Vanderbilt Law Review

Volume 44
Issue 3 *Issue 3 - April 1991*

Article 2

4-1991

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VANDERBILT LAW REVIEW

VOLUME 44 APRIL 1991 NUMBER 3

Reworking the Warrant Requirement: Resuscitating the Fourth Amendment

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I. INTRODUCTION

> Where this free-floating creation of "reasonable" exceptions to the warrant requirement will end, now that the Court has departed from the balancing approach that has long been part of our Fourth Amendment jurisprudence, is unclear. But by allowing a person to be subjected to a warrantless search in his home without his consent and without exigency, the majority has taken away some of the liberty that the Fourth Amendment was designed to protect.[1]

Ninety-three years ago, in response to a newspaper account, Mark Twain wrote: "The reports of my death are greatly exaggerated."[2] While it may be premature to sound the death knell for the fourth amendment, it is no exaggeration to suggest that unless drastic action is taken to remedy the destructive erosion of the fourth amendment,[3] it may as well be buried.

Current search and seizure doctrine is inconsistent and incoherent.[4] No one, including the police who are to abide by it, judges who apply it, or the people who are protected by it, has any meaningful sense of what

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1. Illinois v. Rodriguez, 110 S. Ct. 2793, 2806-07 (1990) (Marshall, J., dissenting).

2. Cable from London to Associated Press, 1897.

3. *See, e.g., Rodriguez*, 110 S. Ct. at 2793 (actual consent was nonexistent and the United States Supreme Court expanded the consent exception to the warrant requirement to include apparent consent); Maryland v. Buie, 110 S. Ct. 1093 (1990) (the Court applied Terry v. Ohio, 392 U.S. 1 (1968), to allow protective sweeps in a home in which an arrest was made). For a discussion of *Buie*, see *infra* note 38. *See generally* Benner, *Diminishing Expectations of Privacy in the Rehnquist Court*, 22 J. MARSHALL L. REV. 825 (1989); Note, Murray v. United States: *The Emasculation of the Fourth Amendment Warrant Clause*, 10 PACE L. REV. 167 (1990); Recent Development, Florida v. Riley: *The Emerging Standard for Aerial Surveillance of the Curtilage*, 43 VAND. L. REV. 275 (1990).

4. Over the past two decades scholars have documented the seriousness of this problem. *See, e.g.*, Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468 (1985); Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 49 (1974) (asserting that a review of 16 major fourth amendment opinions issued between the 1968 and 1972 Terms reveals that the "body of [fourth amendment] doctrine . . . is unstable and unconvincing"). Professor Craig Bradley discovered that the Court decided 35 fourth amendment cases between 1979 and 1984. Bradley concluded: "In seven of these [cases] there was no majority opinion. In . . . seventeen cases decided [between 1983 and 1985], the Supreme Court has never reached the same result as all lower courts and has usually reversed the highest court below, rendering a total of sixty-one separate opinions in the process." Bradley, *supra*, at 1468.

Between 1985 and 1990, the Court rendered 43 opinions. Of the 34 opinions that were decided in the government's favor, 29 were reversals of the highest court below. Thus, 85.3% of the time, the lower court unsuccessfully struggled to understand inconsistent developments in fourth amendment jurisprudence.

Finally, a review of cases before the Court in 1959, 1969, 1979, and 1989 reveals an interesting statistical pattern. In 1959 the Court ruled for the government in 60% of all cases. In 1969 the Court ruled for the government in only 25% of all cases. In 1979 the Court ruled for the government in 59.9% of all cases. Finally, in 1989 the Court ruled for the government in 82% of all cases.

the law is. Undaunted by the lack of coherent guidelines, the police are searching houses,[5] greenhouses,[6] warehouses,[7] motor vehicles,[8] papers,[9] and effects,[10] and seizing persons[11] and things.[12] Meanwhile, judges are required to determine the constitutionality of these searches.

Two decades of jurisprudence covering the warrant requirement and probable cause have seen a ruling majority of the United States Supreme Court either refusing to follow precedent or rewriting precedent to suit present concerns.[13] Rather than mold a body of reliable fourth amendment law, the Supreme Court has created a makeshift solution. Instead of providing direction and guidance to lower courts, the Court has rendered amorphous case-by-case, fact-specific adjudications,[14] whose method of reasoning often is better suited for juries in negligence actions than judges adjudicating constitutional rights. This lack of clear rules has left search and seizure law mired in confusion and contradiction.[15]

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5. *See, e.g.*, United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990).

6. *See, e.g.*, Florida v. Riley, 488 U.S. 445 (1989).

7. *See, e.g.*, Murray v. United States, 487 U.S. 533 (1988); United States v. Karo, 468 U.S. 705 (1984).

8. *See, e.g.*, Colorado v. Bertine, 479 U.S. 367 (1987); United States v. Johns, 469 U.S. 478 (1985); United States v. Ross, 456 U.S. 798 (1982).

9. *See, e.g.*, O'Connor v. Ortega, 480 U.S. 709 (1987); New Jersey v. T.L.O., 469 U.S. 325 (1985).

10. *See, e.g.*, California v. Greenwood, 486 U.S. 35 (1988); United States v. Jacobsen, 466 U.S. 109 (1984); Illinois v. Lafayette, 462 U.S. 640 (1983).

11. *See, e.g.*, United States v. Sokolow, 490 U.S. 1 (1989); United States v. Montoya de Hernandez, 473 U.S. 531 (1985); United States v. Hensley, 469 U.S. 221 (1985).

12. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984); United States v. Place, 462 U.S. 696 (1983).

13. Just this Term in *Rodriguez*, 110 S. Ct. at 2793, for example, the majority held that regardless of whether a third party has actual authority to consent to a search, the consent is legal if the police reasonably believe that the third party had authority to consent. The majority relied in part on statements in prior cases which suggested that some room must be allowed for reasonable police mistakes. *See id.* In his dissenting opinion, Justice Thurgood Marshall points out that the majority fails to admit that the cases they relied on all dealt with situations in which the factual error concerned a probable cause determination, not the adequacy of consent for the searches. *Id.* at 2805-06 (Marshall, J., dissenting). Marshall angrily denounces the majority's tampering with precedent:

> The majority's glib assertion that "[i]t would be superfluous to multiply" its citations to cases like *Brinegar* [*v. United States*], *Hill* [*v. California*] and [*Maryland v.*] *Garrison* . . . is thus correct, but for a reason entirely different than the majority suggests. Those cases provide no illumination of the issue raised in this case, and further citation to like cases would be as superfluous as the discussion on which the majority's conclusion presently depends.

Id. at 2806 (Marshall, J., dissenting).

14. Professor Bradley has suggested that the Court's dilemma stems from its "clear rule-flexible response" ambivalence. He asserts that "the Court tries on the one hand to lay down clear rules for the police to follow in every situation while also trying to respond flexibly, or 'reasonably,' to each case because a hard-line approach would lead to exclusion of evidence." Bradley, *supra* note 4, at 1470.

15. *See id.* at 1468-81. Because the Court has failed to provide clear guidelines, it has become

Some scholars suggest that the fourth amendment is a diseased limb on a sick tree and that the morass of the fourth amendment is symbolic of larger problems with constitutional theory generally.[16] While the analogy is apt, the fourth amendment branch can be treated, pruned, and cured apart from the ailments of the rest of the constitutional tree.[17]

The manifestation of the diseased limb is twofold: (1) the Court has whittled away the fourth amendment's probable cause requirement, shifting it from a rule-based test to a "common sense, fair-probability" standard;[18] and (2) the Court has sacrificed the fourth amendment's prohibition against warrantless searches and seizures for a chameleon-like "reasonableness" approach.[19] The result is almost no reliable substantive law applying the warrant clause.[20]

The post-*Illinois v. Gates*[21] standard for probable cause essentially transformed the warrant application procedure into a reasonableness

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impossible to anticipate future rules.

16. *See* Wasserstrom & Seidman, *The Fourth Amendment As Constitutional Theory*, 77 GEO. L.J. 19, 19-22 (1988). The authors note that the recent difficulty in dealing with fourth amendment problems corresponds with the current controversy surrounding techniques of constitutional adjudication. They characterize the fourth amendment as a diseased limb on the body of an ailing patient—constitutional theory. *Id.* at 21-22.

17. If the Court were to accept the suggestions proposed in this Article for the even application of a straightforward rule, its acceptance of the underlying rationale for clarifying the fourth amendment might spur the Court to use a similar rationale in other areas of constitutional law.

18. *See* Illinois v. Gates, 462 U.S. 213, 230-41 (1983) (holding that probable cause is determined by evaluating the totality of the circumstances).

19. In New Jersey v. T.L.O., 469 U.S. 325 (1985), and O'Connor v. Ortega, 480 U.S. 709 (1987), the Court applied a "special needs" rationale to dispense with the warrant and probable cause requirements in certain circumstances. The Court instead used a "reasonableness test" to determine whether the searches were constitutional. *See Ortega*, 480 U.S. at 719-26; *T.L.O.*, 469 U.S. at 337-43. The reasonableness test also is called a "balancing test." The Court employs this reasonableness test when it concludes that the government's interests outweigh an individual's fourth amendment right to privacy. In *T.L.O.*, and to a lesser degree in *Ortega*, the Court gave considerable attention to the presence of an individualized snspicion to search the persons and their belongings. *See Ortega*, 480 U.S. at 726; *T.L.O.*, 469 U.S. at 342-47 & n.8.

In Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), and National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), the Court changed its emphasis and held that individualized suspicion is not necessary when a search or seizure is governed by the reasonableness analysis. Just this Term, in *Rodriguez*, 110 S. Ct. at 2793, the Court amended the reasonableness analysis even further by suggesting that reasonableness is whatever an officer thinks is reasonable. *See supra* notes 1, 3 and accompanying text.

20. For example, the Court announced recently that one of the traditional exceptions to the warrant clanse—the plain view exception—does not mean what almost everyone thought it meant. In Horton v. California, 110 S. Ct. 2301 (1990), the Court held that inadvertence was not a requirement for the plain view exception. The Court affirmed the lower court's conclusion that a majority of the Court in the plurality opinion of Arizona v. Hicks, 480 U.S. 321 (1987), did not mandate inadvertence. Instead, the Court in *Horton* held that although inadvertence is a characteristic of many plain view seizures, it is not a requirement. *Horton*, 110 S. Ct. at 2309-10.

