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# What Went Wrong with the Warren Court's Conception of the Fourth Amendment?

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## I. INTRODUCTION

I imagine it as a World War II propaganda film, all in black and white. It portrays the enemy nation, a nation whose values are so odious to our own that we all but literally shiver as we watch. Stronger than the fear and repulsion that we feel, however, is the quiet assurance within each of us that this enemy nation must be stopped, no matter the sacrifice in lives and material.

This film portrays a society in which the police are everywhere, unrestrained by any laws but their own. On street corners and in workplaces they approach citizens asking for identification. In bus, train, and air terminals the police are present, asking to look at tickets and to inspect personal belongings. Airplanes and buses are held under police orders and denied permission to leave for their destinations until groups of armed police board and request the identification papers of each passenger and ask to search their bags. And everywhere the police are looking, searching. Their helicopters, equipped with high powered cameras and viewing devices, hover over neighborhoods and factories. In the countryside, teams of police climb over fences posted "No Trespassing," walk through fields, and peer into outbuildings surrounding farmhouses. In the city, they sift through the garbage citizens have left on the curbs in front of their dwellings. They pore over the bank records of citizens and keep track of the phone numbers of all telephone calls to and from their homes. They send informants with recording devices into private homes and furtively place electronic monitors on vehicles of citizens so they can better trace their movements. And always they are with their sniffing dogs which, looking for the scent of whatever is currently forbidden, are set upon whatever packages or belongings that the citizens take out in public.

All this, however, is not really some WWII propaganda film, and it does not take place in some remote fascist state. This is current

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America.[1] Or, at least, it is the negative that exists behind the picture of what we see as America. And, like all negatives, it is as real as the photograph.

My point, however, is not that under current Supreme Court precedent the police can do everything in this little propaganda film. They can, but that's not the point. No doubt many of these activities would be admirable police practice if based upon some articulated standard of justification which a court could review. Rather, the point is that our own police, like the police in the film, can undertake all these actions unrestrained by any law but their own.[2] I am not saying that America has become a police state yet (albeit a democratic one), though doubtless residents of some neighborhoods would disagree. I am saying that all the legal pieces required for that propaganda film to become our dominant reality are already in place.[3] That is because the post-Warren Supreme Courts have held that none of these police activities are

1. The Supreme Court cases in the order in which they appear in the "propaganda film" are: INS v. Delgado, 466 U.S. 210 (1984) (factory workers not seized when immigration officers were posted at exits while others questioned workers to determine identities and nationality); Florida v. Rodriguez, 469 U.S. 1 (1984) (asking a citizen in an airport to talk is not seizure); Florida v. Royer, 460 U.S. 491 (1983) (merely asking for driver's license and airplane ticket does not constitute a seizure); United States v. Mendenhall, 446 U.S. 544 (1980) (several Justices indicate that a stop for identification might not constitute a seizure); Florida v. Bostick, 111 S. Ct. 2382 (1991) (passengers not seized when police enter bus to ask passengers they have detained for identification and to search bags); Dow Chemical v. United States, 476 U.S. 227 (1986) (helicopter taking aerial photos of factory surrounded by fence and protected by ground security does not constitute a search); California v. Ciraolo, 476 U.S. 207 (1986) (helicopters 1000 feet above fenced backyard specifically trying to spy on that home not a search); Florida v. Riley, 488 U.S. 445 (1989) (surveillance by helicopter from 400 feet into enclosed backyard is not a search); Oliver v. United States, 466 U.S. 170 (1984) (no unreasonable search when police walk through gates and past "no trespassing" signs across citizen's land); United States v. Dunn, 480 U.S. 294 (1987) (no search when police climb over barbed wire fence, cross citizen's fields, and peer into his barn); California v. Greenwood, 486 U.S. 35 (1988) (no search when police go through garbage which citizen left on curb in front of her house); Smith v. Miller, 425 U.S. 435 (1976) (going through citizen's bank records does not constitute a search); Smith v. Maryland, 442 U.S. 735 (1979) (using a "pen register" to keep track of all incoming and outgoing phone numbers is not a search); United States v. White, 401 U.S. 745 (1971) (sending a wired informant into a home is not a search); United States v. Karo, 468 U.S. 705 (1984) (surreptitious planting of "beeper" so authorities can track citizen's car is not a search); United States v. Place, 462 U.S. 696 (1983) (exposing luggage to sniffing dogs is not a search). The Orwellian implications of this pattern of cases has not been lost on commentators. *See, e.g.*, John M. Burkoff, *When Is a Search Not a "Search"? Fourth Amendment Doubletalk*, 15 U. TOL. L. REV. 515 (1984).

2. An analogous concern regarding broadening police powers in conjunction with accountability is expressed in the excellent article, William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981).

3. One author finds the legitimation of a right to privacy in an anti-totalitarian

"searches" and/or "seizures," and in these courts' Fourth Amendment jurisprudence, that means that these activities are not circumscribed by the Fourth Amendment at all. Thus, in terms of the Constitution, the police are without any judicial supervision and subject to no standards but their own whim.

How did all this happen? It is my thesis that to a significant extent the blame lies with the Warren Court. Though no doubt staunch defenders of our civil liberties,[4] I blame the Warren Court for its mishandling of two cases that form much of current Fourth Amendment jurisprudence—*United States v. Katz*[5] and *Terry v. Ohio*.[6]

I can readily imagine a response denying this thesis, contending instead that the Warren Court had little or nothing to do with what has happened to the Fourth Amendment. All that has happened is that the political composition of the Court has drastically changed, and has changed in a direction away from individual rights towards law and order. Also, what we are seeing is the historical tendency to restrict our constitutional rights when our nation comes under stress. Since we are currently experiencing such stress in our "war" on drugs and on crime in general, it is hardly surprising that we should see a broadening of police powers. We did, after all, seize 120,000 Japanese-American citizens without any individualized suspicion and put them in concentration camps to alleviate fears in early WWII.[7]

All that being said, I will still stand by my thesis. That does not mean that I totally reject this "realist" line, or find it to be inaccurate as a descriptive matter. But I find that it is more than coincidence that all the police intrusions in our propaganda film were removed from Fourth Amendment constraints by finding that they did not constitute a "search" under *Katz* and/or that they did not fulfill the standard for a "seizure" under *Terry*. Those two cases left a rhetorical legacy that was ripe and easy for manipulation as soon as political winds blowing through the Court and nation changed from protection of the individual from government to the use of government to protect individuals from each other. As a related matter, the Warren Court in *Katz* and

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principle which prevents the state from making us into standardized, cookie-cutter people who meet the government's definition of normal:

> The very possibility of accountability to a people presupposes that the bodies and minds of the citizenry are not to be too totally conditioned by the state that the citizenry is meant to be governing. If they were, self-government, although it might continue to exist in form, would in fact be wholly illusory.

Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 805 (1989).

4. For a tribute to Justice Earl Warren as a man who did his best to hold back any hint of the Orwellian nightmare, see Bernard Schwartz, *Chief Justice Warren and 1984*, 35 HASTINGS L.J. 975 (1984).

5. 389 U.S. 347 (1967).

6. 392 U.S. 1 (1968).

7. *See, e.g.*, Korematsu v. United States, 319 U.S. 432 (1943).

