 (1982).

<sup>209</sup> *Ross*, 456 U.S. at 800.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

informant gave of Bandit, and that Ross went by the name of Bandit. But there was no one in the car.<sup>212</sup>

Police drove by again five minutes later, and noticed the Malibu in traffic.<sup>213</sup> They pulled alongside, and the driver matched the description given by the informant.<sup>214</sup> The police pulled the car over and ordered Ross out of the car.<sup>215</sup> A search of the passenger compartment revealed a bullet on a seat and a pistol in the glove compartment.<sup>216</sup> Thereupon the police placed Ross under arrest and handcuffed him.<sup>217</sup>

Using Ross's key, an officer opened the trunk.<sup>218</sup> Inside they saw a paper bag and a zippered red leather pouch.<sup>219</sup> An officer opened the bag and discovered bags of white powder, which proved to be heroin.<sup>220</sup> The police then closed the trunk and drove the car to headquarters.<sup>221</sup> There, they opened the pouch and discovered \$3,200 in cash.<sup>222</sup> Both the cash and the drugs were introduced as evidence against Ross.<sup>223</sup>

On appeal, a panel of the D.C. Circuit held that the warrantless search of the pouch violated the Fourth Amendment, but that the search of the paper bag was lawful.<sup>224</sup> The circuit court then reheard the case *en banc*.<sup>225</sup> Then-judge Ginsburg wrote for the majority, holding that *Sanders* compelled suppression of the evidence in the pouch and that no distinction could be drawn

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<sup>212</sup> Id.

<sup>213</sup> Id. at 801.

<sup>214</sup> Id.

<sup>215</sup> Id.

<sup>216</sup> Id.

<sup>217</sup> Id.

<sup>218</sup> Id.

<sup>219</sup> Id.

<sup>220</sup> Id.

<sup>221</sup> Id.

<sup>222</sup> Id.

<sup>223</sup> Id.

<sup>224</sup> *United States v. Ross*, 655 F.2d 1159, 1161 n.2 (D.C. Cir. 1981) (en banc), rev'd, 456 U.S. 798 (1982).

<sup>225</sup> *Ross*, 655 F.2d at 1161 n.2.

between the pouch and the paper bag, so that the heroin evidence must be suppressed as well.<sup>226</sup>

Judge Tamm, in dissent, marshalled several pages of citations to cases in which the lower courts had distinguished various effects discovered in automobiles, finding a reasonable expectation of privacy in luggage but none in bags and boxes.<sup>227</sup> But the cases were hardly consistent; some of them treated bags and boxes as private, triggering the warrant requirement.<sup>228</sup> To distinguish the paper bag from the red leather pouch would be to pick a very small nit indeed. In any event, *Robbins* would soon come down, rejecting any distinction between species of containers. Judge Tamm apprehended that, with their ruling on the paper bag, his colleagues were “descending from disarray to chaos”,<sup>229</sup> but chaos already seemed to be the order of the day.

Judge Robb suggested a way out of the thicket. The confusion about the scope of the warrant requirement, he wrote, “follows from a rule which creates search-resistant cells or compartments in an area otherwise lawfully subject to search.”<sup>230</sup> He continued:

[T]he right to search an automobile should include the right to open any container found within the automobile, just as the right to search a lawfully arrested prisoner carries with it the right to examine the contents of his wallet and any envelope found in his pocket, and the right to search a room includes authority to open and search all the drawers and containers found within the room.<sup>231</sup>

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<sup>226</sup> Id. at 1161.

<sup>227</sup> Id. at 1174-76 (Tamm, J., dissenting).

<sup>228</sup> See *United States v. Dien*, 609 F.2d 1038, 1044 (2d Cir. 1979) (holding that cardboard boxes sealed with tape and located behind opaque windows trigger the warrant requirement), *adhered to on reh'g*, 615 F.2d 10 (2d Cir. 1980); *Lichow v. State*, 419 A.2d 1041, 1045 (Md. 1980) (holding that warrant was needed to search a plastic bag).

<sup>229</sup> *Ross*, 655 F.2d at 1171 (Tamm, J., dissenting).

<sup>230</sup> Id. at 1180 (Robb, J., dissenting).

<sup>231</sup> Id. (Robb, J., dissenting).

But this approach, as Judge Robb acknowledged, was precluded by *Chadwick* and *Sanders*, which he read as recognizing “search-resistant cells” within automobiles “otherwise lawfully subject to search.”<sup>232</sup>

The Supreme Court followed Judge Robb's approach without quite overruling *Chadwick* and *Sanders*. Justice Stevens wrote an opinion joined by six Justices. The majority reasoned that the automobile exception operates as a substitute for a warrant, authorizing the search of a car just as if a magistrate had issued a warrant for that purpose.<sup>233</sup> Just as “a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers and containers in which the weapon might be found”, so a “warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search.”<sup>234</sup> Thus, “[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search.”<sup>235</sup>

In *Chadwick* and *Sanders*, however, the police had probable cause to search the containers, but not the vehicles. Granting that “[t]he rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance,” the majority concluded that *Chadwick* had “squarely rejected” that proposition.<sup>236</sup> Thus, in a case in which the police had probable cause to believe that a suspect had contraband in a particular container, they could not circumvent the warrant requirement by waiting

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<sup>232</sup> Id. (Robb, J., dissenting).

<sup>233</sup> United States v. Ross, 456 U.S. 798, 823 (1982) (“The scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause. Only the prior approach of the magistrate is waived; the search otherwise is as the magistrate could authorize.”) (footnote omitted).

<sup>234</sup> Id. at 821.

<sup>235</sup> Id. at 825.

<sup>236</sup> Id. at 809-10.

for the suspect to place the container in a car.

But this was not much of a reservation, for in such a contraband-in-a-container case the police by hypothesis have probable cause to arrest the suspect. Police with the patience to wait for the suspect's entry into a vehicle before effecting the arrest may then search any container in the passenger compartment under *Belton*. Under *Robinson*, those who arrest at once can search any container in the suspect's immediate possession.

Still, cases arose at the border between *Ross* and *Sanders*. In the 1985 case of *Oklahoma v. Castleberry*,<sup>237</sup> an equally divided Court affirmed a state court that had ruled that when police had probable cause to believe that the suspect had drugs in blue suitcases, they needed a warrant to open the suitcases after the luggage had been seized from the trunk of the suspect's car.<sup>238</sup> The lower court had reasoned that if the police had known only that the suspect had drugs in his car, without knowing precisely where, the search would have been legal.<sup>239</sup> However, because the police knew *more*, they needed a warrant.<sup>240</sup>

Almost ten years after *Ross*, the Court took the case of *California v. Acevedo*.<sup>241</sup> In *Acevedo*, a man named Daza, under police surveillance, picked up a Federal Express package the police knew to contain marijuana.<sup>242</sup> Daza took the package to his home.<sup>243</sup> Two hours later, Acevedo entered the apartment and left with a paper bag the same size as the packages of marijuana Daza had received.<sup>244</sup> Acevedo placed the bag in the trunk of this car and drove off, whereupon the police stopped his car, opened the trunk and then the package and discovered mari-

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<sup>237</sup> 471 U.S. 146 (1985).

<sup>238</sup> Castleberry, 471 U.S. at 146.

<sup>239</sup> Castleberry v. State, 678 P.2d 720, 724 (Okla. 1984), *aff'd*, 471 U.S. 146 (1985).

<sup>240</sup> Castleberry, 678 P.2d at 724.

<sup>241</sup> 500 U.S. 565 (1991).

<sup>242</sup> Acevedo, 500 U.S. at 567.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

juana.<sup>245</sup>

The majority, per Justice Blackmun, a lonely dissenter in *Chadwick*, found the case indistinguishable from *Ross*.<sup>246</sup> How could Acevedo have a greater privacy interest in the paper bag in the trunk of his car than Ross had had in the paper bag in the trunk of *his* car? How could the burden of obtaining a warrant be any greater for the California police in *Acevedo* than it had been for the D.C. police in *Ross*?

Justice Stevens, the author of *Ross*, dissented in *Acevedo*.<sup>247</sup> How could the police need a warrant to search the bag while Acevedo was walking toward his car, but not need a warrant the moment the suspect entered the vehicle? Justice White, long the critic of the warrant-clause approach, endorsed the Stevens position.

In truth, there is no difference in an individual's privacy interest in a container on the street or in a car. Indeed, there is no difference between the privacy of a locked glove compartment and a locked brief case. Nor are containers any less mobile, or any more burdensome to impound pending the issuance of a warrant, than are automobiles. The long-recognized automobile exception had almost no distinctive doctrinal content; it was only the occasion for a judicial struggle over the value of warrants. Late and early, an expansive interpretation of the exception turned on skepticism about whether warrants provided enough protection for the privacy of the law-abiding to justify the time and trouble required to obtain one.

After struggling to answer that question in narrow rulings, the need for a determinate Fourth Amendment jurisprudence drove the Court in the direction of bright-line rules. Such rules by nature are over-inclusive or under-inclusive; they err either on the side of the government or of the suspect. Rather than permit the exclusionary rule to deprive the public of just convictions, the Court opted for rules that are over-inclusive of legitimate law-enforcement needs. The dissenting opinions reflect the

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<sup>245</sup> Id.

<sup>246</sup> Id. at 572.