21. 462 U.S. 213 (1983).

evaluation. Because *Gates* tells us that probable cause is a "practical, non-technical conception,"[22] a magistrate approving a warrant affidavit need look no further than a police officer's reasonable belief that a search will uncover evidence of wrongdoing. The following year, *United States v. Leon*[23] furthered the breakdown in the probable cause standard when the Court held that regardless of whether a warrant is valid, the fruits of a search conducted pursuant to a facially valid warrant will be admitted upon a finding of "good faith" on the part of the executing officer.[24] Thus, *Gates* made it easier to get a warrant, and *Leon* made the fruits of almost every invalid warrant admissible.[25] Ironically, both the *Gates* and *Leon* decisions affirmed a preference for warrants,[26] yet their relaxed probable cause standard began the shift away from traditional fourth amendment jurisprudence toward a reasonableness standard.

Although the fourth amendment conveys to "the People [the right] to be secure in their persons, houses, papers, and effects,"[27] the reasonableness approach focuses on the acts of the police instead of the rights of the people. The question, then, becomes whether the police acted reasonably rather than whether a person's rights were violated. This approach endorses retrospective evaluations of police behavior rather than prospective protections. It is a test with no objective rules—a method of procedure subject to the values of the individual police officer and the

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22. *Id.* at 231 (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949)).

23. 468 U.S. 897 (1984).

24. *See id.* at 922-25.

25. Exceptions do exist to the "good faith" exception announced in *Leon*: (1) if a magistrate is not neutral and detached; (2) if an affidavit in support of the warrant is knowingly and recklessly false; or (3) if the affidavit clearly lacked probable cause. *Id.* at 914-17. These exceptions, however, are rare and almost impossible to prove. As a practical matter, almost all warrant-based searches will meet the good faith test. Thus, the fruits of those searches will be admissible regardless of whether the warrant is defective.

26. In *Gates* Justice William Rehnquist wrote:

> In addition, the possession of a warrant by officers conducting an arrest or search greatly reduces the perception of unlawful or intrusive police conduct, by assuring "the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search."

462 U.S. at 236 (quoting United States v. Chadwick, 433 U.S. 1, 9 (1977)). Similarly, Justice Byron White in *Leon* wrote:

> Because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,' we have expressed a strong preference for warrants. . . ."

468 U.S. at 913-14 (citation omitted) (quoting United States v. Chadwick, 433 U.S. 1, 9 (1977) (quoting Johnson v. United States, 333 U.S. 10, 14 (1948))).

27. The fourth amendment states in pertinent part: "The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. CONST. amend. IV.

reviewing judge.

The evisceration of the warrant requirement and its accompanying erosion of fourth amendment protections derive from judicial dislike of the exclusionary rule.[28] Since the application of the exclusionary rule to the states in *Mapp v. Ohio*,[29] the Supreme Court has struggled to balance the protections of the fourth amendment against the loss of incriminating evidence and conviction of the guilty. The ongoing battle with the exclusionary rule is apparent in five siguificant developments in fourth amendment law: (1) a narrowed definition of what constitutes a search;[30] (2) standing thresholds;[31] (3) the denial of federal habeas corpus review of fourth amendment violations;[32] (4) the expansion of exceptions to the warrant requirement;[33] and (5) a free-form reasona-

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28. *See, e.g.*, Stone v. Powell, 428 U.S. 465 (1976). In *Powell* the Court reasoned:

> The costs of applying the exclusionary rule even at trial and on direct review are well known: the focus of the trial, and the attention of the participants therein, are diverted from the ultimate question of guilt or innocence that should he the central concern in a criminal proceeding. Moreover, the physical evidence sought to be excluded is typically reliable and often the most probative information bearing on the guilt or innocence of the defendant. . . . Application of the rule thus deflects the truthfinding process and often frees the guilty.

Id. at 489-90 (citations and footnotes omitted); *see also* Bradley, *Criminal Procedure in the Rehnquist Court: Has the Rehnquisition Begun?*, 62 IND. L.J. 273, 285 (1987) (noting Chief Justice Rehnquist's tendency to find that the evidence in question was not seized illegally). Chief Justice Rehnquist stated that the exclusionary rule "imposes a burden out of all proportion to the Fourth Amendment values which it seeks to advance." Robbins v. California, 453 U.S. 420, 437 (1981) (Rehnquist, J., dissenting). Chief Justice Rehnquist belies that whatever the remedy may be for illegally obtained evidence, it should be neither suppression of evidence nor reversal of convictions for failure to suppress. Bradley, *supra*, at 285; *see also* California v. Minjares, 443 U.S. 916, 926-28 (Rehnquist, J., dissenting).

29. 367 U.S. 643 (1961).

30. *See, e.g.*, United States v. Jacobsen, 466 U.S. 109 (1984) (holding that a chemical test which discloses only whether a substance is cocaine does not compromise a "legitimate" expectation of privacy and is not a search); United States v. Place, 462 U.S. 696 (1983) (holding that a "sniff test" by a trained narcotics detection dog is not a search). *See generally infra* subpart II(B)(1).

31. *See, e.g.*, Rawlings v. Kentucky, 448 U.S. 98 (1980) (conferring standing only upon proof of a violation of an individual's own fourth amendment rights); United States v. Salvucci, 448 U.S. 83 (1980) (holding that one must have a "legitimate" expectation of privacy in the area searched to raise a fourth amendment challenge). *See generally infra* subpart II(B)(2).

32. *Powell*, 428 U.S. at 465 (holding that if a state proceeding provided a fair forum for raising the claims, federal habeas corpus review is denied). *See generally infra* subpart II(B)(3).

33. *See, e.g.*, Michigan v. Sitz, 110 S. Ct. 2481 (1990) (holding that fixed sobriety checkpoints do not violate the fourth amendment); Horton v. California, 110 S. Ct. 2301 (1990) (ruling that inadvertence is not required for a seizure of evidence in plain view); Maryland v. Buie, 110 S. Ct. 1093 (1990) (holding that incident to valid arrest police can make a protective sweep throughout the entire premises if they have a reasonable suspicion of danger or accomplices); United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990) (holding that the search of a foreign national's home is not protected by the fourth amendment); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (special needs exception); Colorado v. Bertine, 479 U.S. 367 (1987) (ruling that inventory searches pursuant to standardized procedures can be performed without a warrant); United States v. Ross, 456 U.S. 798 (1982) (holding that under the automobile exception, officers with probable cause to search a car can search the entire car and all the containers in it); Almeida-

bleness analysis.[34] The desire to preserve evidence even if it was obtained questionably has reduced the fourth amendment's protection of individual rights and confounds any attempt to apply the dictates of the fourth amendment in a coherent fashion.

Under present law, a warrantless search is per se unreasonable unless the search falls into an exception.[35] This requirement, however, has become an unworkable standard. Rather than enforce the per se test and suppress damning evidence, the Court has circumvented the warrant requirement by shifting the inquiry to the reasonableness of the search or seizure[36] or simply creating new exceptions for new situa-

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Sanchez v. United States, 413 U.S. 266 (1973) (suggesting that warrantless searches of persons and their effects may be made upon crossing the international border); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (finding consent searches valid without a warrant); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plain view doctrine); Chimel v. California, 395 U.S. 752 (1969) (search incident to lawful arrest); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk); Camara v. Municipal Court, 387 U.S. 523 (1967) (administrative searches); Warden v. Hayden, 387 U.S. 294 (1967) (holding that hot pursuit is a true exigent circumstance justifying the entrance of a dwelling without a warrant when police have prohahle cause to believe evidence may be lost or destroyed); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (requiring that fruits of an illegal search must he suppressed unless they are discovered from an independent source). *See generally infra* subpart II(B)(4).

34. *See infra* subpart II(B)(5).

35. *See infra* note 149 and accompanying text.

36. *See* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1990). In *Skinner* the Court upheld a drng testing policy that subjected all railway employees to mandatory drug testing after a railway accident occurred. The Court dispensed with the warrant and prohable cause requirement and held that these searches should be judged by the fourth amendment reasonableness standard because the "special needs" of the government in this situation were greater than those in ordinary law enforcement. *Id.* at 619-21. To determine whether a search was reasonable, the appropriate test balances the private individual's fourth amendment interests against the need to promote legitimate government interests. The Court concluded that the government interest in promoting safety on the railways outweighed any individual interest, and therefore, the drug testing policy was not an unreasonable search in violation of the fourth amendment. *Id.* at 633.

Furthermore, the Court held that no individual suspicion was necessary to validate the search. *Id.* at 624. Previously, when the reasonableness analysis was applied, the party conducting the search needed individualized suspicion to conduct a constitutional search of a particular individual. *Skinner* eliminated this requirement in favor of reasonableness. The Court balanced the same two competing interests to determine the reasonableness of the search and concluded that the government interest outweighed the need for individualized suspicion. *Id.* at 633. Moreover, it found that these suspicionless searches were reasonable. *Id.* at 634; *see also* National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1990). The Court decided *Von Raab* on the same day as *Skinner*. *Von Raab* also posed the same issue. In a close decision, the Court approved a United States Customs Service drug program that provided for suspicionless drug testing of incumbent employees seeking transfer or promotion to a position "directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm." *Id.* at at 679. The policy's objective was to safeguard the interests of the national borders and to prevent illegal drugs from entering the country. *See id.* at 666. The Court again found that the special needs of the government justified dispensing with the warrant, probable cause, and individualized suspicion requirements in favor of the reasonableness test used in *Skinner*. *Id.* at 666, 679. The Court concluded that the government interests outweighed any individual interests, and therefore, the drug tests were reasonable under the fourth amendment. *Id.* at 679; *see also infra* subpart II(B)(5) (discuss-

tions.[37] This improvisation changes with each new case.[38] While this approach has provided an outlet for judicial creativity, it is a poor jurisprudential model.

The time for choice in fourth amendment jurisprudence is overdue. The options are clear: redefine the warrant requirement to make it workable within a framework faithful to the precepts of its drafting and sensitive to the realities of a limited criminal justice system dealing with modern criminal ingenuity, or totally dispense with the charade and eliminate the need for warrants or probable cause as a prerequisite

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ing the reasonableness test).