*Terry* failed to take advantage of the opportunity presented them to provide clear rhetorical tools that could be used to control the police in our late twentieth century society.[8]

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8. Actually, the blame that I place on the Warren Court for what I see as the ongoing erosion of the Fourth Amendment includes more than *Terry* and *Katz*. Though a full discussion is beyond the scope of this essay, the line of cases begotten by Camera v. Municipal Court, 387 U.S. 523 (1967), merits some mention. *Camera* was decided at a point when the pendulum on the "reasonableness" vs. warrant debate had swung far towards the warrant requirement. The debate is whether the Fourth Amendment is to be enforced by a standard of general reasonableness or whether reasonableness itself means probable cause and a warrant, except in narrowly drawn exceptional circumstances. *See, e.g.*, Chimel v. California, 395 U.S. 752, 758-60 (1969). Though the decision in *Chimel* two years after *Camera* continued this trend, ironically *Camera*, which had required a warrant for an all-area health and safety check of rental apartments, offered a wealth of rhetorical strategies that would eventually be used to move the pendulum the other way. To force the routine, non-individualized administrative search into a warrant with probable cause model, a model which it did not fit, the *Camera* majority made a series of rhetorical moves that would be used by succeeding Courts to alter sections of the Fourth Amendment map. Because traditional "probable cause" did not apply to this situation, the standard that was to equate with probable cause for this particular set of searches was to be derived by *balancing* the government's interest in the intrusion against the individual interests invaded by the intrusion (resulting in *Camera* in a standard of "probable cause" not requiring individualized suspicion); a similar balancing was to be used in the first place to determine whether a "special needs search" like *Camera* was constitutionally unreasonable; and, though the warrant procedure was valuable, "reasonableness [was] still the ultimate standard." *Camera*, 387 U.S. at 539. (*Terry* in fact applied the *Camera* balancing to arrive at its standard of "reasonable suspicion.") The upshot of these rhetorical moves in *Camera* has been a recent rash of "special needs" searches. In these cases the Court has engaged in balancing to justify the searches as falling under this category of special needs in the first place, and/or to justify dispensing with a warrant, and/or to justify full-blown searches on far less than true probable cause, often without any individualized suspicion. Generally the Court in these cases will use *Camera* as the heart of their analysis. *See, e.g.*, O'Conner v. Ortega, 480 U.S. 709 (1987) (special needs search of public employee's desk without warrant or probable cause); Griffin v. Wisconsin, 483 U.S. 868 (1987) (warrantless special needs search of probationer's home on "reasonable grounds"); Skinner v. Railway Labor Executives Assn., 489 U.S. 602 (1989) (drug testing of federal railroad employees without a warrant or individualized cause); New Jersey v. T.L.O., 469 U.S. 325 (1985) (warrantless search of student's purse on "reasonable grounds" because schools have special needs); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (fixed checkpoint where all stopped without warrant, probable cause, or individualized suspicion).

Once *Camera* breached the traditional lines and permitted rebalancing of the Fourth Amendment, where the outcome depended on the particular context in which the search took place, it was inevitable that a court with a different philosophy than the Warren Court would employ this tool to dispense with our traditional protections whenever they believed the particular need of law enforcement would make "the warrant and probable cause requirement impractical." New Jersey v. T.L.O., 469 U.S. at 351. For a similar criticism of *Camera*, see Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camera *and* Terry, 72 MINN. L. REV. 383, 385 (1988). Plainly, however, the

## II. THE TWO FAILINGS OF *KATZ*

Let us begin with *Katz* since it came out the year before *Terry*. In finding constitutional protection for a man whom the police had electronically surveyed in a public phone booth, the majority in *Katz* appeared bent on establishing an expansive view of the Fourth Amendment. The Amendment was not to be exclusively tied to such property-bound notions as "protected areas" and "trespass." Modern technology simply presented too great a threat of widespread governmental intrusion into our lives every time we walked out our front door if our Fourth Amendment jurisprudence was bound by spatial metaphors responsive to pre-technological times. The new rhetoric of protecting "people not places" was a good civil libertarian response to this impending threat. Ironically, aircraft armed with high-powered cameras hovering over our homes, pen registers recording numbers on our telephones, and beepers surreptitiously placed on our vehicles are likely idiomatic of the very threat of government intrusion that *Katz* sought to avoid. So, to repeat—what went wrong? Actually, there are two failings in *Katz* (although if they had dealt with one, the other might well not have been a problem)—the failure to contextualize and the failure to articulate a broader conception of the Fourth Amendment.[9]

### A. *The Failure to Contextualize* Katz

This failure involves the now classic catch phrase, "reasonable expectation of privacy." As you are probably aware, these words never appeared as such in the majority opinion. The majority rhetoric does

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current Court has taken undue advantage of the *Camera* rhetoric. *See* Stephen J. Schulhofer, *On the Fourth Amendment Rights of the Law Abiding Public*, 1989 SUP. CT. REV. 87, 108-09 (1989).

9. Recent authors have taken different tacks to cure what we perceive in common as serious problems in the current direction of Fourth Amendment jurisprudence. In his article, *The World Without a Fourth Amendment*, Professor Slobogin proposes that courts look at the intersection between the "intrusiveness" of particular government conduct and the level of "certainty" that evidence will be discovered as a result of the conduct. Thus, all the activities in our propaganda film would be subject to court supervision but, depending on the perceived quantum of intrusiveness, might be justified on less than traditional probable cause. Christopher Slobogin, *The World Without a Fourth Amendment*, 39 UCLA L. REV. 1 (1991). Professor William S. McAninch expresses a view generally paralleling my own. William S. McAninch, *Unreasonable Expectations: The Supreme Court and the Fourth Amendment*, 20 STETSON L. REV. 435 (1991). His modification of *Katz*, however, goes in a direction of a balancing which considers intrusiveness on the citizen's freedom, whether the citizen has done all we could reasonably ask to insure privacy, and the level of cause that the police have to believe they will find evidence. *Id.* at 463-71. Professor Berner, on the other hand, proposes that our focus shift from the expectations of the individual intruded upon, to the activity of searching. Bruce G. Berner, *The Supreme Court and the Fall of the Fourth Amendment*, 25 VAL. U. L. REV. 383, 398 (1991).

include "what he seeks to preserve as private"[10] and "the privacy upon which he justified relief."[11] But the classic phrase comes from Justice Harlan's concurrence.[12] No matter, since the majority embraced the phrase a year later in *Terry*[13] and the phrase has since been universally equated with *Katz* and all but unquestioningly accepted as the standard for what may be thought of as the new "protected area"; i.e., the dimension (now defined by expectations rather than property concepts) into which the police may not tread without constitutional consequences. Courts now will ask whether the defendant has "a reasonable expectation of privacy in _____" [fill in where police found incriminating evidence]. If the court's conclusion is "Yes," the Fourth Amendment applies; if "No," the police are constitutionally free to do as they please. So much for what the Warren Court did. More significant is what it did not do.

The Warren Court failed to provide this "reasonable expectation of privacy" with any articulated *context*. Was this to be the "reasonable expectation" of a six-year-old from his mother? Of a prisoner in the Gulag from the former KGB? The reader gets the point. Without a context, the phrase is all but meaningless. Or, more accurately, it is amenable to taking on many alternative meanings, specifically the one(s) of those who can provide the privileged context.[14]

A Supreme Court, of course, is just the kind of entity whose choice of context will be privileged above all others. The Warren Court thus left a rhetorical construct that was open to ready manipulation by succeeding Courts. This was no small matter, for keep in mind that this was no ordinary, garden variety rhetorical construct. This construct would serve as the very gatekeeper to the Fourth Amendment. Set adrift without any articulated contextual constraints, it was obviously pliable enough to *limit*—as it has—the reach of the Fourth Amendment's check on the Executive's use of its police power. In fact, this manipulation is veritable child's play: I know children may sometimes go through my garbage, therefore—imposing the context of "if anyone in the universe can see it, I have no reasonable expectation that every-

10. Katz v. United States, 389 U.S. 347, 351.

11. *Id.* at 353.

12. *Id.* at 361 (Harlan, J., concurring).