<sup>247</sup> Id. at 585 (Stevens, J., dissenting).



price that was paid in legitimacy for the advance in clarity.

In *Acevedo*, Justice Blackmun echoed Justice White's argument in *Chambers*: “[s]ince the police, by hypothesis, have probable cause to seize the property, we can assume that a warrant will be routinely forthcoming in the overwhelming majority of cases.”<sup>248</sup> In *Ross*, Justice Marshall accused the majority of nurturing a “probable cause exception”<sup>249</sup> to the warrant requirement. Excluding searches of private premise, the charge is substantially accurate.<sup>250</sup> The “extreme view of the Fourth Amendment” urged by Bork and Easterbrook, supported by “dubious legal arguments” that the *Chadwick* Court “unanimously reject[ed]”, had become the prevailing law.

### III. LEGITIMACY AND DETERMINACY IN THE REHNQUIST COURT: THE IRON TRIANGLE OF *WHREN*, *BELTON*, AND *ATWATER*

Strictly speaking, *Acevedo* came down after William Rehnquist replaced Warren Burger as Chief Justice. Nonetheless it is useful to characterize the Fourth Amendment jurisprudence from *Robinson* to *Acevedo* as of a piece. The Court during this period slowly but surely abandoned the warrant requirement outside of private premises, and in doing so reflected a heightened sense of the need for clarity and a flexible understanding of legitimacy derived partly from precedent and partly from an understanding of shared contemporary values about privacy.

During the 1990's, however, the Rehnquist Court moved to-

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<sup>248</sup> Id. at 575 (quoting *Arkansas v. Sanders*, 442 U.S. 753, 770 (1979) (Blackmun, J., dissenting)).

<sup>249</sup> *United States v. Ross*, 456 U.S. 798, 828 (1982).

<sup>250</sup> One can devise a hypothetical where a warrant would still be required out-of-doors. Suppose the police have probable cause to believe that Suspect A has mailed a package of drugs to Suspect B. If the police stop the mailman and search the package to confirm their suspicion, they have neither a warrant to search the package, nor probable cause to arrest the mailman. If the mailman is on foot, the automobile exception doesn't apply. But this is more of an exercise in legal ingenuity than an illustration with practical significance.

ward an understanding of legitimacy derived from the original understanding of the Fourth Amendment, as evidenced by common-law practice at the time of the founding. Justice Scalia championed this approach, and over time won over a working majority of his colleagues. Yet the Court remains more committed to clarity than to legitimacy.

The key ruling is *Atwater v. City of Lago Vista*.<sup>251</sup> Justice Souter's majority opinion summarized the relevant facts as follows:

In March 1997, petitioner Gail Atwater was driving her pickup truck in Lago Vista, Texas, with her 3-year-old son and 5-year-old daughter in the front seat. None of them was wearing a seatbelt. Respondent Bart Turek, a Lago Vista police officer at the time, observed the seatbelt violations and pulled Atwater over. According to Atwater's complaint (the allegations of which we assume to be true for present purposes), Turek approached the truck and "yell[ed]" something to the effect of "[w]e've met before" and "[y]ou're going to jail." [Turek had previously stopped Atwater for what he had thought was a seatbelt violation, but had realized that Atwater's son, although seated on the vehicle's armrest, was in fact belted in. Atwater acknowledged that her son's seating position was unsafe, and Turek issued a verbal warning. ] He then called for backup and asked to see Atwater's driver's license and insurance documentation, which state law required her to carry. When Atwater told Turek that she did not have the papers because her purse had been stolen the day before, Turek said that he had "heard that story two-hundred times.

Atwater asked to take her "frightened, upset, and crying" children to a friend's house nearby, but Turek told her, "[y]ou're not going anywhere." As it turned out, Atwater's friend learned what was going on and soon arrived to take charge of the children. Turek then handcuffed Atwater, placed her in his squad car, and drove her to the local police station, where booking officers had her remove her shoes, jewelry, and eyeglasses, and empty her pockets. Offi-

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<sup>251</sup>

*Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

cers took Atwater's "mug shot" and placed her, alone, in a jail cell for about one hour, after which she was taken before a magistrate and released on \$310 bond.

Atwater was charged with driving without her seatbelt fastened, failing to secure her children in seatbelts, driving without a license, and failing to provide proof of insurance. She ultimately pleaded no contest to the misdemeanor seatbelt offenses and paid a \$50 fine; the other charges were dismissed.<sup>252</sup>

Atwater sued for damages under 42 U.S.C. § 1983. The district court granted the city's summary judgment motion, and the Court of Appeals for the Fifth Circuit, sitting en banc, affirmed the grant of summary judgment over three dissenting votes.<sup>253</sup> The Supreme Court in turn affirmed: "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."<sup>254</sup>

The case is illuminating for at least three reasons. First, Atwater's claim had strong support in the common law, because various authorities declared the rule to be that a warrantless arrest for a misdemeanor was impermissible unless the misdemeanor involved a breach of the peace.<sup>255</sup> Second, the facts of Atwater's case were extremely sympathetic. The majority opinion itself declares:

If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail. She was a known and established resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she would almost certainly have buckled up as a condition of driving off with a citation. In her case, the physical incidents of arrest were merely gratuitous humili-

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<sup>252</sup> Atwater, 532 U.S. at 323-325 (citations and footnotes omitted).

<sup>253</sup> Id. at 325-26.

<sup>254</sup> Id. at 354.

<sup>255</sup> See id. at 328-31 (noting views of, inter alia, James Fitzjames Stephen, William Blackstone, and Garville Williams).

ations imposed by a police officer who was (at best) exercising extremely poor judgment. Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.<sup>256</sup>

Third, because a lawful arrest carries with it the power to search incident to arrest, and often as a practical matter triggers the right to impound a vehicle and conduct an inventory search, *Atwater* has an obvious and perverse relationship with the cases governing searches-incident-to-arrest and inventory searches.<sup>257</sup>

Thoughtful critics have denounced the decision,<sup>258</sup> and I have no purpose to flagellate a defunct equine. What I have to add to what has been written about *Atwater* is that the decision illustrates both the urgent need for bright-line rules in the Fourth Amendment context, and the inherent tension between clarity and legitimacy. The majority opinion explicitly rests on the need for determinacy; history is treated as not requiring a holding for *Atwater* and thus permitting the play of interest-balancing. Balancing the interests of the citizen against law enforcement's need for guidance, the majority inclines in favor of law enforcement:

[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. Often

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<sup>256</sup> Id. at 346-47.

<sup>257</sup> This implication, illuminatingly, was made explicit by the dissent. See id. at 371-72 (O'Connor, J., dissenting) (noting that "unbounded discretion" to issue citation or make arrest followed by search-incident and inventory search "carries with it grave potential for abuse.").

<sup>258</sup> See generally, Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in Atwater v. Lago Vista*, 37 WAKE FOREST L. REV. 239 (2002); Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in Atwater v. City of Lago Vista*, 71 FORD. L. REV. 329 (2002).

enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.<sup>259</sup>

Thirty years have passed since the *Robinson* case, and eight of the nine justices then sitting have left the Court. The primacy of determinacy remains.

I turn now to assess how the interaction of the bright-line rules the Court has crafted in this area undermine legitimacy, whether we conceive of legitimacy in contemporary or historical terms.

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<sup>259</sup>

Atwater, 532 U.S. at 347 (citations omitted).

IV. THE LEGITIMACY DEFICIT, *OR*, THE SUPREME COURT'S IRON TRIANGLE

The regime announced in *Belton* and *Acevedo* had certain attractive points. First, it was relatively clear. Police with probable cause to believe that a person had committed an offense had constitutional power to arrest such a person. They may do this outdoors, on the road, or on public premises without a warrant. If they wish to enter private premises to make the arrest, they need a warrant authorizing the entry. Incident to the arrest, they may search the person of the suspect, including any containers thereon. The search-incident power extends to the area of the suspect's immediate control, categorically defined by *Belton* to include the passenger compartment, but not the trunk, or the vehicle which the arrested person had occupied. Under *Ross* and *Acevedo*, police having probable cause to believe evidence or contraband could be found in a vehicle need no warrant to search the vehicle, and this search may extend to any area of the vehicle or any container in the vehicle where the suspected item might be.

Second, the regime, if scrupulously enforced, struck a not implausible balance between the security of the citizen and the government's law enforcement interests. Absent probable cause, the police could not search incident to arrest (for the arrest would be tainted and so too its fruits) or search (for *Ross* and *Acevedo* recognize an exception to the warrant requirement, not to the probable cause requirement). The rules generally favored the police but imposed some restrictions on them as well. Under *Ross* the police could not search for a stolen television in the glove box, and under *Belton* they could not search the trunk incident to an arrest.

A warrant requirement would impose additional costs on the police before undertaking either search or arrest. This would give the police incentives to refrain from borderline searches and arrests. If the Court is right, however, that home invasion constitutes the most serious assertion of public power, at least

so long as personal detention following arrest is brief, then it makes sense to reserve the most costly procedural hurdle for the most sensitive individual interest.

The most salient liability to the *Belton/Acevedo* regime was the risk that the police might arrest people for the purpose of authorizing a search for evidence. *Robinson* itself adopts the premise that arrest is a greater intrusion than search.<sup>260</sup> So indeed it is, especially in public, when the arrest destroys one's liberty but the attendant search does not disturb one's home. If police lack the probable cause required by *Acevedo*, they may be tempted to jump to the more intrusive arrest as a way of authorizing the otherwise forbidden search.