37. *See, e.g.*, United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990) (holding that the warrantless search of a foreign national's home does not violate the Constitution because a home outside the United States is not an interest protected by the fourth amendment); California v. Greenwood, 486 U.S. 35 (1988) (finding that the warrantless search of an opaque garbage bag does not violate the fourth amendment because there is no reasonable expectation of privacy in one's garbage); United States v. Leon, 468 U.S. 897 (1984) (ruling that when an officer relies in good faith on the validity of a judicial search warrant that later turns out to be invalid, the evidence obtained through the search need not be suppressed); United States v. Knotts, 460 U.S. 276 (1983) (holding that the installation of a beeper which allows police to follow a suspect raises no fourth amendment issue); United States v. Ross, 456 U.S. 798 (1982) (finding that the warrantless search of a container within a car does not violate the fourth amendment if police had probable cause to search the whole car).

38. *See, e.g.*, Maryland v. Buie, 110 S. Ct. 1093 (1990); New York v. Belten, 453 U.S. 454 (1981); Chimel v. California, 395 U.S. 752 (1969). In *Chimel* police with an arrest warrant went to the defendant's house. Upon arresting the defendant inside the house, they searched the entire premises. *Chimel*, 395 U.S. at 753-54. The Court held that it is reasonable to search the person and any area within the person's immediate control or reach to prevent destruction of evidence or to protect the officer's safety. *Id.* at 762-63. Any evidence found in this search may be seized. Any search outside of this scope, such as other rooms in the house, however, must be made pursuant to a valid search warrant issued by a detached and neutral magistrate. *Id.* at 763. If no warrant is obtained, the evidence is inadmissible as a violation of the fourth amendment. *Id.*

In *Belton* a police officer stopped the respondent's automobile for speeding. *Belton*, 453 U.S. at 455. While at the car window, the officer smelled marijuana and saw an envelope in plain view that he suspected contained marijuana. *Id.* at 455-56. The officer arrested the respondent, searched the entire passenger compartment of the car, and found cocaine. *Id.* at 456. The Court held that this warrantless search incident to a valid arrest was reasonable. *Id.* at 462-63. To reach this conclusion, the Court extended *Chimel* to allow a warrantless search of the entire passenger compartment of a car, including the glove compartment and any closed containers, when a person is arrested in the car. *Id.* at 460-61.

In *Buie* the Court applied *Terry v. Ohio*, 392 U.S. 1 (1968), to permit protective sweeps throughout a dwelling incident to a valid arrest. Police went to the respondent's house with an arrest warrant. *Buie*, 110 S. Ct. at 1095. Upon entering, they split up and walked throughout the house. Buie was found, arrested, and taken inside the house. *Id.* An officer, however, returned to the basement of Buie's home and seized evidence in plain view that the state used to convict him. *Id.* The Court held that when an officer has reasonable suspicion based on articulable facts that other suspects may be in the house, or that the officers may be in danger, a limited protective sweep without a search warrant can be made incident to a valid arrest. *Id.* at 1098-99. The Court emphasized that it only authorized a cursory search of places where persons reasonably may be found. *Id.* at 1099. Furthermore, the sweep may be made only to search for persons, but other evidence found in plain view may be seized. *Id.* Therefore, *Buie* extends *Chimel* to allow a cursory search of the area outside the immediate control of the arrestee.

of a search or seizure.

This Article begins with the premise that warrants safeguard meaningful rights and are essential to the essence of the fourth amendment. The Article asserts that the warrant clause must be revitalized and enforced, but in a manner that makes it more compatible with law enforcement realities. A less rigid, but more rigidly applied, test must replace the per se unreasonable test. Warrantless searches should be deemed presumptively unreasonable, and the goverument should bear the burden of overcoming the presumption.[39] At the same time, police should be able to obtain warrants more easily, and they should face serious disciplinary measures when proceeding without one.

Part II of this Article discusses the breakdown of fourth amendment law and why the Court needs to develop a new standard. Part III defines the proposed standard and provides some examples of how it would work in practice. Part IV highlights the benefits of the presumptively unreasonable standard generally.

II. THE SEARCH FOR CERTAINTY

Translating the abstract prohibition in the fourth amendment against unreasonable searches and seizures into workable guidelines is a difficult task that has divided the Court deeply.[40] Although the Court occasionally mentions the benefit of "bright line" tests, it overwhelmingly opts for a less-defined approach and often blurs or obliterates whatever lines exist.[41] The warrant requirement, for example, once was based on a straightforward test: warrantless searches are per se unreasonable, except in a few well-defined circumstances.[42] The per se test, however, proved unacceptable for a Court unwilling to exclude evidence pursuant to a narrow rule. Today, the warrant requirement is notable more for its exceptions than its enforcement.[43] This breakdown of the

39. *See infra* Part III.

40. Camara v. Municipal Court, 387 U.S. 523, 528 (1967).

41. *See, e.g., Belton*, 453 U.S. at 454 (discussed *supra* note 38). *Belton* established a bright line test to determine when the police can make a warrantless search of the entire passenger compartment of an arrestee's vehicle. *See id.* at 458-61. The majority determined that fourth amendment protection could best be realized if the police have a definite rule to follow when conducting a vehicle search incident to arrest of the occupants. The Court determined that a single familiar standard was essential to guide police conduct. *Id.* at 458. *But see Buie*, 110 S. Ct. at 1093 (discussed *supra* note 38); Duckworth v. Eagan, 109 S. Ct. 2875 (1989) (ruling that the *Miranda* warning need not be given exactly as described in the *Miranda* opinion and that as long as the defendant is appraised of his rights accurately and fully, *Miranda* is not violated). *See generally* Butterfoss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437 (1988).

42. Mincey v. Arizona, 437 U.S. 385, 390 (1978).

43. There are no fewer than 12 (and perhaps more than 15) exceptions to the warrant requirement. *See infra* subpart II(B)(4).

warrant requirement[44] can be traced directly to the development of the exclusionary rule.

A. The Role of the Exclusionary Rule

Between 1961 and 1990 the Court decided 230 search and seizure cases. The underlying issue in every one of these cases was whether damning evidence should be suppressed because of a fourth amendment illegality. In rendering its many opinions on the validity of a search or seizure, the Court was aware that the result of its decision would determine the admission of evidence.

A federal rule excluding evidence obtained during a warrantless search has existed unchallenged since 1914.[45] Although there was a great uproar by conservative critics when the Warren Court decided *Mapp v. Ohio*,[46] the most radical act the Court accomplished was to apply a preexisting principle to the states.[47] Furthermore, the social upheaval and increased criminal violence predicted by detractors of the exclusionary rule never occurred.[48] Nonetheless, the exclusionary rule

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44. When the term "warrant requirement" is used herein, it refers to both the probable cause and particularity requirements. They are not defined separately because they are inherent in the warrant requirement.

45. *See* Weeks v. United States, 232 U.S. 383 (1914); *see also* Mapp v. Ohio, 367 U.S. 643 (1961).

46. *See, e.g.*, Specter, Mapp v. Ohio: *Pandora's Problems for the Prosecutor*, 111 U. PA. L. REV. 4 (1962) (asserting that *Mapp* has affected adversely the ability of the police to obtain evidence); Traynor, Mapp v. Ohio *at Large in the Fifty States*, 1962 DUKE L.J. 319 (arguing that the lack of uniformity between federal and local rules leads to inconsistent application); Wolf, *A Survey of the Expanded Exclusionary Rule*, 32 GEO. WASH. L. REV. 193 (1963) (asserting that the exclusionary rule has created more problems than it has solved).

47. In fact, much of the Warren Court's "activism" was not nearly as radical as the Court's detractors have asserted. Many of the Court's most controversial decisions simply advanced the application of preexisting doctrines to the states. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (right to jury trial); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel); Mapp v. Ohio, 367 U.S. 643 (1961) (exclusionary rule).

48. *See* Burger, *Who Will Watch the Watchman?*, 14 AM. U.L. REV. 1, 11-12 (1964); Taft, *Protecting the Public from* Mapp v. Ohio *Without Amending the Constitution*, 50 A.B.A. J. 815 (1964). The empirical data about the impact and efficacy of the exclusionary rule is varied and ambiguous, at best. A Cincinnati study of arrests and convictions for narcotics and weapons offenses reveals that the *Mapp* decision had no impact. Oaks, *Studying the Exclusionary Rule in Search and Seizure* 37 U. CHI. L. REV. 665, 690 (1970). While arrests and convictions for gambling offenses decreased after *Mapp*, they were on the decline for the two years preceding *Mapp*. *Id.* at 690-91. A study of the disposition of misdemeanor narcotics cases in New York for the six months preceding and following *Mapp* reveals that there was little change in disposition patterns after *Mapp*. Comment, *Effect of* Mapp v. Ohio *on Police Search-and-Seizure Practices in Narcotics Cases*, 4 COLUM. J.L. & SOC. PROBS. 87, 103 (1968). For additional statistics on various aspects of the impact of the exclusionary rule, see Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion*, 62 KY. L.J. 681 (1974).

It is not unusual that the expected increase in crime never occurred after the Court approved a state exclusionary rule. Intuitively it makes sense that the exclusionary rule is more likely to deter police than to entice criminals to commit more crimes. Most criminals usually do not antici-

remains a thorn in the side of the present Supreme Court, perhaps more because the rule is invoked only by "guilty" people to avoid conviction rather than because it acts as an incentive for innocent people to commit crimes.

This turmoil began in 1914 in the landmark opinion of *Weeks v. United States*.[49] In prohibiting the use of the fruits of the warrantless searches of Mr. Weeks's home, the Supreme Court emphasized that the purpose of the fourth amendment is to limit the exercise of power by the United States courts and federal officials and to protect the citizens of the United States against unreasonable searches and seizures of their persons, houses, papers, and effects.[50] The Court held that papers or effects taken from a house without a warrant were illegally seized documents that must be returned to the defendant and could not be used against him at trial. The Court further stated that if letters and private documents could be seized illegally and used as evidence against a defendant, then the protection of the fourth amendment would be meaningless and "might as well be stricken from the Constitution."[51] Thus, although the fourth amendment does not mention anything about excluding evidence illegally seized, the Court recognized that an exclusionary rule was a necessary remedy[52] for the violation of a constitutional right.[53]

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pate being caught. It is even less likely that they contemplate what evidence will be used against them at trial.

49. 232 U.S. 383 (1914).

50. *Id.* at 391-92.

51. *Id.* at 393. Seven years later in Gouled v. United States, 255 U.S. 298 (1921), the Court firmly secured the exclusionary rule when it broadly held that evidence seized through an illegal search or seizure conducted by federal authorities could not be introduced in a federal prosecution.