13. Terry v. Ohio, 392 U.S. 1, 9 (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

14. Professor Burkoff makes much of how the current Courts have twisted *Katz* by manipulating the context. Burkoff, *supra* note 1, at 537-41. In a fascinating piece by Clark D. Cunningham, the author, recognizing the importance of specific legal language, employs linguistic analysis while exploring the vague, unstated, contextual shifts by the various justices in applying *Katz*. In so doing, he finds the case results depend on whether the author contextualizes "search" as "search of" or "search for" or "search out" or "intrude." Clark D. Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541 (1988).

one in the universe won't do the same"—I have no reasonable expectations remaining upon which to voice my complaint when full-grown, adult police systematically look through my trash to find the traces of my life that will reveal the information they seek about me.

As the reader doubtless surmises, this essay contemplates a context implicit in the very enterprise of *Katz*. Specifically, I am proposing that there is constitutional significance whenever the government intrudes where a citizen has "a reasonable expectation of privacy": 1) from government 2) in keeping with some basic vision of America.

Begin with "from government." Legally, of course, the Fourth Amendment only applies to the government and those who act as its agents or collaborators. That, however, does not logically justify partly defining my "reasonable expectations" in terms of my apprehension of government. As the garbage example above shows, those to whom the constraints of the Amendment apply and whether they apply at all in a particular circumstance are two separate issues. Rather, this first contextual constraint on the *Katz* rhetoric rests on the simple perception that there is something very different between having a child and having a cop go through my garbage, between knowing commercial flights carry vacationers and business people who might strain their eyes to snoop in my backyard for a few moments and knowing a spy helicopter is lurking about.[15] Loose language in *Katz*—such as "knowingly ex-

15. Echoing the same perception are the authors in Christopher Slobogin, *Capacity to Contest a Search and Seizure: The Passing of Old Rules and Some Suggestions for New Ones*, 18 AM. CRIM. L. REV. 387, 397 (1981); and Gregory E. Sopkin, Comment, *The Police Have Become Our Nosy Neighbors:* Florida v. Riley *and the Supreme Court Deviation From* Katz, 62 U. COL. L. REV. 407, 427 (1991). *But see*, Aimee Libeu, Note, *What is a Reasonable Expectation of Privacy?*, 12 W. ST. U. L. REV. 849 (1985).

The court has consistently refused to recognize any constitutional distinction between intrusions by police and those by citizens with one possible exception. *See* Lo-Ji Sales, Inc. v. New York, 442 U.S. 319 (1979), where the Court said:

> Perhaps anticipating our disposition of the case, the State raises a different theory from the one advanced in its opposition to the petition for certiorari and on which it had relied in the state courts. The suggestion is that by virtue of its display of the items at issue to the general public in areas of its store open to them, petitioner had no legitimate expectation of privacy against governmental intrusion, see Rakas v. Illinois, 439 U.S. 128 (1978), and that accordingly no warrant was needed. *But there is no basis for the notion that because a retail store invites the public to enter, it consents to wholesale searches and seizures that do not conform to Fourth Amendment guarantees. See* Lewis v. United States, 385 U.S. 206 (1966). *The Town Justice viewed the films, not as a customer, but without the payment a member of the public would be required to make. Similarly, in examining the books and in the manner of viewing the containers in which the films were packaged for sale, he was not seeing them as a customer would ordinarily see them.*

*Id.* at 328-29 (emphasis added).

Of course, to have held otherwise in *Lo-Ji Sales* would have sanctioned wholesale, unrestrained searches of retail establishments in general and of those purveying classic First Amendment materials (books, videos) in particular.

poses to the public"[16] and "entitled to assume the words he utters into the mouthpiece will not be broadcast to the world"[17]—blurs these distinctions. Yet, if the reader will suspend judgment for the moment, and accept (like an offer of proof regarding evidence to be presented later) that there is an analytically supportable distinction of constitutional significance between police and private citizen intrusions into our lives, we will return to the subject later in this essay and expand in detail upon the basis for this position.

The explanation of the second constraint, "in keeping with some basic vision of America," will not be postponed. At first this constraint might strike the reader as little different from exhorting the Court to do the right thing. After all, this is America. The Court is the Supreme Court of America. How else would they decide? Are they to play God Bless America and the Star Spangled Banner whenever they decide a Fourth Amendment case? Since the phrase is intended to have real meaning and bite, therefore, it is important to explain its source and content.

The source of this contextualizing phrase is underlain by a set of assumptions. The Constitution is far more than the rules for conducting the day-to-day business of the nation. That it is more than a contract or compact or corporate papers of a massive bureaucracy is encoded in Chief Justice John Marshall's phrase that "it is a constitution we are expounding."[18] Taken as a whole, the Constitution has a metaphorical quality.[19] It represents a vision of a country for which "America" is another metaphor. Think about how we talk about The Constitution. To be sure, we discuss the First or Fourteenth Amendments, or Separation of Powers, Checks and Balances, and the like. But we carry a constant idea of the United States Constitution that transcends these parts, a constant idea the very existence of which in a sense defines who we are. We live under the Constitution and, in turn, distinguish ourselves from others as being the kind of people who live under that kind of Constitution. This vision for which the Constitution is a metaphor and by which it is in turn interpretively guided is obviously multi-dimensional, covering various aspects of our lives. Some

16. Katz v. United States, 389 U.S. 347, 351 (1967).

17. *Id.* at 352.

18. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 407 (1819).

19. It is hardly extraordinary at this date to recognize the central role that metaphor plays in our general reasoning processes. *See generally* GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980); ANDREW ORTONY, METAPHORS AND THOUGHT (1979); and in the particular world of legal reasoning, *see* Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105 (1989); Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988). Metaphor is even a central rhetorical device of the mathematics-spewing economist. *See* DONALD M. MCCLOSKY, IF YOU'RE SO SMART: THE NARRATIVE OF ECONOMIC EXPERTISE 10-23 (1990).

dimensions of this vision will deal with the relation of the police to the individual so as to be relevant to our concerns here.

In search of the content of this portion of the American vision, the inquiry is aided by converting the focus from what the vision is to "some basic vision of [what is *not*] America."[20] In other words, I know it when I don't see it. At this point the reader might properly point out that "some basic vision of America [or of what is *not* America]" suffers from its own contextual difficulties (Whose vision? At what point in time?), and that there is no obvious, across-the-board consensus on what "America" is, or even is not. How then can "America" provide a useful guide? You will have your vision, I will have mine, and quickly we will arrive at first principles, then bedrock, where further analysis and argumentation will cease. There will be nowhere further to take the debate; the parties will either concur or walk their separate paths. Yet, it is this very bedrock that we should be mutually exploring. We need to make explicit our varying visions, bring forth our images, and discuss them. Far from ending this dialogue, this will afford a beginning. As Americans, our visions likely have far more in common than not. This is particularly so, I believe, when we talk about the relationship of the average citizen to the police. Also, even though there will doubtless be cases where it will be very difficult to find principled, rational bases to choose among descriptions, even in these difficult cases we will be talking about the right thing.[21] For there exists no technical

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20. Actually, Professor Amsterdam considers a somewhat similar concept when discussing *Katz*:

> The ultimate question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society. That, in outright terms, is the judgment lurking underneath the Supreme Court's decision in *Katz*, and it seems to me the judgment that the Fourth Amendment inexorably requires the Court to make.

Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974). While at least one distinguished commentator believes this accurately captures the essence of *Katz*, Wayne R. LaFave, *The Fourth Amendment Today: A Bicentennial Appraisal*, 32 VILL. L. REV. 1061, 1081 (1987), Professor Amsterdam himself went on to reject the concept as a standard for contextualizing *Katz* because he believed that such a construct was unworkable in practice. Amsterdam, *supra*, at 403-04. For reasons I will offer later, I do not share Professor Amsterdam's concerns. *See infra* text accompanying notes 28-30. Interestingly, a number of cases cited by the dissent in *Bostick*, the bus boarding case, relied on some version of "America" as the rhetorical linchpin in their argument. Florida v. Bostick, 111 S. Ct. 2382, 2390 (1991) (Marshall, J., dissenting).