That risk has materialized, largely because the Court has formulated categorical rules in isolation from each other. The three important rules, in this case, constitute what I call the Supreme Court's Iron Triangle. *Belton* authorizes thorough search of the person and the passenger compartment incident to arrest, even though the charge is failure to pay child support and the search is of a fishing tackle-box. The decision in *Whren v. United States*<sup>261</sup> held that police motives for a stop are irrelevant so long as the requisite probable cause or reasonable suspicion is present, even when Vice Squad officers stop a suspected drug dealer for driving at an unreasonable speed.<sup>262</sup> The last leg in the Iron Triangle is *Atwater*, holding that the Fourth Amendment permits the arrest of persons suspected on probable cause of committing any offense, even a misdemeanor for which no jail time is authorized and even when there is no apparent risk of flight or repeated offending. Each leg of the triangle is supported primarily by the need for bright-line

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<sup>260</sup> See *United States v. Robinson*, 414 U.S. 218, 235 (1973) ("It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.").

<sup>261</sup> 517 U.S. 806 (1996).

<sup>262</sup> *Whren*, 517 U.S. at 813.

rules.<sup>263</sup>

The Court's decision in *Arkansas v. Sullivan*,<sup>264</sup> upholding the inventory search of the vehicle of a motorist arrested for speeding, driving without registration, improperly tinted windows, and carrying a weapon (a rusted roofing hatchet), confirms that the majority of the Court is not disposed to rethink any leg of the triangle.<sup>265</sup> The *Sullivan* opinion was unanimous and rendered *per curiam*, but the four *Atwater* dissenters joined a concurrence by Justice Stevens to express "hope" that "the Court will reconsider its recent precedent."<sup>266</sup>

The Iron Triangle means in practice that the police have general search power over anyone traveling by automobile. No one disputes the proposition that full compliance with all traffic regulations is impossible for any significant distance. *Atwater* authorizes the driver's arrest as soon as police observe the first infraction. *Robinson* authorizes the full search of the driver's person including any containers, and *Belton* extends this authority to the passenger compartment of the vehicle, including containers.

The search-incident-to-arrest is, within its physical compass, general; it is not premised on probable cause but, under *Robinson*, flows automatically from the fact of arrest. The inventory search of the entire vehicle, the trunk and any containers therein, is likewise general, and likewise authorized by the Court's decisions. Determinacy has been achieved, but only at the price of legitimacy.

This Part assesses the legitimacy of the *combined* effects of the bright-line rules announced in *Belton*, *Whren* and *Atwater*. I

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<sup>263</sup> The Court in each instance says as much. In *Whren* Justice Scalia's majority opinion states that the "principal basis" for the decisions excluding subjective motivation from bearing on Fourth Amendment reasonableness "is simply that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, whatever the subjective intent." *Id.* at 814 (citing *Robinson*, 414 U.S. at 236).

<sup>264</sup> 532 U.S. 769 (2001) (*per curiam*).

<sup>265</sup> *Sullivan*, 532 U.S. at 769-72.

<sup>266</sup> *Id.* at 773 (Stevens, J., concurring).



begin by considering legitimacy from the conventional viewpoint of the Burger Court, *i.e.*, whether Fourth Amendment law comports with widely-shared social judgments of reasonableness. I turn then to consider the current Fourth Amendment regime from the perspective of the new historicism, which measures legitimacy according to the Founders' views of reasonableness as reflected in the common law.

*A. Bright-Line Rules and the Fallacy of Composition:  
Legitimacy as Shared Values*

Legal rules prescribe an official response to facts defined in advance as necessary and sufficient to trigger that response. Rules thus match first-order policy judgments only imperfectly; they will be both under-inclusive (leaving out cases that in fact fit the background justifications for the rule) and over-inclusive (including some cases that do not fit the background justifications for the rule). For example, consider a rule that prohibits bringing a dog into a restaurant. The background justification for the rule is that dogs can disturb other diners by barking or by unwanted physical contact.

The rule is both over-inclusive and under-inclusive. It includes even well-behaved canines, even seeing-eye dogs. It excludes many other cases that meet the background justification for the rule (noise and disturbance), such as obnoxious children or other pets.

The rule may be justified, however, if the problem area makes case-specific application of the background justifications unreliable (how can the maitre de determine which dogs are well-behaved and which are not?), if there is a strong need for certainty given the volume of cases and the costs of error, or if both the reliability and determinacy points apply at the same time.

When over-inclusive rules are overlaid on one another, however, the risk of misapplying the background justifications greatly increases. Suppose rule 1 provides that all cases presenting fact A are to be given X treatment, and rule 2 provides that in every

instance of X treatment officials shall follow policy Y. If fact A justifies policy Y treatment X on first-order considerations two thirds of the time, and X treatment also justifies policy Y two thirds of the time, fact X will trigger policy Y even though policy Y is justified in only one third of all cases presenting fact X.

Take the dogs in restaurants example. Suppose that the need for certainty and the difficulty of case-by-case application of the background justifications justifies a no-dogs-in-restaurants rule. Suppose now that similar considerations call for defining "restaurant" in categorical terms, such as "any structure where food is served to more than ten persons unrelated by blood or marriage." Standing alone, both rules make sense. If one puts the two rules together, dogs are prohibited at school picnics and family reunions staged under the pavilion of a city park.

This is precisely what has happened with police powers over motorists. If we state the governing law openly—the police may arrest anyone operating an automobile when they wish, and then search the car (the passenger compartment immediately, the trunk after impoundment), containers included—our shared values, including those of our legal tradition, would reject such an account as authoritarian and lawless. Yet legality—the case for determinate Fourth Amendment rules—is the very reason why we have arrived at this state of affairs.

The conflict with legitimacy is more than an abstraction. A disturbing number of cases of gratuitous arrests for traffic offenses have been reported, and there is good reason to think that most such cases will not be reported at all. If the police find evidence of drugs or other more serious offenses during the search incident or the inventory search, the case will not be written up as traffic. And if the police find nothing more serious, the particular facts and circumstances of the arrest will be reported only if the citizen files a complaint or a lawsuit.

Consider, for example, *People v. McKay*.<sup>267</sup> Defendant was arrested for violating California Vehicle Code section 21650.1, "which requires a bicycle to be operated in the same direction

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<sup>267</sup>

41 P.3d 59 (Cal. Ct. App. 2002).

as the vehicles are required to be driven upon the roadway."<sup>268</sup> During the search incident to the arrest, the arresting officer discovered methamphetamine in defendant's sock.<sup>269</sup> On appeal of the denial of his motion to suppress, the defendant attempted to distinguish *Atwater* on the ground that California law prohibited, rather than authorized, arrest.<sup>270</sup>

The Supreme Court of California rejected this view, giving two reasons. First, a violation of state law limiting police arrest powers does not change federal constitutional law.<sup>271</sup> Citing a long line of authority (and discussing the few bits of contrary authority), the *McKay* court concluded that "so long as the officer has probable cause to believe that an individual has committed a criminal offense, a custodial arrest—even one effected in violation of state arrest procedures—does not violate the Fourth Amendment."<sup>272</sup> Whatever remedy might be available under the state statute, the defendant could not invoke the exclusionary rule, which the California state constitution confines to the minimum requirements of the federal constitution.<sup>273</sup>

Second, the California statute governing arrests for traffic infractions authorizes arrest if the offender fails to produce a driver's license or other satisfactory evidence of identification.<sup>274</sup> Not surprisingly, McKay was not carrying his driver's license while cycling.<sup>275</sup> The *McKay* court, however, concluded that the officer was not required to accept the defendant's word as to his identity, even though McKay did identify himself sufficiently for the police to run a computer check.<sup>276</sup>

If we check such a result against any plausible measure of com-

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<sup>268</sup> McKay, 41 P.3d at 63 (quoting CAL. VEH. CODE § 21650.1 (2002)).

<sup>269</sup> Id. at 63.

<sup>270</sup> Id. at 64.

<sup>271</sup> Id. at 71.

<sup>272</sup> Id.

<sup>273</sup> Id. at 72.

<sup>274</sup> Id.

<sup>275</sup> Id. at 63.

<sup>276</sup> Id.

munity sentiments, the result must be judged illegitimate. The suggestion that riding a bike against traffic on a residential street calls for arrest and search sounds like something out of a late-night talk-show host's monologue. We have, moreover, at least two very clear measures of society's values that do not depend on subjective impressions of popular opinion. First, police only rarely arrest for traffic offenses.<sup>277</sup> Second, many legislatures have spoken against the practice absent some special justification.<sup>278</sup>

California is not alone in enacting limits on police authority to arrest for minor offenses.<sup>279</sup> Whether a majority of states impose such statutory limits is beside the point, because the administrative practice of avoiding arrests leaves most jurisdictions with no immediate need for legislated limits. The important point is one made in *Atwater* for the purpose of upholding police authority—no state in the union has an official policy of arresting traffic offenders.