52. Justice John Clark likely would take issue with the characterization of the exclusionary rule as a remedy instead of as an essential part of the fourth and fourteenth amendments. *See Mapp*, 367 U.S. at 657. Justice Brennan stated:

> [T]he [fourth] Amendment plainly operates to disable the government from gathering information and securing evidence in certain ways . . . . Understood in this way, the Amendment directly contemplates that some reliable and incriminating evidence will be lost to the government; therefore, it is not the exclusionary rule, but the Amendment itself that has imposed this cost.

United States v. Leon, 468 U.S. 897, 941 (1984) (Brennan, J., dissenting) (citations and footnotes omitted); *see also* Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 590-97 (1983) (noting that nowhere in *Weeks* is the exclusionary rule called a "remedy").

53. A right without a remedy is little more than an empty platitude. While there is great controversy over the appropriateness of excluding evidence from the guilt phase of trial as a remedy for police overzealousness, this Article will not discuss the utility of the exclusionary rule as an appropriate remedy for violation of a constitutional right. Moreover, because the exclusionary rule has withstood both harsh criticism and the test of time, it remains, at least in theory, the remedy for fourth amendment violations. *See, e.g.*, Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 411-29 (1971) (Burger, C.J., dissenting) (listing proposals for eliminating the exclusionary rule).

Thirty-five years went by before the Court again addressed the exclusionary rule. In *Wolf v. Colorado*[54] the Court held that the exclusionary rule did not apply to the states.[55] Until the Court overruled *Wolf* in *Mapp*,[56] search and seizure cases focused on developing and refining the substance of fourth amendment doctrine in relatively straightforward fashion.[57] After *Mapp* applied the exclusionary rule to the states, the

54. 338 U.S. 25 (1949).

55. *Id.* at 33. Although Justice Felix Frankfurter affirmed that the core of the fourth amendment is "[t]he security of one's privacy against arbitrary intrusion by the police," *id.* at 27, and that the right of privacy protected by the fourth amendment is "implicit in 'the concept of ordered liberty,'" *id.*, he concluded that an exclusionary rule lacked the appropriate authority to legitimize the rule as the only means for enforcing the fourth amendment. Justice Frankfurter stated: "[*Weeks*] was not derived from the explicit requirements of the Fourth Amendment; it was not based on legislation expressing Congressional policy in the enforcement of the Constitution. The decision was a matter of judicial implication." *Id.* at 28.

56. 367 U.S. 643 (1961).

57. After *Weeks* and before *Mapp*, major doctrinal changes were rare. Most of these doctrines, however, are still in effect today. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (holding that all fruits of an unconstitutional search are inadmissible unless they are derived from an independent source). Some of the major doctrinal decisions gave birth to a number of exceptions to the warrant requirement, some of which still are recognized today. *See, e.g.*, Jones v. United States, 362 U.S. 257 (1960) (granting standing to invoke fourth amendment protection to a defendant who is legitimately on the premises of the place searched); Walder v. United States, 347 U.S. 62 (1954) (holding that a defendant's direct testimony may be impeached on cross-examination by the use of evidence derived from an unconstitutional search and seizure); McDonald v. United States, 335 U.S. 451 (1948) (finding that a warrantless entry and search of a home is justified only if exigent circumstances exist); Zap v. United States, 328 U.S. 624 (1946) (allowing the voluntary waiver of fourth amendment rights); United States v. White, 322 U.S. 694 (1944) (holding that to assert the fourth amendment privilege, the things seized must be the private property, or at least in the possession, of the claimant); Goldstein v. United States, 316 U.S. 114 (1942) (stating that only the victim of an unconstitutional search has standing to object to use of the seized evidence); Olmstead v. United States, 277 U.S. 438 (1928) (finding that wiretapping a phone conversation and other nontrespassory detection techniques are not forbidden for fourth amendment purposes); Agnello v. United States, 269 U.S. 20 (1925) (stating that it was well recognized that officers, incident to a valid arrest, could make a warrantless search of the person and the place where the person was arrested if the crime was committed in that place, but that a warrant was necessary to search other places); Carroll v. United States, 267 U.S. 132 (1925) (holding that with probable cause, officers may search an automobile without a warrant because of the inherent mobility of a car and the possibility of losing evidence); Hester v. United States, 265 U.S. 57 (1924) (finding that the fourth amendment does not protect "open fields").

After these exceptions were created, the Court interpreted them in several subsequent cases. *See, e.g.*, Chapman v. United States, 365 U.S. 610 (1961) (balancing the interests of the individual versus the interests of government and deciding that a search of a house without a warrant or exigent circumstances was unreasonable); Silverman v. United States, 365 U.S. 505 (1961) (finding a search unconstitutional when police pushed a microphone through the defendant's wall thereby touching a heating duct and committing a trespass); Abel v. United States, 362 U.S. 217 (1960) (allowing the police to search a hotel room after the occupant has checked out and seize items left behind with the consent of management); Henry v. United States, 361 U.S. 98 (1959) (holding that without probable cause, the police cannot search a car); Jones v. United States, 357 U.S. 493 (1958) (holding that probable cause alone does not justify a warrantless entry into a dwelling); Giordenello v. United States, 357 U.S. 480 (1958) (ruling that a search made incident to an invalid arrest is unconstitutional); On Lee v. United States, 343 U.S. 747 (1952) (finding that an under-

law of search and seizure started its downward spiral of unpredictabil-

cover agent who obtains incriminating statements while wearing a wired microphone in the defendant's place of business does not constitute a fourth amendment violation); United States v. Jeffers, 342 U.S. 48 (1951) (holding that a warrantless search of a hotel room is unconstitutional even when probable cause exists if the search is not incident to an arrest or without exigent circumstances justifying entry); United States v. Rabinowitz, 339 U.S. 56 (1950) (allowing a search incident to an arrest of a one-room office because it was in the "immediate control" of the arrestee). *Rabinowitz* is the first time the Court mentioned that searches are governed by reasonableness, not a warrant. *See also* Trupiano v. United States, 334 U.S. 699 (1948) (requiring a search warrant whenever practicable); United States v. Di Re, 332 U.S. 581 (1948) (extending the automobile exception only to circumstances in which there is probable cause that Prohibition laws are being violated); Harris v. United States, 331 U.S. 145 (1947) (finding that under the appropriate circumstances, a search incident to an arrest may extend beyond the person to include the premises under the arrestee's immediate control); Goldman v. United States, 316 U.S. 129 (1942) (finding that listening to a conversation from another room is not a fourth amendment violation).

Many decisions dealt with the issue resolved in *Mapp*: the application of the exclusionary rule to the states. *See, e.g.*, Ohio *ex rel.* Eaton v. Price, 364 U.S. 263 (1960) (holding that a statute requiring a search warrant for a building inspection is constitutional); Elkins v. United States, 364 U.S. 206 (1960) (holding that evidence obtained by state officials is inadmissible at federal trial over a defendant's timely objection if it is the product of an unreasonable search even when no federal officials participated in the search and seizure); Salsburg v. Maryland, 346 U.S. 545 (1954) (upholding a state statute authorizing warrantless searches for certain gambling misdemeanors); Lustig v. United States, 338 U.S. 74 (1949) (deciding that any participation of a federal officer in an unreasonable state or private search is unconstitutional); Feldman v. United States, 322 U.S. 487 (1944) (holding that evidence found in an unreasonable search by state officials is admissible at federal trial).

Several cases concern probable cause and the fourth amendment's particularity requirement. *See, e.g.*, Draper v. United States, 358 U.S. 307 (1959) (allowing the use of an informant's hearsay information to formulate probable cause); Brinegar v. United States, 338 U.S. 160 (1949) (holding that probable cause exists when trustworthy facts and circumstances are within an officer's personal knowledge); Nathanson v. United States, 290 U.S. 41 (1933) (ruling that mere suspicion or belief is not enough for probable cause); Sgro v. United States, 287 U.S. 206 (1932) (holding that a warrant cannot be based on the same facters that justified an expired warrant because probable cause must be related in time to the warrant); Grau v. United States, 287 U.S. 124 (1932) (requiring that an affiant state independent facts for each warrant and finding that the mere belief in the truth of statements made in a different warrant is insufficient); Taylor v. United States, 286 U.S. 1 (1931) (finding that the presence of odor alone does not give probable cause); Husty v. United States, 282 U.S. 694 (1931) (holding that legal evidence is not necessary to show probable cause and that a reasonable and prudent officer's personal appraisal of facts which justify the belief that evidence will be found is enough); Marron v. United States, 275 U.S. 192 (1927) (prohibiting general searches through the particularity requirement); Byars v. United States, 273 U.S. 28, 29 (1927) (holding insafficient a warrant which states that the officer has "good reason to believe and does believe" rather than that the officer has probable cause); Albrecht v. United States, 273 U.S. 1, 5 (1927) (finding that information sworn before a state official without authority to conduct federal proceedings violates the fourth amendment because it is not "supported by oath or affirmation"); Steele No. 1 v. United States, 267 U.S. 498 (1925) (holding that the particularity requirement is satisfied if the officer with the search warrant, with reasonable effort, can ascertain and identify the place to be searched and the things to be seized).

The remainder of the cases decided between *Weeks* and *Mapp* dealt with miscellaneous fourth amendment issues that helped shape current doctrine. *See* Frank v. Maryland, 359 U.S. 360 (1959) (finding constitutional a statute allowing a search for administrative purposes, but not for evidence of criminal activity); Rochin v. California, 342 U.S. 165 (1952) (finding that police activity shocked the conscience of the court and, therefore, violated the defendant's right to due process); Davis v. United States, 328 U.S. 582 (1946) (holding that public property held by a private citizen

ity. Indeed, *Mapp* was the catalyst for an explosion of state criminal procedure cases that continues to the present.

The problem with *Mapp*, its progeny, and the current disharmony,[58] is that the creation of an exclusionary remedy shifted fourth amendment law from text-based analysis to procedural rules, which often are a reaction to individual factual circumstances rather than guidelines for social justice.[59] When the Court read into the fourth amendment a remedy for an unreasonable search and seizure that does not appear in the words of the brief, vague, and unilluminating text,[60] the Court unwittingly began the process of reading out the warrant and probable cause requirements that do appear in the text. Accordingly, *Weeks* and *Mapp* both expanded and limited the fourth amendment.