21. "And talking about the right issues, in our circumstances, is an important contribution." Christopher Wolfe, *Grand Theories and Ambiguous Republican Critique: Tushnet on Constitutional Law*, 15 LAW & SOC. INQUIRY 831, 875-76 (1990). *See also* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 140 (1987); McAninch, *supra* note 9, at 464.

rule or standard for deciding Fourth Amendment issues which are not ultimately tied to some vision of the community. So let us dig through the bedrock and assay whether the film description of the relation of the police to the citizenry in our propaganda film is *not* America.

This film cannot be America. It cannot be America because we fought a bloody world war to make the world free from a nation like that. It cannot be America because we're just in the process of coming out of a Cold War in which all our national energies went to halting the expansion of a government that we envisioned as the embodiment of the state in that film. At this point, however, one can imagine a competing vision of the relationship of the police to the individual: America is the place where the good-guy cops break the rules to get the bad-guy robbers. The good guys succeed in spite of pin-headed bureaucrats and judges who throw hypertechnical rules in their way. That is good because what America is really about is the good guys beating the bad guys. Certainly this is a film playing on screens across our land. Yet, without directly confronting the legitimacy of its vision, one can respond that here we are not talking about the bad guys. It is good citizens who sit on the buses that are being boarded and good citizens who sit in the backyards over which the helicopters fly. It is all of us. Those offering this competing vision surely would not cast us as bad guys in their *Dirty Harry*[22] movies, and it is hard to imagine that they would label the police in our propaganda film as the good guys.

It could of course be that like the famous "Pogo" cartoon of the Sixties, "We have met the enemy and they are us."[23] I do not believe that, however. We have just gotten locked into our own legal categories and analyses, and have followed down their path, as attorneys tend to do, without ever standing back and recalling why we had the categories in the first place. We do have significant shared values, and one of which we can all be confident is that America—in its ideal vision, though not necessarily its reality for all residents—is *not* a "police state."

Looking at the Constitution itself only reinforces this view of what is not and cannot (in the sense of vision) be America. One may confess to not knowing what the Framers or those former colonists who ratified the Constitution thought about police striding through buses, placing beepers on automobiles, flying helicopters with high-powered surveillance equipment, or reviewing computer records of our bank deposits. And one may acknowledge that the word "America" does not appear in any provision, nor does "metaphor." Nonetheless, when looking at the construction of the overall document, when looking at its structure by contemplating the various parts of the document and their relation to

22. *See, e.g.*, DIRTY HARRY (Malpaso Productions 1971).
23. Walt Kelly, Creator of "Pogo" comic strip.

one another,[24] one can gain a great deal of insight. This is a document with a prevailing bias against letting any governmental power, let alone the police, control our lives.[25] Look again at the Constitution yourself. Start with the original Constitution. It is filled to bursting with checks and counterchecks on every conceivable exercise of power by federal and state government which, in turn, drastically impedes the facility of government to act upon us. Now look at the amendments. Focus on the Bill of Rights as a whole, going beyond particular language of particular provisions, and you will confront a set of ideas which collectively transcend a mere mistrust of government and make an actively anti-government statement:

> Mr. Justice Jackson put it well when he described the Bill of Rights as "the maximum restrictions upon the power of organized society over the individual that are compatible with the maintenance of organized society itself." The Bill of Rights in general and the Fourth Amendment in particular are profoundly anti-government documents. They deny to government—worse yet, to democratic government—desired means, efficient means, and means that must inevitably appear from time to time throughout the course of centuries to be absolutely necessary means, for government to obtain legitimate and laudable objectives.[26]

In short, we are not a society to give any instrumentality of the executive, let alone the police, free rein.

To this point, however, we have not yet talked about the ramifications of my suggested contextualization of *Katz* for the police officer on the streets. Certainly the role of Fourth Amendment jurisprudence is to guide as well as to censure. What possible guidance then can a construct like "some basic vision of America" have for an officer who hears a noise down a garbage strewn, darkened alley, sees a doorway slightly ajar, and must now decide whether he or she can peek through the crack (assuming such behavior is advisable in a practical sense)? Initially, it is hard to conceive that "reasonable expectation of privacy"

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24. For a full articulation of a structural approach to constitutional interpretation, see CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969).

25. This no doubt also reflects the vision of today's conservatives when considering the economic sphere. In this regard, increased regulation by the state and federal government (the latter via expansion of federal power under the commerce, taxing and spending powers) no doubt deeply intrudes into the lives of individuals in their commercial realms. But health and safety regulations under a general "police power" (or a commerce clause rubric) is different from "the power of the police." Even extreme government intrusion into our economic lives is not the same as a police state. Police are different, as will be discussed in detail later, because they embody state sponsored and legitimated use of violence. *Cf.* Rubenfeld, *supra* note 3, at 806 (explaining why minimum wage or maximum rent laws do not harken the threat of totalitarianism).

26. Amsterdam, *supra* note 20, at 353 (footnotes omitted).

was ever any aid. At best, subsequent court "factorization" (i.e., analyzing the concept according to a list of factors) of the *Katz* standard may have provided raw material for on-the-job rules of thumb.[27] Thus a line of cases where the courts apply *Katz* in terms of "factors" such as, e.g., the specific steps the suspect took to protect his privacy (fences, sign) and who else had free access to this zone (children, meter readers) might be transposed to a rule of thumb on the streets: If the suspect has a high fence and has posted "No Trespassing" signs, don't scale the fence without a warrant; climb a telephone pole and spy with binoculars. In other words, police do not find guidance from a "general standard" (as contrasted with bright-line rules that tell police "you can always" or "you can never") such as *Katz*. Instead, courts' factual applications of the general standard, rather than the standard itself, provide the guidance.[28] Thus, the proposed "basic vision of America" gloss on *Katz* would generate a similar set of factual results which in turn would be converted into operational rules of thumb on the streets.[29] Further, most of the situations that comprise the focus of this essay are not in the nature of fast-moving, on the scene decisions like our officer in the alley. They consist of categories of planned programs of governmental intrusions: use of pen registers, searching bank records, boarding buses, helicopter surveillance flights, etc. Once police get the "message" as to the types of activities that raise Fourth Amendment concerns, they should have little problem in recognizing analogous categories of intrusions that likewise invoke the Constitution. At worst, to the extent they have doubts, the police can first go to the courts. In fact, that is the most this essay seeks. Police may employ the full range of investigative techniques. They simply may not do so accountable to no one but themselves.

With the contextualization of *Katz* that has been offered, the rhetoric of that opinion now has something to bring to our propaganda movie, as intuition tells it should. Why, after all, should one have to endure police routinely invading their private world while sitting on a bus or in their backyards? Starting with the observation that the officers are surely interfering with your privacy, you would assess whether or not you should reasonably expect such privacy by asking: In a basic vision of what we mean by "America," do we have police routinely going through our garbage, flying over our backyards, and boarding planes and buses asking for our "papers"? As to this inquiry, it would seem that one could be justifiedly confident that the answer would have

27. *Cf., e.g.*, James A. Bush & Rece Bly, *Expectation of Privacy Analysis and Warrantless Trash Reconnaissance After* Katz v. United States, 23 ARIZ. L. REV. 283, 287-88 (1981).

28. Whether even these rules of thumb actually guide police on the streets or merely serve as after the fact scripts to justify their actual conduct in court is an open question.