The interlocking bright-line rules of the Court's Iron Triangle thus authorize police practices that no American jurisdiction regards as reasonable. Indeed, a rule simply authorizing the police to search automobiles at their whim—without articulable suspicion of any sort—would actually be *less* objectionable than current doctrine. At least a regime of arbitrary search would not require police to curtail the suspect's liberty as a precondition to search.<sup>280</sup> What *Atwater*, *Belton* and *Whren* encourage is the

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<sup>277</sup> See *Atwater v. City of Lago Vista*, 532 U.S. 318, 353-54 (2001) (discussing the small number of minor-offense arrests).

<sup>278</sup> See *id.* at 352 (discussing police interest in limiting minor-offense arrests); Frase, *supra* note 258, at 410-11 (discussing various state approaches).

<sup>279</sup> See, e.g., *Atwater*, 532 U.S. at 352 ("Many jurisdictions, moreover, have chosen to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenses.").

<sup>280</sup> As Professor LaFave points out, the Court's rejection of any police authority to search incident to citation in *Knowles v. Iowa*, 525 U.S. 113 (1998), implies that the scope of police authority during a traffic stop flows from what the police in fact did, not what they might have done. See Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth*

practice of making unnecessary arrests in bad faith for the ulterior purpose of search, and thereby inflicting handcuffs and arrest records as well as invasions of privacy on petty offenders.

The *Atwater* majority consoled itself with the hope that police have not exploited the overbreadth of the combined rules.<sup>281</sup> It hardly seems like a point in favor of legitimacy, however, to say that the practice approved in the instant case is so outrageous that we can trust the police not to do much of it.

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Amendment, 102 MICH. L. REV. 1843, 1869 (2004). It follows that to enjoy Belton search-incident authority the police must contemporaneously subject the motorist to the custodial arrest authorized by *Atwater*.

I have previously argued that civil liberties law should place much less emphasis on informational privacy, and much more emphasis on behavioral autonomy, in light of the threat of mass-casualty terrorism. See Donald A. Dripps, *Terror and Tolerance: Criminal Justice for the New Age of Anxiety*, 1 OH. ST. J. CRIM. L. 9 (2003). Such a model might well approve of police powers to stop and search for the purpose of combating terrorism without individualized suspicion when the authorities have some intelligence about the time and place of an expected attack. It surely does not approve of police authority to search anyone on the road just to see what they might find; and the current doctrine giving the police this authority, provided they first take the more coercive step of making an arrest, is an excellent example of how civil-liberties law has short-changed behavioral autonomy.

<sup>281</sup> See *Atwater*, 532 U.S. at 353 (“The upshot of all these influences, combined with the good sense (and, failing that, the political accountability) of most lawmakers and law-enforcement officials, is a dearth of horrors demanding redress.”).

*B. Bright-Line Rules and Legitimacy as History*

The *Atwater* majority opinion devotes many pages to fending off Ms. Atwater's historical argument.<sup>282</sup> This discussion reflects the Court's recently-heightened sensitivity to founding-era common-law practice as a guide to understanding the Fourth Amendment's general language. It also, in my judgment, makes a powerful case against the general practice of consulting specific common-law rules as reference points for Fourth Amendment jurisprudence.

Atwater argued that many common-law authorities believed that warrantless misdemeanor arrests were permissible only when committed in the presence of the arresting officer and only when the offense involved a breach of the peace.<sup>283</sup> The Court rejected this argument because the common-law authorities were not unanimous<sup>284</sup> and because both in England and America legislatures had adopted statutes authorizing warrantless arrests for various misdemeanors that did not involve breach of the peace.<sup>285</sup>

Now consider the various differences between a founding-era search and seizure case and a contemporary one. First, the institutional context is different, because the modern paramilitary police force was not invented until the middle of the nineteenth century.<sup>286</sup> Second, the remedial context is different,

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<sup>282</sup> Id. at 326-45.

<sup>283</sup> Id. at 319.

<sup>284</sup> See id. at 330 ("The great commentators were not unanimous, however, and there is also considerable evidence of a broader conception of common-law misdemeanor arrest authority unlimited by any breach-of-the-peace condition.").

<sup>285</sup> See id. at 337 ("During the period leading up to and surrounding the framing of the Bill of Rights, colonial and state legislatures, like Parliament before them, regularly authorized local peace officers to make warrantless misdemeanor arrests without conditioning statutory authority on breach of the peace.") (citations omitted).

<sup>286</sup> See, e.g., George C. Thomas III, *Time Travel, Hovercrafts, and the*

because the exclusionary rule largely has replaced the tort remedy.<sup>287</sup> Third, the legal context has changed, because, while common-law tort cases were subject to statutory overruling, Fourth Amendment cases have constitutional stature and may not be overridden by simple majorities in the legislature.<sup>288</sup>

The institutional and remedial changes are related to each other, because the creation of a full-time police force routinely engaged in searches and arrests could not have been achieved without protections, formal or informal, from tort liability. The shift to the exclusionary rule, coupled as it was with the emer-

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Framers: If James Madison Sees the Future and Re-Writes the Fourth Amendment, 80 NOTRE DAME L. REV. (forthcoming June 2005) (manuscript at 25-31).

<sup>287</sup> For example, in *Robinson* then-Justice Rehnquist pointed to the absence of the exclusionary rule in the eighteenth and nineteenth century to explain the paucity of early authority on the scope of the search-incident-to-arrest. See *United States v. Robinson*, 414 U.S. 218, 233 (1973) ("The scarcity of case law before *Weeks* is doubtless due in part to the fact that the exclusionary rule there enunciated had been first adopted only 11 years earlier in Iowa; but it would seem to be also due in part to the fact that the issue was regarded as well settled.") (footnote omitted). How the issue could be "well-settled" without caselaw is a little mysterious; once the exclusionary rule gave defendants an incentive to raise the issue, the law governing search-incident-to-arrest quickly became confused.

<sup>288</sup> Debate about the existence and scope of pre-Marbury forms of judicial review continues. See generally, *Chimel v. California*, 395 U.S. 752, 755 (1969) (discussing the convoluted history of the law); Philip Hamburger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV. 1 (2003). There does not, however, seem to be any suggestion that common-law rules as such, without some boost from natural law or what not, had priority over statutes. After all, the Crown won *Paxton's Case*. 1 Quincy 402 (Mass. 1755), reprinted in M.H. SMITH, *THE WRITS OF ASSISTANCE CASE 556-558* (1978) ("The Justices were unanimously of Opinion that the Writ might be granted, and some Time after, out of Term, it was granted."). After the *Townshend Acts* in 1767, the colonial courts outside of Massachusetts managed to avoid issuing general warrants and writs of assistance, but there were a variety of means to this end—sometimes holding the writs illegal without questioning Parliamentary supremacy, sometimes by simple delay, and sometimes with intimations of constitutional priority over legislation. In Massachusetts the courts actually issued the writs. See Morgan Cloud, *Review: Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1737-38 (1996).

gence of large-scale professional police departments, virtually dictates a regulatory perspective on the Fourth Amendment. Given a high volume of cases, a repeat institutional player, and high cost to the public from the imposition of the only available sanction, the case for bright-line rules scarcely could be made any stronger.

The shift to a Fourth Amendment jurisprudence expressed as rules, however, turned the legal ecology upside-down. The common-law tort practice worked case by case. The litigated cases were few, because few search victims had the resources and resolve to sue. The common-law commentators, not surprisingly, sometimes drew different conclusions from the cases that did reach a reported decision.<sup>289</sup> The common law lived with uncertainties and contradictions. The modern world of rules does all it can to avoid them.

When we look to the common-law, then, we are looking at a system that placed a much smaller premium on clarity than the modern system places. Consider *Belton* and *Atwater* in this connection. Suppose we accept the *Atwater* majority's view that common-law history at least gives some support to the legality of warrantless misdemeanor arrests absent breach of the peace. The scope of the search incident to such arrests, at common law, would have been tested by tort suits against the arresting officers for trespass to chattels. Imagine tort cases involving Robinson's cigarette pack, Belton's jacket pocket, and the arrest of Sullivan's car. It is hard to believe that all of those cases would have come out the same way (especially if we view a low-damages verdict for plaintiff as a win for the police). And yet in the current regime there are good reasons why those cases should come out the same way. The same could be said for the probable cause cases, as distinct from the search-incident cases—Chadwick's footlocker, Sanders's suitcase, Acevedo's paper bag, and so on.

When we stitch together individual bright-line rules, each supposedly supported, or at least not excluded, by the common law,

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<sup>289</sup> For example, consider the various views of the commentators regarding warrantless arrest absent breach of the peace reviewed in *Atwater*.



what do we get? We get the Iron Triangle, which authorizes the police to arrest and search the person and effects of anyone traveling by auto (or even by bicycle), without probable cause to search, let alone prior judicial authorization. If we know anything about the Fourth Amendment's history it is that the Framers' abhorred general warrants, but both logic and historical research suggest that *warrantless yet non-actionable* general searches would have been at least as abhorrent to them.<sup>290</sup> Current Fourth Amendment law, however, authorizes just such general searches.