After *Mapp*, the words "and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,"[61] commonly called the warrant clause of the fourth amendment, generated an enormous volume of litigation. The Constitution does not proscribe all searches without warrants, only "unreasonable searches and seizures."[62] The exclusionary rule, however, requires the

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is subject to recall and inspection at any reasonable time); United States v. Lefkowitz, 285 U.S. 452 (1932) (holding that a general search for evidence, where no evidence of a crime is suspected, is unreasonable); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931) (liberally construing the fourth amendment in favor of those whom it was intended to protect); Segurola v. United States, 275 U.S. 106 (1927) (requiring that an objection to illegal evidence must he timely made); McGuire v. United States, 273 U.S. 95 (1927) (ruling that destruction of property does not render evidence found pursuant to a lawful arrest inadmissible even though officers may be civilly liable); Essgee Co. v. United States, 262 U.S. 151 (1923) (holding tbat the compulsory production of corporate documents to a grand jury made pursuant to a subpoena duces tecum is not a fourth amendment violation); Burdeau v. McDowell, 256 U.S. 465 (1921) (deciding that searches by private, nongovernmental persons are not prohibited by the fourth amendment); Gouled v. United States, 255 U.S. 298 (1921) (holding that searches and seizures achieved through deception, as well as those forced or coerced, may be unreasonable).

58. Justice Frankfurter wrote some years back that "[t]he course of true law pertaining to searches and seizures . . . bas not . . . run smooth[ly]." Chapman v. United States, 365 U.S. 610, 618 (1961) (Frankfurter, J., concurring). Ten years later Justice Potter Stewart reiterated that it has not yet been possible to reduce "Fourth Amendment law to complete order and harmony." Coolidge v. New Hampshire, 403 U.S. 443, 483 (1971).

59. *See* Seidman, *Factual Guilt and the Burger Court: An Examination of Continuity and Change in Criminal Procedure*, 80 COLUM. L. REV. 436 (1980) (suggesting that the Burger Court used the criminal justice system to advance the substantive aim of crime prevention, but that the rights of criminal defendants were sacrificed in the advancement of these broader social goals).

60. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353-54 (1974). The fourth amendment enunciates: "the right of the people to be secure against unreasonable searches . . . and no warrants shall issue but upon probable cause." U.S. CONST. amend. IV. But the amendment does not define what activities amount to searches and seizures, or what makes activities unreasonable, or what is probable cause.

61. U.S. CONST. amend. IV.

62. *See supra* note 27. The view that only "unreasonable" searches and seizures are prohib-

fruits of a warrantless search or seizure, or of an invalid warrant,[63] to be excluded from all criminal prosecutions—and, thus, we have the great controversy over the so-called warrant clause. In the words of Justice William Rehnquist, "[E]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth is deflected."[64] This visceral repugnance toward "benefitting" the guilty has caused disharmony within the Court and has created ever increasing layers of conflicting doctrine.

In the years immediately following *Mapp*, the Warren Court fashioned a variety of procedural rules designed to provide greater protection to the accused while also accomplishing greater social goals.[65] The Court began a tripartite mission of encouraging respect for individual rights,[66] mandating strict judicial scrutiny of the law enforcement process,[67] and creating a set of rules that police could accept and abide by.[68] Justice Warren Burger then charted a new course for the Court. During his leadership the Court shifted the emphasis from protecting individual rights to controlling crime.[69] Thus, it no longer was politic to

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ited first was articulated in United States v. Rabinowitz, 339 U.S. 56, 63-66 (1950). The notion surfaced occasionally in a few later opinions, particularly those written by Justice Byron White and now by Chief Justice Rehnquist. *See, e.g.*, United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990) (Rehnquist, C.J.); United States v. Villamonte-Marquez, 462 U.S. 579 (1983) (Rehnquist, J.); Almeida-Sanchez v. United States, 413 U.S. 266, 289 (1973) (White, J., dissenting).

63. Wong Sun v. United States, 371 U.S. 471 (1963); Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920).

64. Rakas v. Illinois, 439 U.S. 128, 137 (1978).

65. Just as the Burger and Rehnquist Courts that followed, the Warren Court used the criminal justice system as a tool for social engineering. Perhaps the clearest example of the Warren Court's activism was its decision in *Mapp*, 367 U.S. at 643, to overrule Wolf v. Colorado, 338 U.S. 25 (1949), and enforce the exclusionary rule against the states. This position neither was briefed nor argued by the petitioner's counsel.

In *Mapp* Dollree Mapp was convicted in Ohio State Court for possession of obscene materials. The materials used to convict Mapp were seized from her home in a warrantless raid. *Mapp*, 367 U.S. at 644-45. In the United States Supreme Court, Mapp's counsel pursued the question of whether one could be convicted constitutionally for the mere knowing possession of obscene materials. The only mention of *Wolf* appeared in the last paragraph of the amicus brief of the American Civil Liberties Union, which urged overruling *Wolf*. 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 1.1(e), at 14 (2d ed. 1987).

66. *See* Gideon v. Wainwright, 372 U.S. 335 (1963); *Mapp*, 367 U.S. at 643.

67. *See* United States v. Wade, 388 U.S. 218 (1967).

68. *See* Terry v. Ohio, 392 U.S. 1 (1968); Miranda v. Arizona, 384 U.S. 436 (1966); *see also* See v. City of Seattle, 387 U.S. 541 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967).

69. *See* C. WHITEBREAD & C. SLOBOGIN, CRIMINAL PROCEDURE: AN ANALYSIS OF CASES AND CONCEPTS 3-4 (2d ed. 1986). Professor Louis Seidman suggests that the Burger Court never quite fulfilled its mission of convicting the guilty in the name of crime control. Just as the Warren Court that preceded it, the Burger Court's commitment to its model was "only rhetoric deep." Seidman, *supra* note 59, at 445. As Seidman states: "Far from establishing a process focusing on individualized guilt and innocence, the Burger Court has continued to sacrifice the truth in individual cases on the altar of broader social goals." *Id.* at 445-46.

let the criminal "go free because the constable has blundered."[70] The new challenge focused on convicting the criminal regardless of whether the constable blundered. Today's Court, guided by Chief Justice William Rehnquist, advances the Burger Court model further by "getting" the criminal and simultaneously often defending the constable's judgment.[71]

Meanwhile, the fourth amendment has blown like a leaf among these shifting winds of social policy, lost first in the development, and now the breakdown, of procedural rules. Because the exclusionary rule has caused so much dissent and confusion, the simple answer would be to overrule *Mapp v. Ohio*. Certainly this has occurred to the Court, but it will not happen simply because a majority of the Court would not support such a reversal. Alternatively, the Court may have refrained from overruling *Mapp* because politically it might be easier to suffocate the fourth amendment slowly rather than shoot it down in cold blood.[72]

B. Five-Part Disharmony

Twenty-nine years after *Mapp*, the warrant requirement has been eviscerated, and fourth amendment jurisprudence is a mass of confusion that clouds and often eliminates fourth amendment protections. Five separate but overlapping developments in search and seizure doctrine have nourished this confusion: (1) a narrowed interpretation of the meaning of search within the context of the fourth amendment; (2) restructured standing requirements for criminal defendants; (3) the elimination of federal habeas corpus jurisdiction for fourth amendment violations; (4) the "shifting maze of categorical boxes"[73] that makes up the exceptions to the warrant requirement; and (5) a sliding-scale reasonableness approach to the fourth amendment. This Article examines each of these developments in turn.

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70. People v. Defore, 242 N.Y. 13, 21, 150 N.E. 585, 587 (Cardozo, J.), *cert. denied*, 270 U.S. 657 (1926).

71. *See, e.g.*, Illinois v. Rodriguez, 110 S. Ct. 2793 (1990); Maryland v. Buie, 110 S. Ct. 1093 (1990); United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990); United States v. Sokolow, 490 U.S. 1 (1989); Florida v. Riley, 488 U.S. 445 (1989); United States v. Leon, 468 U.S. 897 (1984).

72. Justice Brennan, who views the exclusionary rule as an integral part of the fourth amendment, charged in a vitriolic dissent in *United States v. Leon* that the Court killed the fourth amendment by endorsing a good faith exception to the warrant requirement. Brennan stated: "I have witnessed the Court's gradual hut determined strangulation of the [exclusionary] rule. It now appears that the Court's victory over the Fourth Amendment is complete." *Leon*, 468 U.S. at 928-29 (Brennan, J., dissenting) (footnote omitted).

73. *See* Uviller, *Reasonability and the Fourth Amendment: A (Belated) Farewell to Justice Potter Stewart*, 25 CRIM. L. BULL. 29, 33 (1989).

1. Definitional Limitations

The warrant and reasonableness clauses of the fourth amendment are triggered only when a state actor executes a search or seizure. Interpretation of these terms, therefore, is a critical threshold question. When fewer activities qualify as a search or seizure, fourth amendment protections hold less significance. In recent years the Court has narrowed significantly the definitions of these terms.

Prior to *Katz v. United States*,[74] decided in 1967, a search required a physical intrusion into a protected area—a person, house, paper, or effect—to qualify for fourth amendment scrutiny.[75] With technology enabling intrusion without trespassing, the Court abandoned this analysis in *Katz*. The Court explained that "the Fourth Amendment protects people, not places,"[76] and thus, the Court established a test that tied the question of search to notions of privacy. Justice Potter Stewart, writing for the majority, stated: "[W]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected."[77] This definition focuses on the individual and the steps taken to shield an activity from the public eye.

Concurring in *Katz*, Justice John Harlan set out a two-part test that subsequently became the law: First, a person must exhibit an actual—subjective—expectation of privacy, and second, that expectation objectively must be one that society recognizes as "reasonable."[78] Thus, a person strongly may believe that activities within the home are protected because they are in the most inviolate of places—the home. But if one's house is made of unobstructed glass, then the expectation of privacy will fail the objective criteria of Justice Harlan's test.[79]

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74. 389 U.S. 347 (1967)

75. In Hester v. United States, 265 U.S. 57 (1924), the Court held that the protection of the fourth amendment does not extend to open fields because no trespass occurred onto the curtilage, a recognized protected area. In United States v. Lee, 274 U.S. 559 (1927), the Court found that shining a flashlight into a boat was not a search because, although the contents of the boat were exposed, there was no trespass onto a protected interest. Finally, in Olmstead v. United States, 277 U.S. 438 (1928), the Court held that wiretapping a phone conversation was not forbidden by the fourth amendment when no physical trespass occurred to obtain the conversations.

76. *Katz*, 389 U.S. at 351.