29. *Cf. generally* Slobogin, *supra* note 9, at 71-74.

been in the negative. Thus, proper contextualization would make all the difference; however, contextualization of the *Katz* standard was not the only avenue open to the Warren Court and not necessarily even the best. This leads to the second of *Katz*' failures, the failure to clearly articulate the Court's broader vision.

### B. *The Failure to Seize the Opportunity to Articulate a Broader Conception of the Fourth Amendment*

*Katz* was plainly attempting to put forth a broad conception of the Fourth Amendment. As Professor Amsterdam noted in his classic article, *Perspectives on the Fourth Amendment*:[30]

> *Katz*, in other words, returned to the grand conception of *Boyd v. United States*, a case that Mr. Justice Brandeis said would 'be remembered as long as civil liberty lives in the United States' but which the Supreme Court had largely forgotten in the *Olmstead* era. *Katz* held, as *Boyd* had, that whatever 'is a material ingredient, and effects the sole object and purpose of a search and seizure' *is* a search and seizure in the only sense that the Constitution demands.[31]

All that being said, *Katz* failed completely in expanding upon or even clearly articulating this broad conception beneath the surface. As a result, that vital aspect of the opinion was all but lost over time as *Katz* was sifted over and over again through the legal process, and became synonymous with the rather more narrow and readily manipulated conception of reasonably expected privacy we've spent so much of this essay discussing. Yet it is certain that the Warren Court had not intended to limit *Katz* to "privacy." In fact, right at the beginning of the opinion we find, "[t]hat Amendment protects individual privacy against certain kinds of judicial intrusion, but its protections go further, and often have nothing to do with privacy at all."[32] True, in footnote 4 noted after this quote the Court cites instances of public "seizures" of persons and goods.[33] It is therefore possible to contend that the phrase "and often have nothing to do with privacy at all" is limited to this one context. Following this line of reasoning, "seizures" would not involve privacy, "searches" would. But that would be a rather myopic view of *Katz*. Aside from the fact that there is no reason to believe the examples in footnote 4 are exclusive, that footnote has nothing to do with the previous phrase, "but its protections go further." Perhaps most significant, when discussing in footnote 9 the Court's divergence in *Katz* from its previous reliance on a "protected areas" analysis, the Court states, "but we have never suggested that this concept ['protected areas'] can serve

30. Amsterdam, *supra* note 20.

31. *Id.* at 384 (footnotes omitted) (citing Boyd v. United States, 116 U.S. 616, 622 (1886)).

32. Katz v. United States, 389 U.S. 347, 350 (1967).

33. *Id.* at 350 n.4.

as a talismanic solution to every Fourth Amendment problem."[34] The clear implication is not that "protected areas" is now discarded as a rhetorical tool, but that "privacy" has been added to the rhetorical arsenal as a metaphor better suited for the particular mode of government intrusion before the Court. Harking again to Professor Amsterdam:

> Finally, it is plainly wrong to capsulate *Katz* into a comprehensive definition of fourth amendment coverage in terms of "privacy." *Katz* holds that the fourth amendment protects certain privacy interests, but not that those interests are the only interests which the fourth amendment protects. To the contrary, the *Katz* opinion says in so many words that "its protections go further, and often have nothing to do with privacy at all." In short, the common formula for *Katz* fails to capture *Katz* at any point because the *Katz* decision was written to resist captivation in any formula. An opinion which sets aside prior formulas with the observation that they cannot "serve as a talismanic solution to every Fourth Amendment problem" should hardly be read as intended to replace them with a new talisman.[35]

Professor Amsterdam's view deserves respect, yet one might well ask for more from *Katz*. One might justifiably ask for a deeper exploration of this broader vision; one might want to know how these Fourth Amendment "protections go further." If, as Professor Amsterdam contends, "the *Katz* decision was written to resist captivation in any formula," however, one might be willing to settle for a broader inventory of the Warren Court's rhetorical arsenal and accept that there will be no meta-metaphor. In fact, such an inventory would have gone a long way towards revealing the broader vision beneath *Katz*. Further, there is reason to be confident that there must be more in this inventory than we have been given in *Katz*. After all, the construct of "expectations of privacy" does not seem to capture the full sense of the Fourth Amendment, *even* as to Mr. Katz's phone call. More was at stake than his privacy. Ironically, in a quest for this increased rhetorical inventory to express this something "more," this missing dimension of *Katz*' broader conception, one finds it in, of all places, a rhetorical construct appearing throughout *Terry*—the "right to personal security."[36]

In fact, *Terry* refers to this construct, which also appears in *Boyd*,[37] in ways very similar to, and almost interchangeable with, the *Katz* standard. Near the beginning of the opinion, the Court in *Terry* cites *Katz* as

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34. *Id.* at 351 n.9.

35. Amsterdam, *supra* note 20, at 385 (footnotes omitted). Other commentators agree that *Katz* did not limit the scope of the Amendment to "privacy"; *see, e.g.*, Richard L. Aynes, Note, Katz *and the Fourth Amendment: A Reasonable Expectation of Privacy, Or a Man's Home Is His Fort*, 23 CLEV. ST. L. REV. 63, 80 (1974).

36. Terry v. Ohio, 392 U.S. 1, 8-9, 17 nn.13 & 15, 19 (1968).

37. Boyd v. United States, 116 U.S. 619, 630 (1886) ("the invasion of his indefeasible right of personal security").

the Court equates the Fourth Amendment with protecting citizens against "unreasonable governmental intrusion" whenever they "harbor a 'reasonable expectation of privacy.' "[38] That is the last mention of *Katz*. From then on, it is our "right to personal security" that is being protected (as were our "reasonable expectations of privacy" in the *Katz* formulation) from "governmental invasion"[39] and "intrusions by agents of the public."[40] In fact, the Court commits itself to assessing the "quality of the intrusion" upon "*reasonable expectations* of personal security."[41] Sound familiar? As we will see, the Court has likely chosen the wrong metaphor (i.e., "expectation of privacy") for posterity because, ironically, the *Terry* formulation of "right to personal security" better captures the visions of *Katz* than does *Katz* (or at least the two metaphors should be used in conjunction).[42]

The "right to personal security" adds two dimensions to our Fourth Amendment rhetorical arsenal lacking in "reasonable expectation of privacy." First, it talks in terms of a "right." "Rights" are far more resilient constructs than "expectations." They conjure the image of substantiality. Rights are solid, permanent-type things which carry great importance. Those who intrude on our rights are in the wrong. Rights are something we are proud to stand up for, so our rights do not pass gently into the night. They are lost only if waived or forfeited, and never intruded upon without the best of reasons. "Expectations" are of more gauzy, ephemeral stuff. We are accustomed to expectations being unrealistic, and it is not uncommon to have our expectations disappointed. In short, it is far easier as a rhetorical matter to find our expectations unrealistic or unreasonable than to accept that our rights may be denied us. Professor Amsterdam in fact recognized the importance of such rights-oriented rhetoric when he wrote about *Katz*:

> The key to the [Fourth] Amendment is the question of what interests it protects. Mr. Katz's conversation in a pay telephone booth was protected because he "justifiably relied" upon its being protected—relied, not in the sense of an expectation, but in the sense of a claim of right.[43]

The problem is that the *Katz* metaphor, in its accepted form that focuses on "expectations," was incapable to carry forth any sense of a "right" as opposed to a hope.

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38. *Terry*, 392 U.S. at 9 (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).
39. *Id.* at 19.
40. *Id.* at 19 n.13.
41. *Id.* at 19 n.15.
42. In fact, "security" and "privacy" where linked in the same construct by the case that established the exclusionary rule in federal court: "The security of one's *privacy* against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." Wolff v. Colorado, 338 U.S. 25, 27 (1949) (emphasis added).
43. Amsterdam, *supra* note 20, at 385. *Cf.* Note, *From Private Places to Personal Privacy: A Post-*Katz *Study of 4th Amendment Protection*, 42 N.Y.U. L. REV. 968, 981 (1968) (finding positive right of privacy in *Katz*).