There is one further joker in the historical deck. The *Atwater* Court emphasized the fact that legislatures both before and after the founding adopted statutes authorizing warrantless misdemeanor arrests absent breach of the peace.<sup>291</sup> The trouble with this claim is that it undermines any reliance on any common-law tort doctrine as a predicate for constitutional doctrine, because all common-law tort doctrine could be overridden by statute. Lord Camden's opinion in the canonical case of *Entick v. Carrington* says quite plainly that a very different case would be present if an act of parliament had conferred on

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<sup>290</sup> In a deeply researched article, Professor Davies concludes that the Fourth Amendment's original meaning was to prohibit Congress from authorizing general warrants and no more. Davies, *supra* note 38. He theorized that the Founders did not intend to regulate warrantless searches and seizures because they assumed that statutory creation of general warrants was the only way officers could circumvent tort liability for searches and seizures (although he points out that a warrant was not always a complete defense to tort liability). *Id.* at 724. He summarized his account of the original understanding as follows:

The silences of the text regarding warrantless intrusions and when warrants were required or excused were not oversights or defects of drafting. Rather, in the common-law context the Framers had no reason to expect that those topics could become unsettled or controversial. The Framers were content to state the standards for valid warrant authority because they believed that would suffice to curb discretionary search and seizure.

*Id.* [emphasis added]. Professor Thomas, similarly, concludes that the Framers expected that warrants would be necessary to enter private premises, whether to search or arrest. See Thomas, *supra* note 286, at 37.

<sup>291</sup> See *Atwater v. City of Lago Vista*, 532 U.S. 318, 333-38 (2001).

the Secretary of State the power to issue warrants for incriminating papers.<sup>292</sup>

Of course legislatures actually did pass statutes authorizing arrests for nonviolent misdemeanors. Perhaps this shows that the Founders understood the Fourth Amendment to constitutionalize some sacred subset of the common-law tort regime. What subset? History holds no answer to this question. The common-law itself evolved with the confidence that major errors could be corrected by legislation.<sup>293</sup> Founding-era legislative practice, however, fails to define the scope of the constitutional limits.

If founding-era legislatures authorized certain searches and seizures (for example, the warrantless searches of ships authorized by the first Congress), we cannot be sure that the legislation respected the understood constitutional limits. The Alien and Sedition Acts offer some evidence that founding-era legislatures could misunderstand the Constitution. A founding-era case upholding, against a Fourth Amendment challenge, a

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<sup>292</sup> See *Entick v. Carrington*, 19 Howell's State Trials 1029, 1045 (C.P. 1765):

The question, whether officers or not, involves another; whether the secretary of state, whose ministers they are, can be deemed a justice of the peace, or taken within the equity of the description; for officers and justices are here co-relative terms: therefore either both must be comprised, or both excluded.

This question leads me to an inquiry into the authority of that minister, as he stands described upon the record in two capacities, viz. secretary of state and privy counsellor. And since no statute has conferred any such jurisdiction as this before us, it must be given, if it does really exist, by the common law; and upon this ground he has been treated as a conservator of the peace.

Id.

<sup>293</sup> For instance, Blackstone declared that "it is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated," but he thought the rule was wrong and "is worthy the interposition of the legislature." 4 WILLIAM BLACKSTONE, COMMENTARIES \*355.

statute authorizing searches or seizures *would* be evidence of contemporary understanding; but we face a dearth of such cases deciding squarely raised Fourth Amendment issues.

Legislative *inaction* is even weaker evidence of constitutional meaning. Until the judiciary limits executive search-and-seizure power, whether by tort or by constitutional rulings, legislatures have no reason to expressly authorize specific law-enforcement practices. Such judicial limits cannot arise until the executive undertakes the challenged practices. So it hardly follows that the failure of founding-era legislatures to authorize *Terry* stops, school searches or airport searches says anything about the constitutionality of such practices.

Prior to the advent of municipal police, public schools and aviation, legislatures had no reason to even consider such practices. We can analogize to the night-watch, or public orphanages or passenger ships; still, does the failure of founding-era legislatures to authorize the close search for weapons of every passenger boarding a passenger ship really signal that modern airport searches are unconstitutional? If there had been a wave of hijackings of passenger ships in the 1790s, and legislatures had authorized such searches, would founding-era courts have struck them down?

History does not answer counterfactual questions. Yet the question of what aspects of the common-law search-and-seizure rules have constitutional status is just such a counterfactual question. Only today's judges can answer such a question. In judging their answer, they must exercise the very sort of subjective reasoning that has been driving the turn to the common law in the first place.

When brought together, the Fourth Amendment rules pertaining to vehicle searches fail both the test of history and the test of reason. The practical power to arrest and search any traveler, according to the standardless discretion of individual officers, is the sort of practice the Framers detested. It likewise offends widely-shared contemporary judgments about reasonable police practices.

Justice Scalia's concurring opinion in *Thornton* does more to

prove than to address the incompatibility of common-law methodology with a determinate Fourth Amendment jurisprudence.<sup>294</sup> He supposed that the common-law did not permit global searches incident to arrest, but instead imposed a requirement that evidence, weapons or contraband might be found during the search.<sup>295</sup> The supposed common-law limitation was not a strict requirement of probable cause, but it is not an automatic right to search either.

There are two problematic aspects to this (admittedly welcome) attack on the Iron Triangle. First, we have no way of knowing that the Framers expected the supposed common-law limitation to have constitutional status, *i.e.* to become by force of the Fourth Amendment invulnerable to contrary legislation. Second, the turn to direct reliance on the common-law, in preference to the crafting of an intermediate layer of bright-line rules crafted by the Court, is significantly underdetermined. The police, incident to arrest, must have some reason—but not probable cause—to suspect evidence, contraband or weapons. That's a standard, not a rule, and a fairly vague standard at that.

The Court eventually might equate the common-law standard with the *Terry* reasonable-suspicion standard.<sup>296</sup> This would be helpful from the standpoint of determinacy because it would give police and lower courts a familiar toolkit with which to work. Nonetheless, even this move would leave the police and lower courts with little guidance about the scope of the search-incident authority. At least four major uncertainties would be created.

First, a *Terry*-type approach, whether applied to arrests indoors or on the road, would call for case-by-case determina-

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<sup>294</sup> Thornton v. United States, 124 S. Ct. 2127, 2133-38 (2004) (Scalia, J., concurring).

<sup>295</sup> Thornton, 124 S. Ct. at 2136 (Scalia, J., concurring).

<sup>296</sup> In *Maryland v. Buie*, 494 U.S. 325 (1990), the Court made a similar analytical move, by adopting the *Terry* reasonable-suspicion standard to test the justification for a protective sweep of premises after officers have entered and arrested a suspect. *Buie*, 494 U.S. at 327.

tions not just about the scope of the suspect's reach (the *Chimel* test) but about the likelihood that any weapons, evidence or contraband *was in fact in the area searched*. *Chimel* did not (or at least does not now) require particularized suspicion of this sort; when the suspect is placed under arrest, the police may search drawers and closets within the grabbing range without any reason to think that evidence or a weapon may be there.<sup>297</sup> Second, a *Terry* approach would have to deal with the suspect's physical capabilities, especially as they relate to containers. A backpack (or a briefcase or a toolbox, etc.) in a car may hold marijuana, but how easy would it be for the suspect to grab it and destroy it on the facts of a given case? If a defendant could not have physically reached the evidence at the time of arrest, the police would need to persuade trial courts that their assessment of the suspect's intentions was not implausible. Third, the test would have to account for what the police might have done differently.<sup>298</sup> If the police learn that they lose the search power

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<sup>297</sup> See *Chimel v. California*, 395 U.S. 757, 763 (1969):

There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs—or for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.

*Id.* at 763. The apparent implication of this passage is that the "routine" search of the reachable areas is permitted without specific suspicion or any evidence of resistance by the suspect. Subsequently, in *Maryland v. Buie*, the Court dealt with the authority of the police to search a house for possible cohorts of the suspect following the arrest. *Buie*, 494 U.S. at 327. The Court ruled that the police needed *Terry*-type reasonable suspicion to believe that cohorts might be present, but also gave this version of the *Chimel* rule: "We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334. Justice Scalia's approach might therefore undermine *Chimel* as well as *Belton*.

<sup>298</sup> See 4 LFAVE, *supra* note 31, § 6.3(c), at 310 (asking "to what

once the suspect is handcuffed or locked in the squad car, they may search the suspect (perhaps at gunpoint for security purposes—hardly an ideal arrangement) while the suspect is still in the car or just outside.<sup>299</sup> Does the *Terry* approach require them to curtail their search authority by restraining the suspect?

Fourth, a *Terry* approach would have to be squared with *Ross* and *Acevedo*. In the context of arrests for traffic offenses a *Terry* standard would impose a serious limit on the search incident power. After all, the police are not likely to find evidence of speeding in a purse or the glovebox. But what about the common case of an arrest for possession of drugs, perceived by the officer during the process of writing a traffic citation? If an arrest now gives the officer the power to search for suspected contraband without probable cause, the probable cause required by *Ross* and *Acevedo* would have to give way to the new standard. Yet it is precisely the concern with using the search-incident power to circumvent the probable cause required for a warrantless search under the automobile exception to the warrant requirement that raises the judicial hackles about *Belton*

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extent are the arresting officers obligated to take measures to narrow the range of the arrestee's control?" LaFare also notes that this problem arises in cases involving indoor arrests, but that the courts generally have not discussed it. *Id.* at 310-11.

<sup>299</sup> *United States v. Wesley*, 293 F.3d 541 (D.C. Cir. 2002).