77. *Id.* at 351-52. The "*Katz* test" evolved into the two-part subjective-objective expectation of privacy test enunciated in Justice John Harlan's concurrence. *See infra* text accompanying note 78. One must focus on the original formulation, however, to discern the true intent of the *Katz* Court.

78. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

79. That police lawfully could search the interior of a glass house without a warrant because their actions are not in contravention of the fourth amendment raises an interesting dilemma. Absent exigent circumstances, however, they could not go in the house and seize contraband,

The Harlan test, like any subjective-objective reasonableness test, is susceptible to shifting social and political influences. Unless one lives in isolation, a subjective belief is a product of societal norms. If fewer instances arise in which a court finds a subjective expectation of privacy that society (in actuality, a court) is willing to find objectively reasonable, then subjective expectations diminish. Justice Harlan's test, therefore, becomes the ultimate catch-22 and could eliminate all claims to fourth amendment protection. Taken to its absurd extreme, the government could defeat any subjective expectation of privacy simply by broadcasting on television every half-hour its intention to place all citizens under comprehensive electronic surveillance.[80]

While not quite as obvious as announced surveillance, recent decisions erode fourth amendment protections by placing increasingly greater emphasis on the objective criteria: the Court focuses on the nature of the intrusion rather than actual subjective expectations of privacy. In *United States v. Place*,[81] decided in 1983, Drug Enforcement Administration agents temporarily seized a suspect's luggage to enable a drug detection dog to sniff it.[82] Although the majority found that the fourth amendment protects a person's "privacy interest in the contents of personal luggage," they held that a canine sniff is not a search. The majority reasoned that a "sniff" does not require opening luggage and rummaging through its contents and, therefore, is less intrusive than a traditional search. Furthermore, the Court stated that the sniff was less intrusive because it disclosed only the presence or absence of narcotics, a contraband item.[83] Permitting a minimum level of intrusion before labeling an act a search, and then tying that level of intrusion to the nature of the item searched, sends a very different message than Justice Stewart's majority opinion in *Katz*. Justice Stewart's test, instead, fo-

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fruits, or instrumentalities without a warrant.

In most situations we find that the fourth amendment offers less protection from warrantless seizures than from warrantless searches. In the public arena, for example, police generally have much greater leeway to make arrests without a warrant. United States v. Watson, 432 U.S. 411 (1976) (stating the common-law rule that a police officer could arrest without a warrant for a misdemeanor or felony committed in his presence as well as for a felony not committed in his presence as long as there is a reasonable ground for making the arrest).

Permitting a warrantless arrest is particularly ironic given that the arrestee who does not make bail could end up spending 10 to 20 days in jail before a formal determination of probable cause. Why is it that a greater infringement upon liberty demands less protection than a search of property?

80. Amsterdam, *supra* note 60, at 384.

81. 462 U.S. 696 (1983).

82. *Id.* at 698-99. They actually held the luggage for 90 minutes during which they transported it from La Guardia to Kennedy Airport. The Court held that a 90-minute detention exceeded the bounds of the brief detention permitted in Terry v. Ohio, 392 U.S. 1 (1968), for investigative purposes. *Place*, 462 U.S. at 710.

83. *Place*, 462 U.S. at 707.

cuses on the steps that the individual took to shield the personal effects from the public eye, not the actual physical intrusion.[84]

The lesser intrusion rationale in *Place* surfaced more prominently the next year in *United States v. Jacobsen*.[85] In *Jacobsen* Federal Express employees opened a damaged box in which they found a tube made of silver duct tape. A manager cut open the tube and found plastic bags containing white powder. The private carrier called the Drug Enforcement Administration (DEA), but before the DEA arrived the Federal Express employees returned the plastic bags to the tube and the box, which was left open. A federal agent saw that one end of the tube was slit open. He removed the plastic bags containing the white powder, field tested the powder, and identified it as cocaine. A second field test confirmed the first. The agents rewrapped the package, obtained a warrant to search the location to which the package was addressed, and arrested the respondents.[86]

The respondents argued that the warrant was invalid because it was based on a warrantless test of the white powder, which was a significant expansion of the earlier private search by Federal Express. The Court rejected this argument and found no significant expansion of the private search because the package was opened already.[87] The respondents argued that because Federal Express did not field test the substance, the DEA did expand the intrusion. The Court found otherwise, using rationale very similar to that articulated in *Place*. The field test did not violate a societally reasonable expectation of privacy[88] because it only confirmed one fact of which the DEA agents previously were unaware—that the substance was cocaine.[89] The critical finding, however, was the Court's determination that "[a] chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy."[90]

Linking the definition of a search to the legitimacy of the item searched represents a radical departure from the *Katz* notion of a reasonable expectation of privacy. One can have a reasonable expectation of privacy in an illegitimate item or act. If, for example, a state made homosexual sex a crime, persons who engaged in such sex in the privacy of their bedroom with the shades drawn would have a reasonable expec-

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84. *See supra* notes 76-77 and accompanying text.

85. 466 U.S. 109 (1984).

86. *Id.* at 111-12.

87. *Id.* at 121.

88. *Id.* at 122.

89. *Id.*; *see also* United States v. Knotts, 460 U.S. 276 (1983) (finding that following "beeper" signal along a public highway is not a search).

90. *Jacobsen*, 466 U.S. at 123.

tation of privacy in their act. If, however, a reliable informant revealed this activity, arguably police could invade the bedroom without a warrant because the individuals had no legitimate expectation of privacy when engaged in an illegitimate act.[91]

Although the cases have not ventured so far as to allow warrantless intrusions into the home,[92] the Court has laid groundwork in this direction. In *New Jersey v. T.L.O.*[93] the Court stated that "the Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise '*illegitimate.*' "[94] The Eleventh Circuit Court of Appeals used this legitimacy language to justify a finding that drug smugglers have no legitimate expectation of privacy in the sealed hull of a boat.[95] Although this analysis might have a superficial appeal, it is nothing more than a self-fulfilling tautology: A search occurs only if an individual has a legitimate expectation of privacy in the area searched; society is not prepared to recognize a legitimate expectation of privacy in areas where illicit activity is conducted; therefore, any inspection of illicit activity cannot be a search. If the white powder tested in *Jacobsen* was not cocaine, but something similar, such as another drug used in making a controversial AIDS medicine, would the Court reach the same conclusion that no search took place?[96] Taken to its logical extreme, the fourth amendment, therefore, only protects the innocent.[97]

A second line of attack in the post-*Katz* definitional limitation cru-

91. *See, e.g.*, Bowers v. Hardwick, 478 U.S. 186 (1986) (holding constitutional a statute making consensual sodomy a criminal act).

92. *See, e.g.*, Arizona v. Hicks, 480 U.S. 321 (1987) (requiring probable cause to justify a search that precedes a plain view seizure in a residence).

93. 469 U.S. 325 (1985).

94. *Id.* at 338.

95. United States v. Sarda-Villa, 760 F.2d 1232, 1237 (11th Cir. 1985) (stating: "We cannot imagine that society would recognize as reasonable the use of 'dead space' in the hull of a ship, sealed with permanent material and disguised in appearance, for the legitimate storage of personal items").

96. What is legitimate? What if the powder that Jacobsen was shipping was legitimate, but the means of shipping it was a crime? Assume that the powder was a new drug to fight AIDS, that a federal statute exists which prohibits the interstate shipment of improperly labeled drugs, and that the white powder was not labeled as a drug. Mr. Jacobsen's activity still would be illegitimate. How does one apply the test?

97. This is a rather interesting turn of events. Essentially this premise is a reversal of the argument that the exclusionary rule protects only the guilty. Some commentators suggest that the fourth amendment protects only the innocent. One such author, Professor Arnold Loewy, bases this conclusion on two propositions: (1) it is not unreasonable for the government to search for and seize evidence of a crime, and (2) the fourth amendment does not protect the right to secrete evidence of a crime. Loewy, *The Fourth Amendment As a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229, 1229 (1983). Professor Loewy bases the first of these assumptions on the text, history, and decisions concerning the fourth amendment. *See id.* at 1231-44. He supports the second assumption by analyzing the use of the "reasonable expectation of privacy" standard. *See id.* at 1248-57. Based on these propositions, Loewy concludes that the fourth amendment is designed to protect only the innocent: a guilty person is merely an incidental beneficiary.

sade is found in the curtilage and aerial surveillance cases. As in the *Place-Jacobsen* chemical analysis limitation, the question of whether a search took place is tied to the area searched. The focus, however, is on reasonable police activity rather than the legitimacy of the area or article searched. Traditionally, heightened privacy expectations are associated with the home, giving residents a secure subjective expectation of privacy.[98] Recent cases concerning curtilage and aerial surveillance, however, undermine the security of this belief.

In *Oliver v. United States*[99] the Court affirmed the so-called open fields doctrine established in *Hester v. United States*.[100] In *Hester* Justice Oliver Wendell Holmes wrote that the fourth amendment's special protection of "persons, houses, papers, and effects" does not apply to open fields. The curtilage, on the other hand, does receive the same protection that is given to the home.[101] In *Oliver* the Court rejected a claim that the respondents had a legitimate expectation of privacy in land on which they erected two fences and placed no-trespassing signs. The Court found that the inquiry into what expectations are legitimate is totally unrelated to the individual's effort to conceal "assertedly 'private' activity."[102] The proper question asks whether the government's intrusion encroaches on the "personal and societal values" that the fourth amendment protects.[103] Although the individual should have a role in determining personal and societal values, this is not the message of *Oliver*. Objective evaluation of personal privacy once again controls.[104]

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98. *See* Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647 (1988) (asserting that society values the privacy of activities normally carried on within the home).

99. 466 U.S. 170 (1984).

100. 265 U.S. 57 (1924).

101. *Id.* at 59.

102. *Oliver*, 466 U.S. at 182 & n.12.

103. *Id.* at 182-83.