Second, "personal security" adds to the construct of "privacy" the crucial notion of "safety." This is a notion that is completely absent from *Katz*, and the one which comprises the additional dimension to the police intrusion, the "more" that was at stake than just Mr. Katz's privacy. This brings us to the discussion promised the reader long ago—the government versus private person distinction; or, why having police rifle through my garbage is very different from having a child remove a broken toy from my trash. Let's start with what seems an undeniable fact: Seeing a police officer snooping around our house or workplace makes us feel different from the "same" (in quotes because in fact it cannot be the same) snooping by a neighbor. Why? It is true that, generally, the government will have far greater capacity and resources for gathering information about us than the neighborhood snoop (although the local grapevine can on occasion outgather wiretaps and informants). But this does not account for the difference. The key has been forestated in the concept of "safety," a concept that is embedded in the construct "personal security." A brief illustration will make this clear. If a neighbor is asking questions around the neighborhood about you and taking notes of your comings, goings, and guests, you will likely feel annoyed and indignant: "How can I get any privacy around here?" "How is it any of his business?" "What a nerve!" "I should go right over there and confront him!"

If, however, you became aware that the "same" thing is being done by the police, you may be indignant, but it is extremely likely you will also feel nervous, anxious, and scared: "What do they want?" "I haven't done anything wrong, have I?" "Does anyone know what's going on, what they want to know about me?"

What is important for our purposes is not just the obvious point that the two situations are dramatically different on a psychological-human level, but that the reason for the difference has little to do with the invasion of your "privacy" in the sense that the police know information about you that you did not wish to disclose. In other words, it is not that in Katz's terms, the information has been "broadcast to the world." Rather, it is *what* the police, in contrast to the neighbor, can do with that information which accounts for the real difference. The police can use the information to justify use of force—make us talk to them, force us to the police station, make us let them into our homes, closets, drawers. Because, ultimately, that's what distinguishes police from the rest of us; they can use force, even deadly force.[44] It does not matter that you are not doing anything wrong. You have absolutely no control over how the police will select, interpret, and use what they see. Why

44. The literal threat of physical violence that lies beneath the surface of formal law has been generally recognized. *See, e.g.*, Anthony D'Amato, *Rethinking Legal Education*, 74 MARQ. L. REV. 1, 29 (1990); Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986).

else are most of us so uncomfortable when passing through customs even though we have nothing to hide?—Or have we? Have we forgotten to declare something? Are we carrying an item from a previous trip? Do we have something made in the country we just visited that we bought last year in a store at home? Doubts set in and we begin to feel unsafe as we anticipate the total power the customs official could exercise over our lives. Again, we think we've done nothing wrong, but who knows?

Several years ago, before the Berlin wall came down, I traveled with my parents through Eastern Europe. As we crossed the Czechoslovakian/Hungarian border our train stopped and a series of dour looking men in increasingly drabber uniforms came into our compartment to check and stamp our papers. All looked like the fascist border guards from every spy movie set in Eastern Europe you've ever seen. It was very scary. We were doing nothing wrong. But we knew that they had all the power and could do whatever they wanted to us. Now, in America, we don't think that police can do whatever they want. There are courts, attorneys, and the press. Yet, when all is said and done, at least in the short run, at the immediate moment of confrontation, is it so different here? For that moment, there is nothing you can do. All your power has been resituated in the other and, as between you and the other, their power is absolute and unchecked. Maybe this person will follow the law, but you can never know that. And if they don't, there is nothing you can do. The formal system of checks and balances will come too late as they did recently for a man stopped for a traffic offense in Los Angeles and for three civil rights workers decades past.[45]

Perhaps that is why the "grand conception" in *United States v. Boyd*[46] to which Professor Amsterdam refers was based upon a close conjunction of both the Fourth *and* Fifth Amendments.[47] While the current Court has eroded the Fifth Amendment underpinning of *Boyd* which led to suppression of a subpoena in that case,[48] the *Boyd* court's reference

45. *See, e.g.*, David K. Shipler, *Khaki, Blue, and Blacks*, N.Y. TIMES, May 26, 1992, at 17; JUAN WILLIAMS, EYES ON THE PRIZE 234-35 (1987).

46. 116 U.S. 616 (1886).

47. *Id.* at 633. In fact, this conjunction of the Fourth and Fifth Amendments played a role in Mapp v. Ohio, 367 U.S. 643, 646-47 (1961); *see also id.* at 662 (Black, J., concurring).

48. *See* Fisher v. United States, 425 U.S. 391 (1976) (holding that subpoena for citizen's papers given his attorney not privileged under Fifth Amendment because government did not compel citizen to create papers in first place); Andresen v. Maryland, 427 U.S. 463 (1976) (holding that Fifth Amendment does not prevent seizure of private papers under a search warrant). In finding that *Boyd*'s Fifth Amendment foundations had been eroded, the *Fisher* court relied heavily on yet another Warren Court case—Schmerber v. California, 384 U.S. 757 (1966). *Fisher*, 425 U.S. at 408, 409. In *Schmerber*, offhandedly noting that "the [Fifth Amendment] privilege has never been given the full scope which the values it helps protect suggest," *id.* at 762, the majority held, regarding a forcible extraction of a blood

to the Fifth Amendment was plainly a recognition that behind the government rummaging lay a threat of incrimination and the accompanying legitimated use of governmental violence. The recent movie, *Boyz 'N the Hood*[49] carries a common understanding with *Boyd*. No one who has seen that movie is likely to forget the ever-present, but unseen, police helicopters that hovered over the neighborhood. The ominousness of those helicopters had little to do with privacy—the intrusion into privacy was a source of annoyance and indignation, just like in the case of the nosey neighbor, but in no way accounted for the sense of ominousness and what might best be described as akin to evil. The latter sense came instead from the constant reminder of government power and the threat that the power could be brought to bear as violent force at any moment. The residents of the "hood" (i.e., neighborhood) had their right to personal security, their sense of safety, as violated by the police as it was by the gangs.

Going back to our propaganda film, possessed with a rhetorical arsenal that employed the "right to personal security" (with or without the *Katz* standard), the Warren Court could have begun a conversation in which it would have been far more difficult to justify much, if not all, in the film. Here is where in *Katz's* underlying conception the Fourth Amendment's "protections [could] go further [than privacy],"[50] i.e., by avoiding offense to our justified right to personal security. In the words of the *Terry* majority, "[i]n our view the sounder course is to recognize that the Fourth Amendment governs all intrusions by agents of the public upon personal security, and to make the scope of the particular intrusion, in light of the exigencies of the case, a central element in the analysis of reasonableness."[51]

The reader might wonder at this point whether this mode of analysis would place under the Fourth Amendment scrutiny all information gathering by the police which is directed against an individual. After all, talking to the neighbors is as likely to make an individual feel "unsafe" and vulnerable to the police as going through his bank records or garbage. And if the individual does not even know he is a target of investigation, can he still have his sense of personal security violated? To answer, it should first be reiterated that this analysis is merely unearthing another rhetorical tool to aid in application of the Fourth Amendment, one that is not anchored to privacy; it is not proposing a

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sample by police, "[s]ince the blood test evidence, *although an incriminating product of compulsion*, was neither petitioner's testimony nor evidence relating to some communicative act or writing by petitioner, it was not inadmissible on privilege grounds." *Id.* at 765 (emphasis added). This "testimonial" (privileged) versus "nontestimonial" (not privileged) rhetoric was an important tool in eroding the broad, protective sweep of *Boyd*.