Indeed, to take [defendant's] view would largely render *Belton* a dead letter. The search of a passenger compartment incident to arrest would then be permissible only if the officer left the defendant in the car, in which event the officer would have to crawl over him to effectuate the search, or if the officer removed the defendant but did not (or could not) effectively secure him. As we have previously warned, such a rule "might create a perverse incentive for an arresting officer to prolong the period during which the arrestee is kept in an area where he could pose a danger to the officer." And it would certainly vitiate the Supreme Court's intention to create "a straightforward rule, easily applied, and predictably enforced," by requiring courts to determine retrospectively whether a given arrestee had been so insufficiently secured as to warrant the officer's search of the passenger compartment.

*Wesley*, 293 F.3d at 548-49.

in the first place.

A majority opinion adopting Justice Scalia's position would not be likely to resolve these issues. They would have to be answered in thousands of cases in the lower courts. Meanwhile, the police would have to guess about the answers they are going to get on motions to suppress. This is the very scenario that played out in the 1980s, to the dismay of law enforcement and the deep concern of the Court.

It may well be that a *Terry*-type rule makes more sense than *Belton* given *Atwater*. It would have made more sense, in my view, to impose some similarly pragmatic limits on the arrest power itself, protecting liberty first and privacy second. The worst feature of *Belton* is the incentive to arrest created by the broad search power. A constitutional rule limiting police power to arrest for nonjailable misdemeanors, of the sort proposed by Professor Frase,<sup>300</sup> would have dealt directly with this problem. But that, if you pardon the pun, is *Atwater* under the bridge. The approach adumbrated by Justice Scalia has clear legitimacy advantages over the Iron Triangle. Whether these justify the cost in determinacy, I argue, is an unavoidable and unattractive choice.

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See Frase, *supra* note 258, at 410.

V. THE PROBLEM IN PERSPECTIVE: ROOTS AND RESPONSES

A. *Acknowledging the Difficulties*

The Fourth Amendment cases are difficult because both determinacy and legitimacy are important values. Given the current institutional, remedial and legal environment of Fourth Amendment litigation, the Court's focus on determinacy, for many decades now and under the control of quite various judicial personnel, seems hard to challenge head-on. A return to a tort-type reasonableness analysis on a case-by-case basis is something even harsh critics of contemporary interest balancing seem reluctant to embrace.

If the priority on clarity is a permanent and defensible feature of legal doctrine in this area, we must also acknowledge the institutional limits on the judiciary. The intersection of rules announced in one case with rules announced in another may be hard to change because the two cases came to the Court at different times. Thus Justice Stewart and Justice Powell, who supported the results in *Robinson* and *Belton*, seem to have assumed that *Atwater* should be decided according to Justice O'Connor's dissenting opinion in that case. Neither Stewart nor Powell, however, cast a vote in *Atwater*. *Whren* might have come out the same way in a post-*Atwater* legal context, but unanimity would have been far less likely.

Moreover, courts are multi-person bodies subject to the apparently inexorable laws of collective decision theory. Cycling, path-dependence and intransitive results are the norm, not the exception, for collective decisions.<sup>301</sup> Judicial conventions such as *stare decisis* and standing may reduce, but cannot eliminate, the tendency of groups to reach decisions that would, if made by

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<sup>301</sup> For an accessible account of Arrow's Theorem, see Hovenkamp, *supra* note 35.



a single person, be regarded as irrational.<sup>302</sup> What follows are some suggestions about how to reduce or manage the tension between determinacy and legitimacy in the Fourth Amendment context.

*B. Some Constructive Suggestions*

My suggestions fall into three general areas. First, the Supreme Court can help itself, by taking a larger number of Fourth Amendment cases, in patterns that enable ongoing oversight of what is, for better or worse, an important body of judge-made law. Individual Justices should be more cognizant of the systemic nature of the Fourth Amendment jurisprudence, and accordingly less inclined to announce rules in isolation from the body of law at large, whether the isolated rules are derived from contemporary balances of interests or cribbed from the common law. Second, state courts, state legislatures, and police administrators have a role to play here, by developing, both by state constitutional rulings and through the processes of legislation and rule-promulgation, workable rules that are more sensitive to legitimacy considerations than those thus far adopted by the Supreme Court of the United States. Third and finally, legal commentators should do more than we have to focus on the systemic nature of Fourth Amendment doctrine. In particular, the time may have come round for another effort at a Model Code of Pre-Arrest Procedure.

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<sup>302</sup> See Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1328-67 (1995).

### 1. Working With Rules—the Supreme Court Level

From what I have said thus far, my view on some controversial points of Fourth Amendment doctrine should be clear. The Court is perfectly right to announce doctrine in rule-like terms, but it should do so with more sensitivity to how the various rules inter-relate, and it should give up entirely on the project of finding rules of constitutional law in the common law of torts, a jurisprudence that was neither rule-based, nor constitutional, nor static at any given date. I think Professor Amsterdam and Professor Davies have it right; too much has changed to enable modern judges to seek specific guidance from eighteenth-century common law practices.<sup>303</sup> History remains centrally relevant, but at a much higher level of generality—the level of generality that has guided the Court's Fourth Amendment jurisprudence from *Boyd* through the very recent past.

Part of what is driving the Court's turn to history is skepticism about *any* judge-made rules of constitutional law purporting to constrain future decisions more specifically than does the constitutional text itself. Despite thoughtful arguments on the other side,<sup>304</sup> I agree with theorists such as Richard Fallon and David Straus, who argue that constitutional law inevitably, and therefore legitimately, includes a layer of judge-made doctrine

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<sup>303</sup> See Amsterdam, *supra* note 1, at 401 (stating that given the sweeping changes in society, even “if we wanted to take exclusive counsel of the framers on the problems of our time, we could not do so”); Davies, *supra* note 38, at 740-41 (“Applying the original meaning of the Fourth Amendment in a completely changed social and institutional context would subvert the purpose the Framers had in mind when they adopted the text.”).

<sup>304</sup> See, e.g., Akhil Reed Amar, Foreword: The Document and the Doctrine, 114 HARV. L. REV. 26, 133-34 (2000) (recognizing legal character of both the text and caselaw interpreting it, but urging that primacy be given the text); Joseph D. Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 NW. U. L. REV. 100 (1985) (objecting to prophylactic rules on theory that they violate Article III's case-or-controversy requirement).

with political priority over ordinary legislation.<sup>305</sup> The U.S. reports are full of doctrines that invalidate state action absent clearly established violations of the text, and that also uphold state action when a violation of the constitutional text is clear. Examples falling into the first category include the First Amendment overbreadth doctrine<sup>306</sup> and pro-individual burdens of proof in civil commitment<sup>307</sup> and child-custody proceedings.<sup>308</sup> Criminal procedure doctrines in this first category include the presumption of prejudice from the actual or constructive denial of counsel,<sup>309</sup> *Batson's* rebuttable presumption of discriminatory purpose in the exercise of peremptory challenges,<sup>310</sup> and, of course, *Miranda*.

The second category is less widely discussed but supports the same theoretical case for accepting the legitimacy of judge-made rules to implement more general constitutional provisions. The qualified-immunity defense in constitutional-tort cases offers one example of the Court creating a safe-harbor for admittedly unconstitutional conduct.<sup>311</sup> The presumption against

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<sup>305</sup> See, e.g., Richard H. Fallon, Jr., Foreword: Implementing the Constitution, 111 HARV. L. REV. 54 (1997); David A. Strauss, The Ubiquity of Prophylactic Rules, 55 U. CHI. L. REV. 190 (1988).

<sup>306</sup> See, e.g., *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 265-66 (2002) (invoking overbreadth doctrine and invalidating ban on computer-generated images of child pornography).

<sup>307</sup> See *Addington v. Texas*, 441 U.S. 418, 431-33 (1979) (holding preponderance standard unconstitutional in civil commitment proceedings).

<sup>308</sup> See *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982) (holding that state must satisfy at least the clear-and-convincing evidence standard before terminating parental rights).

<sup>309</sup> See *Strickland v. Washington*, 466 U.S. 668, 692 (1984) ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.").

<sup>310</sup> See *Batson v. Kentucky*, 476 U.S. 79, 94 (1986) ("Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. The State cannot meet this burden on mere general assertions that its official did not discriminate or that they properly performed their official duties.") (citations omitted).

<sup>311</sup> See, e.g., *Anderson v. Creighton*, 483 U.S. 635, 646 (1987)

unconstitutional motivations in prosecutorial charging decisions offers another.<sup>312</sup>

The beginning of wisdom regarding judge-made constitutional doctrine is the premise that errors in the application of the Constitution to particular cases *are inevitable*. Any type of constitutional litigation will generate some mistaken rulings for the government and some mistaken rulings for individuals. So long as judge-made doctrine about procedures and remedies makes a good-faith effort to strike a reasonable balance between the two types of errors, it seems not merely permitted, but indeed required, by fidelity to the constitutional text.

I have, however, some further suggestions based on the procedural character of the Court's work in this area. Given the admitted need for bright-line rules, and the dangers that attend announcing such rules on a case-by-case basis, there is some reason to hope that the Supreme Court would take more, rather than fewer, Fourth Amendment cases (or at least more Fourth Amendment *questions*, a point to be explained shortly); and that these cases (or questions) should, when the cert pool permits, be taken, argued and decided together.