104. *See* Dow Chem. Co. v. United States, 476 U.S. 227 (1986); California v. Ciraolo, 476 U.S. 207 (1986). The Court in *Ciraolo* held that police aerial observation of marijuana plants in the petitioner's backyard did not violate the fourth amendment. Similarly, in *Dow* the Court found that photos taken from an airplane flown in navigable airspace above industrial plants, which revealed EPA violations, were obtained constitutionally. Neither surveillance was a fourth amendment search because any member of the public could observe the activity from the air. The Court found that, although steps had been taken to conceal the activity from public view, the expectation of privacy from all observation was unreasonable. *See Dow*, 476 U.S. at 235-39; *Ciraolo*, 476 U.S. at 214. Thus, pursuant to United States v. Katz, 389 U.S. 347 (1967), the expectation of privacy in the marijuana plants or in the backyard, as well as in the chemical plant, was not one that an ordinary member of society was willing to recognize as reasonable. In California v. Greenwood, 486 U.S. 35 (1988), the Court held that a person has no societally recognized reasonable expectation of privacy in trash left on the curb. The Court reasoned that once trash is placed on the curb, the person leaving it assumes the risk of tampering by animals, children, and others. *Id.* at 40. Therefore, because a reasonable person knows that this meddling is possible, a warrantless search of the

The absurdity of this analysis is revealed in the most recent aerial surveillance decision. In *Florida v. Riley*[105] police surveyed property within the curtilage of the respondent's home while hovering in a helicopter four hundred feet above the respondent's greenhouse. Two sides of the greenhouse were enclosed. Trees, shrubs, and the respondent's mobile home obscured the other two sides from view. Opaque roofing panels covered the greenhouse, but two panels were missing, leaving approximately ten percent of the roof open.[106] An officer identified what he thought was marijuana growing in the greenhouse and obtained a search warrant based on this observation. Although the Court recognized that Riley took sufficient measures to establish his subjective expectation of privacy, it nonetheless found that no search occurred, apparently because the helicopter was within "navigable airspace."[107] It is hard to imagine an activity more intrusive than a helicopter hovering at low altitude, kicking up dust, blaring noise above one's home, and evoking images of a commando raid. Yet the Court deferred to Federal Aviation Administration regulations.[108] Justice Byron White stated that if law or regulation prohibited flying at that altitude, then the situation would be different. The Court permitted the intrusion, however, because the minimum altitudes that define navigable airspace for other aircraft do not apply to helicopters.[109]

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trash is not a constitutionally protected search according to *Katz*. *Id.* at 40-41.

105. 488 U.S. 445 (1989). *See generally* Recent Development, *supra* note 3.

106. *Id.* at 448.

107. *Id.* at 450-51.

108. The Court reiterated that "helicopters may he operated at less than the minimums for fixed-wing aircraft 'if the operation is conducted without hazard to persons or property on the surface.'" *Id.* at 451 n.3 (quoting 14 C.F.R. § 91.79 (1988)).

109. *Id.* at 451. Because no lower limits exist for helicopters, even a flyby at 100 feet seems permissible. In *Riley* Justice White concluded that "Riley could not reasonably have expected the contents of his greenhouse to be immune from examination by an officer seated in a fixed-wing aircraft flying within navigable airspace at an altitude of 1,000 feet." *Id.* at 450. Just three years earlier in *Ciraolo* the Court found that society would not honor any expectation of privacy from low-flying aircraft at this altitude. *See supra* note 104. Furthermore, since fixed-wing aircraft are permitted to fly at a lowest altitude of 500 feet, the respondent had no expectation of privacy at that height. *Riley*, 488 U.S. at 450. Finally, because a helicopter is not fixed wing and can be operated safely at lower altitudes, Riley should have no expectation of privacy at even below 500 feet. Apparently, Justice White concluded that Riley was on notice after *Ciraolo* (at least with respect to low-flying aircraft at an altitude of 500 feet) and also should have known the helicopter regulations as well. *Id.* at 450-51 & n.3. Given that no FAA minimum altitude limits exist for helicopters, this self-supporting rationale leads to the conclusion that a low-altitude flyby of 100 feet or less is constitutionally permissible and that individuals cannot assert any reasonable expectation of privacy from the activity.

Recently, however, in People v. Pollock, 796 P.2d 63 (Colo. Ct. App. 1990), a Colorado court invalidated a low-level overflight conducted by police to observe marijuana under cultivation. The court found that the surveillance violated the homeowner's legitimate expectation of privacy. *Id.* at 64-65. The court noted that it was quite unusual for helicopters to fly over a residence at 200 feet, as occurred in the case. *Id.* The court noted also that the helicopter plainly caused a great deal of

Previously, the Court analyzed the question of search by testing the intrusiveness of the activity and considering expectations of privacy. In the chemical analysis setting, it found a field test not intrusive because a field test determines only one piece of information—that a substance is an illegal drug. In *Riley* the Court abandons even this narrow test, opting instead to rely on an administrative rule governing navigable airspace that is wholly irrelevant to constitutional protections from intrusions into personal privacy.

Had the Court in the above cases found the police activity to constitute a search, it would have had to analyze whether the warrantless searches violated the fourth amendment. Finding no search, however, precluded this discussion. Definitional limitations on the words search and seizure take the activity outside the protection of the fourth amendment and, thus, eliminate any need for a warrant. Furthermore, if an activity is not a search, then the Court does not need to inquire whether it is reasonable.

These definitional limitations are the product of two milestones on the Court's social agenda: (1) a desire to allow more aggressive police investigative methods to root out crime, and (2) a distaste for the exclusionary rule—a sanction that disarms damning evidence. Individual rights and liberties, however, dominate the expense side of this social ledger. Police can hover in helicopters above private homes, drug enforcement agents can field test the contents of a personal travel kit, and dogs can sniff luggage and perhaps even individual persons.

2. Who Has Standing?

A similar limiting pattern emerges in the trilogy of cases establishing present requirements for standing to challenge a fourth amendment violation.[110] To claim the benefit of the exclusionary rule, a party must have standing to raise the issue.[111] Until 1978, all defendants who claimed that a search violated their rights had "a key to the court-

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noise and disturbance. *Id.* at 65. Thus, *Pollock* was distinguished from *Riley*. *Pollock* is also distinguishable from *Dow*, which permitted aerial surveillance with sophisticated equipment of a large industrial plant. *See supra* note 104. Had the area in *Dow* been immediately adjacent to a private home, however, the result might have been different.

110. *See* Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); Rakas v. Illinois, 439 U.S. 128 (1978).

111. Jones v. United States, 362 U.S. 257 (1960). Prior to *Jones*, the California Supreme Court in People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955), chose to abolish the standing requirement altegether. The court observed that "such a limitation virtually invites law enforcement officers to violate the rights of third parties and to trade the escape of a criminal whose rights are violated for the conviction of others by the use of evidence illegally obtained against them." *Id.* at 760, 290 P.2d at 857.

room," or automatic standing to challenge the search.[112] A series of three opinions authored by Justice Rehnquist overruled this automatic standing rule and again diminished the protections of the fourth amendment.

Beginning in 1978 with *Rakas v. Illinois*,[113] and completed just two years later in *United States v. Salvucci*[114] and *Rawlings v. Kentucky*,[115] the Court discarded the concept of standing as a separate inquiry in fourth amendment cases. Rather, the focus shifted to whether a defendant's expectation of privacy was breached sufficiently that she personally was aggrieved by a search. Furthermore, the Court adroitly changed the "reasonable expectation of privacy" language adopted from *Katz*[116] to an inquiry into the defendant's "legitimate expectation of privacy."[117]

In *Rakas* the Court denied standing to mere passengers in the car that police had searched because the passengers asserted no possessory or property interest in the car or items seized.[118] The door to the courtroom for fourth amendment litigants and the protections of a warrant, however, still were available to owners or possessors of property.

In *Salvucci* the Court abolished the automatic standing rule of *Jones v. United States*[119] and held that "defendants charged with crimes of possession may only claim the benefits of the exclusionary

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112. *Jones*, 362 U.S. at 257. Standing is the "key to the courtroom" because one must have standing to assert a claim. Absent standing, the person cannot even come before the Court. *Id.* at 259 (indicating that without standing, a petitioner may not raise a legal issue before a court).

113. 439 U.S. 128 (1978).

114. 448 U.S. 83 (1980).

115. 448 U.S. 98 (1980).

116. 389 U.S. 347 (1967).

117. *See, e.g.*, *Salvucci*, 448 U.S. at 85; *Rakas*, 439 U.S. at 148.

118. The Court concluded:

> [P]etitioners' claims must fail. They asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized. As we have previously indicated, the fact that they were "legitimately on [the] premises" in the sense that they were in the car with permission of its owner is not determinative of whether they had a legitimate expectation of privacy in the particular areas of the automobile searched.

Rakas, 439 U.S. at 148. Thus, the government introduced into evidence the items seized from the automobile on petitioners' armed robbery charge.

Perhaps the most egregious example of the inequitable result of *Rakas* is found in United States v. Payner, 447 U.S. 727 (1980). In *Payner* Internal Revenue Service investigators deliberately engaged in illegal activity and stole the briefcase of a Bahamian bank executive to photograph documents contained within. *Id.* at 730. The government then used the documents to convict depositors like Payner of tax fraud. Thus, the government manipulated the standing requirement by deliberately violating the rights of a third party to obtain evidence against its real targets, who were powerless to object. "Because this type of prosecution was precisely what the agents had in mind when they egregiously violated the bank official's Fourth Amendment rights, the case dramatically illustrates how the standing limitation can encourage unconstitutional police activity." P. JOHNSON, CRIMINAL PROCEDURE 281 (1988).

119. 362 U.S. 257 (1960).

rule if their own Fourth Amendment rights have in fact been violated."[120] Relying on his own language in *Rakas*, Justice Rehnquist wrote that "an illegal search only violates the rights of those who have 'a legitimate expectation of privacy in the invaded place.' "[121] The Court remanded the case to determine whether the defendant had a legitimate expectation of privacy in stolen mail located in the home of the defendant's mother.

The same day that the Court eliminated automatic standing in *Salvucci*, the Court in *Rawlings v. Kentucky* narrowed the holding in *Rakas* and virtually eliminated possession as a basis for standing. In *Rawlings* police officers armed with an arrest warrant for Marquess went to his house and found four other persons there with him. Pursuant to a search warrant to search Marquess's house, which was issued forty-five minutes after the police arrived, the police ordered Ms. Cox, one of the four house guests, to empty her purse. Over 1800 tablets of LSD and other controlled substances tumbled from the purse. David Rawlings immediately claimed possession of the drugs in Cox's purse,[122] which under *Rakas* would have given him standing to challenge the search.