49. BOYZ 'N THE HOOD (Both, Inc. & Columbia Pictures 1991).

50. Katz v. United States, 389 U.S. 347, 350 (1967).

51. Terry v. Ohio, 392 U.S. 1, 17-18 n.15 (1968).

single metatheory. This tool in turn requires a context as did the *Katz* construct. As should be no surprise, that context is very similar to the one proposed for *Katz*—the right to personal security "as an American." In other words, is this the kind of police activity that *as Americans* (not this particular individual) makes our lives feel vulnerable to the police? To answer such a question will obviously often be a function of one's judgment of the character, intensity, and such of the particular police procedure. Helicopters and beepers are likely to invoke constitutional concerns under the metaphor "personal security" because, by their very nature, they threaten to place police information gathering all about us in a way that is inconsistent with the idea of "America." Note that this same result would likely follow from the previous contextualization of *Katz*. This *Terry*-derived metaphor merely has the advantage that in adding the two nuances of "rights" and "safety," it rhetorically reinforces that we are talking about a broader conception of the Fourth Amendment than we have been left with by the legacy of *Katz*.

As to talking to the neighbors, it would depend. It might make us nervous as individuals if the police are checking us out with the neighbors, but this activity would not appear to threaten the sense of security we feel as Americans. That is, we may not like it, but this practice does not change the existing relationship between us and the police in this society. It is the kind of thing police do and have always done. It might be very different, however, if the police embarked on a systematic program of checking out everyone. Similarly, while it may be true that one would stay on the bus with or without the police presence, the citizen-commuter's sense of "personal security" is certainly diminished when he or she knows that they might be suddenly confronted with armed police at any leg of their journey.[52]

## III. The Failings of *Terry*: Either/Or Bifurcation of Street Encounters and the Fourth Amendment

Yet, there is obviously a paradox when considering "safety" in conjunction with the activities of the police. We have just discussed a potentially valuable concept in *Terry* that was laid by the wayside. In pursuing the paradox of safety, we touch on an equally great failing of the Warren Court in *Terry*, a legacy where a finding of "seizure" (or "search") is predicate to invoking the Fourth Amendment.

The "safety" paradox is clear to us all. While the presence of police in a free society can make us feel unsafe, we also depend upon them for our safety. In the Sixties, this notion was epitomized by the police public relations conceived billboards, "Next time you're in trouble, try calling a hippie." The irony is that, though to this point this essay has

52. Florida v. Bostick, 111 S. Ct. 294 (1987).

made much of the constriction we tend to feel on our sense of personal security when police start snooping around, in fact, snooping around is the very thing we want our police to do. We want them to check out windows that look pried and people who look ill. We want them to go up to citizens, and ask questions: "Are you lost?" "Are you OK?" "Did you see the red car driving away from here?" "Do you need help with that tire?" And if I'm being mugged by three smiling thugs, I want a passing officer to rely upon his or her expert "hunch," and come over with hands on gun asking, "What's going on here?" I admit it.

Still again, and here's the paradox at work, it is unsettling that without any cause, the police can come up to any of us and ask for identification. It's just too much like being asked for our "papers," especially in a society that so values autonomy from government[53] and to just be left alone. And realistically, putting aside for the moment how the courts may talk about our voluntary choices in these situations, it is hard to accept that we are really free to go when such a "request" is made.[54] Even if in fact we are, who among us would take the risk of walking away, take the risk of being confronted with the legitimated use of violence with which we empower our police? A law enforcement officer is not like some street leafleteer who, if you refuse her offering, will go on to the next person. How do you really walk away from the police? "FBI, we'd like to talk to you." "No thank you, I'm really not interested. I have my wife to talk to."

The Warren Court can be blamed for failing to decide *Terry* so as to better protect the citizen within this paradox of safety. That is not to say that they merit blame for ducking the tough issue of defining the constitutional parameter of "street encounters." That they did so is somewhat understandable in light of the myriad forms in which such encounters could arise. Accordingly, there is no quibble that *Terry* only decided the constitutionality of a "frisk" and a "stop" sufficient to conduct the frisk.[55] (*Terry* did not even consider the legitimacy of a forcible stop for investigation or questioning.)[56] The complaint rather is that the rhetoric of *Terry* is so unfocused, so disjointed, that it left an either/or Fourth Amendment universe that *Terry* never intended. There were "searches" (full-blown and frisks) and there were "seizures" (arrests and stops), and there were "the rest." If it was a search (*Katz*) or seizure (*Terry*), police were constrained by the Fourth Amendment. If it fell under "the rest," the police were free to act as they wished. Again,

53. *See* John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293, 301 (1980).

54. For another author who does not believe that walking away is a realistic option, see Tracey Maclin, *The Decline of the Right to Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1300-01 (1990).

55. *Terry*, 392 U.S. at 16, 19 n.16.

56. *Id.* at 19 n.16.

*Terry* never intended this result, but one must pick through random passages from text and footnotes to find the contrary evidence.

The majority in *Bostick*, the bus boarding case, supports the crucial first step in its analysis—that merely approaching and questioning the passengers does not implicate the Fourth Amendment—by citing from footnote 16 in *Terry*: "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons."[57] This the *Bostick* majority uses to conclude that if such "personal intercourse" does not constitute a seizure, the Constitution does not apply. But that is not logically supportable from this quote. In fact, had *Terry* taken the trouble to get its rhetoric together, the *Bostick* majority's leap in logic would also plainly be at odds with the *Terry* opinion itself; for, while not all street encounters between police and citizens fall under the Fourth Amendment, *Terry* never meant to draw the either/or line with its construct of "seizure." As reflected in *Katz* the year before, this Court had a broad vision of the Amendment. Searches and seizures obviously reflected certain types of concrete police practices, but "search and seizure" was also a metaphor to the Court for the range of police activities that could threaten our personal security.

Early in the opinion, *Terry* recognizes that there are police-citizen street encounters violative of the Fourth Amendment of which the Court is unable to take judicial cognizance, either because these encounters cannot be coherently defined so as to distinguish them from otherwise legitimate practices or because these constitutional violations would not be responsive to the exclusionary rule as they are not motivated by evidence gathering. The "wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain"[58] was one example given of this latter category.

Typical of the rhetorical confusion in *Terry*, the Court then almost immediately backs off from this position that such violations of the Constitution will not be remedied:

> Under our decision, courts still retain their traditional responsibility to guard against police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires. When such conduct is identified, it must be condemned by the judiciary and its fruits must be excluded from evidence in criminal trials. . . . However, the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices.[59]

57. Florida v. Bostick, 111 S. Ct. 2382, 2386 (1991) (citing Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)).

58. *Terry*, 392 U.S. at 14.

59. *Id.* at 15, 17 n.14.

Here the Court is considering more than some form of "seizure" or "search" as circumscribing the police activity falling under the Fourth Amendment. This again is a broader conception of the Amendment, as implied in *Katz*. Harassing, being overbearing, or arousing community resentment are characteristics totally unrelated to anything we would think of as a seizure. Rather, they represent what one may call aggressive police intrusions. To be sure, seizures by police are covered by the Amendment, but according to *Terry*'s broader, but submerged vision, so are other police encounters with citizens.