The model I have in mind is the Fifth Amendment litigation that produced *Miranda v. Arizona*.<sup>313</sup> Moved by widespread dissatisfaction with existing confessions law, and by recent innovations in both Fifth and Sixth Amendment doctrine, the Court granted certiorari in five cases.<sup>314</sup> The range of views put forward by the parties and *amici*, together with the varied but

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(applying immunity defense to warrantless search of plaintiffs' home); *Malley v. Briggs*, 475 U.S. 335, 344-45 (1986) (applying qualified immunity defense to officer who sought arrest warrant for plaintiff on facts allegedly falling short of probable cause).

<sup>312</sup> See *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (stating that "[t]he presumption of regularity supports their prosecutorial decisions and, in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.") (citations omitted).

<sup>313</sup> 384 U.S. 436 (1966).

<sup>314</sup> For a review of the *Miranda* litigation in the Supreme Court, see DRIPPS, *supra* note 3, at 78-79.

representative facts of the cases at bar, provided an extremely thorough review of the field. As I have previous remarked, “no administrative agency could have generated a more thorough or more thoughtful survey of the confessions problem.”<sup>315</sup>

The result—the *Miranda* rules—remain controversial to this day. The compromise struck by the *Miranda* litigation, however, is at least based on a comprehensive assessment of police interrogation as a systemic practice raising recurring issues. Might not such a systemic approach make sense in the Fourth Amendment context?

The volume of Fourth Amendment litigation is at least as great as the volume of confessions litigation. In dealing with an open Fourth Amendment issue—say, the scope of police search powers in a *Belton* case regarding the persons and effects of third-parties in the company of the arrested motorist—the Court should take several cases whenever possible. Moreover, because Fourth Amendment cases increasingly present questions that depend on the inter-relationship among rules, the cert grant should invite the parties to argue for the modification of established doctrine. Such an approach would make it easier to take a systemic view of the issues presented in particular cases. For instance, a case like *Sullivan* presented an excellent opportunity to reconsider the plausible idea of suppressing contraband discovered during a search justified by the risk of weapons or of false claims for lost property. Given the settled law contrary to their positions, litigants have little incentive to challenge old rules in light of new ones. That sort of challenge, however, is called for, on an ongoing basis, by the Fourth Amendment of rules.

The evolution of the Iron Triangle offers compelling proof of the dangers of taking one Fourth Amendment case at a time. In *Robinson* and *Gustafson*, the Court assumed without deciding that the arrests supporting the searches were neither “unreasonable seizures” nor motivated by the desire to circumvent the probable cause required to search for evidence.<sup>316</sup> *Whren* did

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<sup>315</sup> Id. at 78.

<sup>316</sup> See supra note 109 and accompanying text.

not involve search incident to a pretextual *arrest*, but a plain-view discovery incident to a pretextual but nonetheless less-intrusive *stop*.<sup>317</sup> *Atwater* involved a civil action for damages, not a motion to suppress the fruits of a search incident to an unlawful arrest.<sup>318</sup> Case-by-case creation of bright-line rules has led to a body of doctrine that permits bad-faith arrests for petty offenses to secure evidence absent probable cause to search. Yet in no case has the Court actually dealt with a motion to suppress evidence discovered during a search incident to an arrest for a traffic offense; even *Sullivan* involved an inventory search, not a search incident to arrest.<sup>319</sup>

We now face a situation in which the various legs of the Iron Triangle may prove difficult to reconsider. Litigants have little incentive to expressly ask the Court to overrule recent precedent, so long as the likely result is a replay of the original (*Sullivan*, for example, simply replicates *Atwater*). The Court, in turn, is unlikely to rule on a ground that was not addressed by the parties.

*Thornton v. United States* illustrates the limitations of case-by-case formulation of bright-line rules.<sup>320</sup> The case might well have done no more than demarcate one of the *Belton* rule's boundaries, with good points made by both the majority and dissenting opinions. Justice Scalia, however, joined by Justice Ginsburg, took the occasion to express serious concerns about the Iron Triangle:<sup>321</sup>

As one judge has put it: "[I]n our search for clarity, we have now abandoned our constitutional moorings and floated to place where the law approves of purely exploratory searches of vehicles during which officers with no definite

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<sup>317</sup> Whren, 517 U.S. at 806.

<sup>318</sup> See supra notes 251-56 and accompanying text.

<sup>319</sup> *Arkansas v. Sullivan*, 532 U.S. 769-70 (2001) (per curiam). Likewise, the recent decision in *Illinois v. Caballes*, 125 S. Ct. 834 (2005), upheld the use of a narcotics-detecting dog, not itself a Fourth Amendment search, incident to, and within the temporal duration of, a traffic stop rather than an arrest.

<sup>320</sup> *Thornton v. United States*, 124 S. Ct. 2127 (2004).

<sup>321</sup> *Thornton*, 124 S. Ct. at 2133 (Scalia, J., concurring).

objective or reason for the search are allowed to rummage around in a car to see what they might find." I entirely agree with that assessment.<sup>322</sup>

The majority, however, took the view that because neither the parties nor the court below had argued for a modification of *Belton* that "[w]hatever the merits of Justice Scalia's opinion concurring in the judgment, this is the wrong case in which to address them."<sup>323</sup> Justice O'Connor concurred, expressing sympathy with Scalia's view but also expressing "reluctan[ce] to adopt it in the context of a case in which neither the Government nor the petitioner has had a chance to speak to its merit."<sup>324</sup>

There are a variety of good reasons why courts should hesitate to decide questions not squarely presented by the instant case. Professor Sunstein, perhaps, has expressed these views most forcefully.<sup>325</sup> Narrow rulings permit the Court to change course, thus reducing the risk of a catastrophic mistake.<sup>326</sup> They both reduce the risk of a political backlash against the courts, and permit legislative intervention, which may make constitutional litigation unnecessary.<sup>327</sup>

These considerations, however, have far less force in the criminal procedure area than they may in other areas of constitutional law. The constitutional law regulating police governs millions of police-citizen encounters every year; the Court's turn to bright-line rules implicitly recognizes the likely futility and inconsistency of case-by-case adjudication in this area.<sup>328</sup>

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<sup>322</sup> Id. at 2135 (Scalia, J., concurring) (quoting *United States v. McLaughlin*, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring)).

<sup>323</sup> Id. at 2132 n.4.

<sup>324</sup> Id. at 2132 (O'Connor, J., concurring).

<sup>325</sup> See generally CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) (defending narrow decisions based on widely-accepted constitutional principles).

<sup>326</sup> Id. at 49-50.

<sup>327</sup> Id. at 24-45.

<sup>328</sup> For a fuller exposition of my views, see Donald A. Dripps, Constitu-

Legislative abdication, however, has left the courts with primary policy-making responsibility with respect to limits on police powers.<sup>329</sup> Professor Amsterdam, and the *Miranda* Court, were quite right to view particular constitutional cases as what they have become—the occasions for making major national policy choices as well as for resolving the claims of the parties.

There are institutional limits on the judicial process, but the Supreme Court can do better than it has done so far.<sup>330</sup> Ideally the Court would take many cases raising related issues for simultaneous resolution, *a' la Miranda*. One of the reasons why the *Miranda* litigation was so exceptional, however, is that the law of confessions had become at that time both highly uncertain and obviously dynamic.<sup>331</sup> Litigants could be counted on to raise a variety of claims, theories, and supporting data.

In the Fourth Amendment context the turn to bright-line rules creates a very different litigation environment. Good lawyers with the choice between a case-specific argument (“the defendant was out of the car, and so not covered by *Belton*”) or an across-the-board argument *that has already lost* (“the police should not be allowed to search cars incident to the arrest of

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tional Theory for Criminal Procedure: Dickerson, Miranda, and the Continuing Quest for Broad-but-Shallow, 43 WM. & MARY. L. REV. 1, 39-46 (2001).

<sup>329</sup> See *id.* at 45-46; Amsterdam, *supra* note 1, at 378-79 (“Legislatures have not been, are not now, and are not likely to become sensitive to the concern of protecting persons under investigation by the police.”). For an excellent example of law-and-order politics, see Frase, *supra* note 258, at 415 (“For example, in Texas, following the Atwater decision, a bill limiting arrests in minor cases passed the legislature despite great police opposition, but was then vetoed by the Governor in response to further police pressure.”) (footnote omitted).

<sup>330</sup> The Court has long enjoyed the rare prerogative of choosing its own agenda through the discretionary granting or denial of certiorari. For the history (and a critique) of this discretionary jurisdiction, see Edward A. Hartnett, Questioning Certiorari: Some Reflections on Seventy-Five Years After the Judges' Bill, 100 COLUM. L. REV. 1643 (2000). For a leading study of the certiorari process in operation, including some evidence of strategic behavior by individual chambers, see H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991).

<sup>331</sup> See DRIPPS, *supra* note 3, at 79-81.



suspects who are handcuffed in the squad car at the time of the search") are not likely to choose the more general. If the Court adheres to the *Thornton* approach and waits for litigants to ask the Court to reconsider the bright-line rules set by precedent, the likelihood is that those rules will go unchallenged and ultimately ossify.

What the Justices might do is specifically ask the litigants to address the continued desirability of bright-line rules in cases that on their face involve only the application of those rules. In *Thornton*, for example, once it became clear that many of the Justices had serious concerns about *Belton* in a post-*Atwater* world, the Court could have ordered reargument on the question of whether the rule announced in *Belton* should be modified or discarded.