There is a further ringing irony in the fact that *Terry* should provide the *Bostick* majority with a springboard for their either/or, "search"/"the rest" view of the Amendment. *Terry* specifically rejected distinctions between stops and arrests because it "suggest[ed] a rigid all-or-nothing model" to control police-citizen encounters.[60] *Terry* also tried to devalue the significance of the terms "search" and "seizure" as describing a clear set of police behaviors that exhaust the subject matter of the Amendment: " 'Search' and 'seizure' are not talismans."[61]

Because the *Terry* majority so fragments this language, only Justice White's concurrence, a perfect sound bite ("There is nothing in the Constitution which prevents a police officer from addressing questions to anyone on the streets.")[62] survives to describe the relationship between the Constitution and "the rest" (i.e., non-seizure) of citizens-police street encounters. It is therefore not surprising that by the time we get to *Bostick*, the routine, systematic questioning by police of all passengers on a bus is seen no differently than the officer who approaches a single individual on the street to ask whether he is lost. Both fall outside the scope of the Fourth Amendment. Yet, there is a very great, and constitutionally significant, distinction between an officer approaching an individual for questioning, even though based on no more than a "hunch," and the widespread, systematic questioning without any basis for individual focus (not even a hunch), such as in *Bostick*.[63]

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60. *Id.* at 17.

61. *Id.* at 19.

62. *Id.* at 34 (White, J., concurring). Justice White's view in turn is likely based on the so-called "right [by police] to inquire." *See* Maclin, *supra* note 54, at 1266-68.

63. The post-Warren Courts have also sanctioned stops of citizens without any individualized suspicion using a balancing test under so-called "special needs" situations. *See supra* note 7. *E.g.*, fixed checkpoints, United States v. Martinez-Fuerte, 428 U.S. 543 (1976); sobriety checkpoints, Michigan State Police v. Sitz, 496 U.S. 444, (1990). Without burdening the reader with my general opinion of these cases or my specific opinion of the emerging rationale that seizing innocent citizens is not so bad if police exercise no discretion in the matter because they do it to everyone, I will just point out the obvious: These cases did deal with very particular "special needs," the perceived harms of drunken driving and illegal immigration. Of course, we can play our game again and claim a "special need" to

This essay does not propose keeping police from investigating suspicious individuals and situations which do not "look right." Though this is an area where potential abuse is great, it is also the one area where police can best use their acquired expertise. Experts recognize patterns, and police "hunches" likely correspond to a perception of a pattern they cannot fully articulate. Police should thus be permitted to approach and direct questions to an individual so long as they had a reason, and their hunches (which would not justify a Terry stop) would be counted as reasons. Since police could always meet this standard of having at least a "hunch" when called to testify at a suppression hearing in court, and are not likely to take the time to approach someone without one anyway, the law should be left as it is, and these encounters therefore not subjected to court supervision (unless, for instance, patterns of harassment are revealed).

Systematic programs of police-citizen encounters like *Bostick* merit different treatment. They really change our lives, make us feel always vulnerable to the police when we go out into the world. Now, maybe it is because I am white, middle-class (and long since being a teenager) that I don't worry when I leave home about the possibility that an officer will approach and question me on a hunch. Maybe I see that as only happening to "them." I don't know. I do know that systematic intrusions like *Bostick* place the cloud of police power over all of us, as did the relentless helicopters in *Boyz 'N the Hood*.[64]

Admittedly, we at times allow, without any individualized suspicion, systematic police intrusions that are arguably as, or even more invasive, than the police conduct on Mr. Bostick's bus, such as roadblocks or airport searches. Roadblocks, however, are narrowly circumscribed by a very limited time frame tied to a specific emergency situation existing within that narrow time frame. Airport searches are ongoing, but are limited to a very restricted area and directly tied to a literally life-and-death danger that could affect the very people being searched on the very aircraft they will board. We attorneys revel in the liquid nature of language and could no doubt convert the bus boarding in *Bostick* into an analogous response to an "emergency" in which those on the bus and their families' very lives are endangered and which is limited to the very limited area, etc. We could do so, but if we did we would have to recognize that we were game playing, making plays on words and then pretending that by our play we could convert make believe to equate with some reality. As a game, it is fun. As a matter of serious decision

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stop drug traffic, but not without casting our rhetorical net so wide as to approach making "stopping crime" a special need and, with it, to all but cast the Fourth Amendment aside.

64. In contrast, the cop on the beat, even if always snooping around, (as might well be consistent with the reemerging concept of community policing), is likely a familiar figure who strikes far less fear than the faceless centurions of the society in our propaganda film.

making, it is dubious. The threat of systematic boarding of buses, trains, and planes by police throughout the country loosens the police into our lives in a way and with a magnitude that isolated, occasional roadblocks and metal detectors at our airports do not even conjure in the wildest of imaginations.[65] Here *Terry* fails us; for, what the disjointed rhetoric of *Terry* only implies, we need articulated with a clear voice—i.e., that aggressive police-citizen street encounters such as in *Bostick*, whether characterized as a "seizure" or not, intrudes on our "personal security" and thus should not be permitted, since it is utterly without some level of articulated suspicion for the Court to review under the Fourth Amendment.

## IV. Some Final Thoughts: Removing Much of the Blame

I have now come near the end, and facing the end, perhaps like one contemplating a dying declaration, I feel compelled to be truthful. I have heaped blame on the Warren Court and the world they now leave us. I have said that the Warren Court should have taken control of contextualizing *Katz*, should have articulated the broad conception of the Fourth Amendment underlying *Katz* and *Terry*, and should have made clear in *Terry* that police intrusions not constituting "seizures" could still fall under the Fourth Amendment. But, in fairness, though the Warren Court may have set itself up, it is the subsequent Courts that have taken unfair advantage. But why? Forget labels of radical-conservative and other such knee-jerk responses. Whatever their politics, they are Americans too. Why don't they see the same propaganda film I do? I can imagine only two explanations:

1. The parade of horribles does not scare them because they either trust the police not to abuse the power[66]—i.e., trust in a society of men (in blue) over law—or, they are confident that they can draw the line and take back control at the appropriate time,[67] or at least they are sure that none of this is likely to happen in their neighborhood.

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65. Professor Sundby distinguishes these two situations, applying the traditional probable cause and warrant standard to the former and reasonableness balancing to the latter. *See* Sundby, *supra* note 8, at 418-20.

66. In Daniel M. Harris, *The Supreme Court's Search and Seizure Decisions of the 1982 Term: The Emergence of a New Theory of the Fourth Amendment*, 36 Baylor L. Rev. 41, 71 (1984), the author feels that this trust in police, lacking in the Warren Court, explains much of the subsequent Courts' Fourth Amendment jurisprudence. Professors Whitebread and Heilman see an analogous phenomenon in the current Court which they identify as constitutionally misguided "crime control" philosophy. Charles Whitebread & John Heilman, *The Interpretation of Constitutional Rights Reflections on the Burger Court's Counterrevolution in Criminal Procedure*, 1986 Det. C.L. Rev. 935, 938 (1986).

67. Professor Burkoff characterizes Justice Rehnquist's position in the beeper case as "we'll deal with Orwellian excesses when and if and *after* they occur!" Burkoff, *supra* note 1, at 540 (author's emphasis).

2. They have taken the public relations-created slogans "War on Crime" and "War on Drugs" literally and are interpreting the Fourth Amendment as if we were literally engaging a foreign nation on our own soil.[68]

How is one to respond without dipping into a bag of constitutional platitudes? This is a nation of laws, not men. The nation was born out of a mistrust of powerful government. Constitutional rights are eroded incrementally. The Constitution is most important in times of crisis; it is a document of faith, and is at its most magnificent when that faith is tested.

On the other hand, the fact that one must resort for response to sixth grade civics tells us something. It tells how deeply off-base the current Court is; for these platitudes echo fundamental national "truths," and this Court is totally at odds with those truths.

Near the end of its opinion, the majority in *Bostick* confidentially proclaims that its analysis could not be controverted unless we were prepared to "advocate[] overruling a long, unbroken line of decisions dating back more than 20 years."[69] That is precisely what I am proposing.

68. *See, e.g.*, Doug Bandow, *War on Drugs or War on America*, 3 STAN. L. & POL'Y REV. 242, 250 (1991).

69. Florida v. Bostick, 111 S. Ct. 2382, 2388 (1991).