What needs to happen procedurally is for *all of the rules* governing the outcome in a particular case to be assessed synthetically. This doesn't mean arguing about every rule in every case; the rules would cease to be rules if that were permitted. The Court, however, should invite the reconsideration of the important rules on a regular basis, especially when significant changes have altered the legal ecology.<sup>332</sup>

An example of the approach I have in mind is *Dickerson v. United States*.<sup>333</sup> The Fourth Circuit held *Dickerson's* statements admissible under Title II of the 1968 Crime Control statute, which purports to repudiate *Miranda* and reinstate the voluntariness test as the sole standard for judging the admissibility of confessions.<sup>334</sup> In the Supreme Court the gov-

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<sup>332</sup> I have previously defended a theory of 'scrupulous stare decisis' in criminal procedure cases, a theory which calls upon Justices to follow both the holding and the rationale of decisions they disagree with, but which calls upon judicial majorities to overrule precedents quite readily when those precedents have lost majority support. See Dripps, *supra* note 328. The second part of the theory, encouraging majorities to repudiate disapproved precedents, depends, as a practical matter, on regular opportunities for reassessing rules laid down in prior cases.

<sup>333</sup> 530 U.S. 428 (2000).

<sup>334</sup> *Dickerson*, 530 U.S. at 432.

ernment declined to defend the constitutionality of the statute, and Ickerson, obviously, agreed with the government.<sup>335</sup> The Supreme Court, however, appointed an amicus (then-Professor, now-Judge, Paul Cassell) to argue on behalf of the Fourth Circuit's position.<sup>336</sup>

Here we have an example of the Court reaching out to decide an issue not raised by the parties, despite the importance of that issue in a very large number of other cases. In the Fourth Amendment context, nothing so dramatic is required. If the Court frames the cert grant to include both a narrow question about the application of a bright-line rule *and* a broader question about the continued vitality or scope of the established rule, we can count on defendants and prosecutors to vigorously litigate both questions.

## 2. Clarity Distinguished from Uniformity: The Case for Testing Alternative Rules

Clarity and uniformity are different things. For example, the statute of limitations for a contract action may well vary from one state to another, but lawyers in each state have no doubt what limitations period applies to claims arising under the law of any given state. In a world of judge-made rules with constitutional force, it would be desirable to have some experience with alternative bright-line rules to inform the federal constitutional inquiry.

To revert to the *Miranda* analogy, the Warren Court didn't just invent the famous warning. The *Miranda* majority instead borrowed the warning from the practice of the FBI, adding only the *Gideon*-inspired offer of appointed counsel to the indigent.<sup>337</sup>

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<sup>335</sup> Neal Devins, Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering *Miranda*, 149 U. PA. L. REV. 251, 255 (2000).

<sup>336</sup> For a review of the procedural history, and a cogent defense of the Court's course, see *id.* at 255.

<sup>337</sup> See DRIPPS, *supra* note 3, at 82 ("The *Miranda* rules closely resemble the contemporary practice of the FBI.") (footnote omitted).

The Warren Court had some reason for believing that the warnings wouldn't cripple law enforcement, because the FBI had found the warnings workable. Experience has corroborated the FBI's model; current research indicates that eighty percent of suspects waive their rights.<sup>338</sup>

There is in fact wide variety in the search-and-seizure rules adopted by police departments, state legislatures and state courts. What makes this variety less salient, and thus less instructive, than it might be, is the general reluctance to enforce such subconstitutional rules with the exclusionary sanction.<sup>339</sup> Good reasons exist for this reluctance; legislatures and police departments that have reasons for adopting rules will find ways to enforce them, while judicial imposition of the exclusionary rule for violations of nonconstitutional rules might well deter legislators and police administrators from promulgating such policies.<sup>340</sup>

If we want a body of experience to inform federal constitutional adjudication, then, we must turn to the state courts, the only likely place to develop a track record with the various alternative rules. No doubt the *McKay* court was quite right in reading current law to separate the statutory limit on police arrest decisions from the federal constitution. The California courts, however, have no authority under the state constitution to exclude reliable evidence because it was illegally obtained, except when suppression is required by the federal constitution.

In other states, we should encourage a variety of state constitutional rules, backed by the exclusionary sanction, as experiments in the spirit of Brandeis.<sup>341</sup> These experiments are

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<sup>338</sup> Id. at 224-25 n.117 (reviewing studies).

<sup>339</sup> See, e.g., *United States v. Caceres*, 440 U.S. 741, 757 (1979) (refusing to suppress evidence obtained by IRS agent acting contrary to IRS regulations).

<sup>340</sup> See Wayne R. LaFare, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 509 (1990).

<sup>341</sup> See David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the "New Federalism" in Constitutional Criminal Procedure*, 3 U. PA. J.

inevitable with respect to open questions of federal Fourth Amendment doctrine, but they might be most valuable with respect to settled principles of federal law, such as the various components of the iron triangle.<sup>342</sup> What would be the consequences of considering police motivation in search-incident to arrest cases? What would be the consequences of backing statutory limits on misdemeanor arrests with the exclusionary sanction? If my central claim about Fourth Amendment law being more than the sum of the parts is correct, answers to such questions might supply important knowledge about alternatives that might, in due season, be reconsidered by the Supreme Court of the United States.

To state court justices leery of the exclusionary rule, I commend a possibility I have previously defended at some length: the contingent exclusionary rule.<sup>343</sup> Suppressing illegally-obtained evidence unless the government pays damages to the victim, disciplines the offending officer or undertakes institutional reforms calculated to prevent future violations offers many of the advantages, and few of the disadvantages, of the traditional exclusionary rule. Judges reluctant to deviate from the minimum of civil liberty recognized in federal constitutional law might be emboldened to undertake the sort of experiments I have in mind, if they knew that civil liberty might be vindicated without losing the conviction of the present, apparently guilty, defendant.

### 3. Reconciling Determinacy and Legitimacy: The Need for Systemic Legal Scholarship on Criminal Procedure

The literature on the Fourth Amendment boasts both some of

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CONST. L. 367, 397 (2001) (urging state courts to depart from Whren more widely than they have done).

<sup>342</sup> See Frase, *supra* note 258, at 412-13 (noting that at least two state courts have rejected Atwater).

<sup>343</sup> See Donald A. Dripps, *The Case for the Contingent Exclusionary Rule*, 38 AM. CRIM. L. REV. 1 (2001).

the best law review articles ever written<sup>344</sup> and what is among the most influential legal treatises of modern times.<sup>345</sup> I have the highest respect for each of these forms of scholarship, but there are systemic limits on them both. Journal articles tend either to pour enormous intellectual and research resources into the task of evaluating a particular case or to attacking or defending some overreaching methodology. In between the particular and the general lies the troubling area of intersecting rules I have discussed in this article.

Professor LaFave certainly appreciates the interplay of various rules, being both the leading defender of bright-line rules and a vigorous critic of the Court's Iron Triangle. The treatise format, however, has two formal qualities that make it both too close to, and too far away from, the Supreme Court itself. No treatise can get far away from existing positive law, and it is unlikely that a treatise can reflect the challenges of collective decision-making that bedevil the courts.

What might be useful, to both courts and legislatures, is a renewed attempt at a model code of police practices. The Model Code of Pre-Arrest Procedure<sup>346</sup> arrived both too late and too early. It arrived too late because the Warren Court revolution worked constitutional changes before the drafters had completed their work. It came too early because the project was ended before the steady drift of the Supreme Court in favor of broader police powers had induced something of a reaction among state courts.

The precise body to undertake such a project is not terribly important. What would be important is for *a group* of experts with varying ideological perspectives to undertake the project of regulating police investigations *on a systemic basis*. Much has changed since the ALI project expired; think about terrorism, videotaping, portable telephones, DNA evidence, the psychology of eyewitness identification, and on and on. Any such undertaking would have to grapple with the problems posed by

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<sup>344</sup> See, e.g., Amsterdam, *supra* note 1.

<sup>345</sup> See LaFave, *supra* note 31.

<sup>346</sup> AM. LAW INST., MODEL CODE OF PRE-ARREST PROCEDURE (1975).

overinclusive rules leveraging one another. That would require compromises of a sort that appear legislative and thus beyond the reach of even open-ended constitutional provisions—until such compromises, like the *Miranda* rules, have become an accepted part of legal culture.

## VI. CONCLUSION

Current Fourth Amendment law conditions the use of the primary mode of personal transportation in this country on liability to arbitrary arrest and search. It bears repeating, and it merits emphasis: *That can't be right*. It is a result that defies the Framers' hostility to general searches, that creates incentives for the police to resort to the coercive practice of arrest for the purpose of circumventing limitations on their powers to search, and that contradicts contemporary understandings of reasonableness, as reflected in prevailing practice.

I have tried to trace the roots of this troubling situation to the genuine need for determinacy in Fourth Amendment jurisprudence, rather than to misguided ideologies or mistaken views of historical practice on the part of individual Justices. To some extent the tension between legitimacy and determinacy is irreducible. Clear rules are always wrong in some of their applications. That does not defeat the case for rules, but it does call for recognizing their relationships and considering alternatives, not just on the occasion of particular cases, but from a systemic perspective and on an ongoing basis.

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