The Supreme Court held, however, that Rawlings had no standing because he had no legitimate expectation of privacy in Ms. Cox's purse. Justice Rehnquist stated that Rawlings's ownership of the drugs was to be considered, but Rehnquist emphasized that *Rakas* rejected the principle that fourth amendment protections could be asserted based on " 'arcane' concepts of property law."[123]

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120. *See Salvucci*, 448 U.S. at 85. In *Jones* the Court recognized the need for automatic standing. *See supra* notes 111-12 and accompanying text. In *Salvucci* the Court rationalized abolishing the automatic standing rule because 12 years earlier, in Simmons v. United States, 390 U.S. 377 (1968), the Court held that a defendant's testimony at a suppression hearing could not be used as substantive evidence of guilt at trial. *See Salvucci*, 448 U.S. at 89-90. Thus, because a defendant's testimony regarding standing could not be admitted as a confession, the self-incrimination dilemma no longer existed. *Id.* at 90.

Justice Marshall, in his dissent, however, argues that *Simmons* does not fully cure the self-incrimination dilemma for two reasons. First, testimony at a suppression hearing still may be used to impeach a defendant's testimony at trial. Justice Marshall avers that the impeachment process would subject a defendant to the same dilemma of self-incrimination unless he were to forfeit his constitutional right to testify on his own behalf. This, he feared, would deter raising fourth amendment claims. *Id.* at 96 (Marshall, J., dissenting). Second, forcing a defendant to argne for standing at a suppression hearing could allow the prosecution to elicit testimony beyond that given on direct examination. Justice Marshall argued that even if this additional testimony could not be used at trial, it still may be useful to the prosecution in formulating strategy or developing its case. *Id.* (Marshall, J., dissenting). Because of these advantages, Justice Marshall concluded that the problem of self-incrimination persists despite *Simmons*. *See id.* at 97 (Marshall, J., dissenting).

121. *Salvucci*, 448 U.S. at 91-92 (quoting *Rakas*, 439 U.S. at 140).

122. 448 U.S. at 101.

123. *Id.* at 105 (citing *Rakas*, 439 U.S. at 149-50).

By manipulating the "legitimately on the premises" language from *Jones*, Justice Rehnquist quietly and smoothly redefined search. Justice Rehnquist shifted the inquiry from a violation of a reasonable expectation of privacy to a violation of a legitimate expectation of privacy,[124] thus revising the *Katz* search test. He then carried over the legitimate expectation of privacy test to the context of standing.

In *Place* and *Jacobsen* the Court adopted the standing language to redefine search, concluding that an intrusion which "merely discloses whether or not a particular substance is [illegitimate] does not compromise any legitimate interest in privacy."[125] The existence of the legitimate expectation language in the standing cases supported this change even though it was quite radical. The result is that a defendant charged with possession of narcotics never should be able to establish a fourth amendment violation—either that the defendant's justified expectation of privacy was violated, or that a search took place.

3. Habeas Corpus and the Fourth Amendment

In *Stone v. Powell*[126] the Court carved out a major exception to the fourth amendment exclusionary rule, while simultaneously minimizing the importance of the warrant requirement and the fourth amendment generally. *Powell* is significant to this Article's thesis because it highlights the Court's preference for denying rights to the guilty, a critical element in the breakdown of the warrant requirement.

Pursuant to federal statute, prisoners who have exhausted state remedies can petition for federal court review of their case if they meet the requirements for federal habeas corpus.[127] Prior to 1953 defendants were most likely to have their cases heard in federal court if they could support a claim that the trial court lacked jurisdiction or had committed an error so fundamental that the trial court lost its jurisdiction.[128] In *Brown v. Allen*[129] the Supreme Court expanded the scope of federal habeas to include any claim of federal constitutional error arising in

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124. This shift in language comes back to haunt defendants in cases like *Jacobsen* and *Place*. For an insightful analysis of how Justice Rehnquist adeptly employs language to mold the law, see Rahdert, *William Rehnquist's Judicial Craft: A Case Study*, 60 TEMP. L.Q. 841, 856-59 (1987).

125. *Jacobsen*, 466 U.S. at 123; *see also supra* notes 93-97 and accompanying text.

126. 428 U.S. 465 (1976).

127. Since the Judiciary Act of 1789, the federal courts have had the authority to issue the writ of Habeas Corpus—known as the "Great Writ." The federal courts' authority to issue the writ arises from 28 U.S.C. § 2254 (1988), which allows the court to issue the writ when a person is "in custody in violation of the Constitution or laws or treaties of the United States." *Id.* § 2254(a).

128. Johnson v. Zerbst, 304 U.S. 458, 468 (1938). *See generally* Friedman, *A Tale of Two Habeas*, 73 MINN. L. REV. 247 (1988).

129. 344 U.S. 443 (1952).

state criminal proceedings.[130] Twenty-three years later in *Powell*, the Court eliminated fourth amendment violations from constitutional errors worthy of habeas review. The Court stated plainly: "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial."[131]

Although laden with ambiguities,[132] *Powell* creates a hierarchy of constitutional rights for criminal procedure that ensures a place at the bottom for fourth amendment violations.[133] In *Powell* the Court stated

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130. Prior to *Brown*, the primary basis for a federal habeas claim was the question of jurisdictional error. *Id.* at 500. In *Brown* the Court took the extraordinary step of expanding the writ of habeas corpus to include all cases containing a question of constitutional error. The rationale for this bold step was not articulated in the opinion and unfortunately remains unclear to this day. Nevertheless, for purposes of this Article, I proceed from the generally accepted proposition that *Brown* created an expansion of the writ to include claims of constitutional error adjudicated by state courts. *See, e.g., Powell*, 428 U.S. at 476 (tracing the development of federal habeas jurisdiction and noting the expansion in *Brown*); Fay v. Noia, 372 U.S. 391 (1963) (holding that a state prisoner may apply for a writ of habeas corpus in federal district court if a constitutional violation is alleged and all state remedies have been exhausted, but that the petitioner may not be granted federal habeas review if any state remedies were waived). *See generally* Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 462 (1963); Reitz, *Federal Habeas Corpus: Postconviction Remedy for State Prisoners*, 108 U. PA. L. REV. 461, 463 (1960). For a comprehensive discussion of the historical development of the writ and an insightful analysis of the *Brown* rationale, see Friedman, *supra* note 128.

131. *Powell*, 428 U.S. at 494.

132. The opinion is confusing, for although on its face it is a habeas corpus case addressing the scope of federal jurisdiction, much of its language is devoted to devaluing the fourth amendment as constitutional doctrine. While *Powell* affirms the *Mapp* rule that the fourth and fourteenth amendments require exclusion from trial of evidence seized in violation of their commandments and reversal upon direct appeal, it excludes the exclusionary rule on collateral appeal. *Powell* construes the difference between direct appeal and habeas in pragmatic rather than constitutional terms, finding no utility in applying the exclusionary rule on collateral review. Justice Lewis Powell's opinion further clouds the issues by avoiding "direct confrontation with the incontrovertible facts that the habeas statutes have . . . always been construed to grant jurisdiction to entertain Fourth Amendment claims of both state and federal prisoners." *Id.* at 507 (Brennan, J., dissenting). Justice Powell mentions in passing a "guilt-related" basis for habeas jurisdiction: he argues that "[r]esort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government." *Id.* at 491 n.31. Justice Powell assures us, however, that the opinion is not an endorsement of habeas jurisdiction only for constitutional claims bearing on innocence. Justice Powell concluded: "Our decision today is *not* concerned with the scope of the habeas corpus statutes as authority for litigating constitutional claims generally." *Id.* at 494-95 n.37 (emphasis in original). Accordingly, the case has become one of the leading opinions attacking the fourth amendment rights of criminal defendants and the exclusionary rule. *But see* Friedman, *supra* note 128, at 284. Professor Barry Friedman argues that *Powell* cannot be read simply as a fourth amendment case because it fails to distinguish consideration of fourth amendment claims on direct review as compared with habeas. *Id.* Specifically, footnote 31 discusses a "guilt-related" rationale for habeas, and later cases downplay the differences between fourth amendment rationales and innocence-based claims. *Id.*

133. Justice Brennan, however, read *Powell* as much broader than just an attack on the

that fourth amendment violations are different from fifth or sixth amendment violations because "claims of illegal search and seizure do not 'impugn the integrity of the fact-finding process or challenge evidence as inherently unreliable.' "[134] The Court characterized the exclusionary rule as merely a tool used to discourage law enforcement officers from violating the fourth amendment.[135] Thus, although the majority did not address directly a guilt-based theory for habeas, it did suggest that at least in federal court, the fourth amendment is a protection for the innocent, not the guilty.

In a single opinion, *Stone v. Powell* limited the fourth amendment to a degree that had taken the Court years to achieve in both standing and definitional cases. Together the preceding three developments dilute the warrant requirement and allow the Court to avoid the invocation of the exclusionary rule. The Court, however, has not been content to stop here.

4. Exceptions to the Warrant Requirement

In *Katz v. United States*[136] the Court held that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated

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fourth amendment exclusionary rule. He charged that the Court generally was limiting all federal habeas jurisdiction and challenged its authority to do so. Justice Brennan argued:

> To be sure, my Brethren are hostile to the continued vitality of the exclusionary rule as part and parcel of the Fourth Amendment's prohibition of unreasonable searches and seizures, as today's decision in *United States v. Janis*, [428 U.S. 433 (1976)], confirms. But these cases, despite the veil of Fourth Amendment terminology employed by the Court, plainly do not involve any question of the right of a defendant to bave evidence excluded from use against him in his criminal trial when that evidence was seized in contravention of rights ostensibly secured by the Fourth and Fourteenth Amendments. Rather, they involve the question of availability of a *federal forum* for vindicating those federally guaranteed rights. Today's holding portends substantial evisceration of federal habeas corpus jurisdiction. . . .

Id. at 502-03 (footnote omitted) (emphasis in original); *see also* Seidman, *supra* note 59, at 453. Professor Michael Seidman argues that Justice Brennan mischaracterized the majority approach by accusing it of "reducing constitutional requirements to 'mere utilitarian tools,' desigued solely to separate guilty from innocent defendants." *Id.* (footnote omitted). Professor Seidman actually finds that *Powell* "turns out to be quite a narrow decision" and whatever it accomplished, "the [*Powell*] Court . . . certainly did not disown the exclusionary rule." *Id.* at 452, 453.

134. *Powell*, 428 U.S. at 479 (quoting Kaufman v. United States, 394 U.S. 217 (1969)).

135. *See id.* Justice Powell could have reached a similar result in *Powell* by entertaining the guilt-related theory of habeas jurisdiction—that incarcerated persons raising fourth amendment claims have no right to federal habeas because their claims are irrelevant to their innocence. Many scholars actually suspect that this theory is what Chief Justice Burger had in mind when he assigned the opinion to Justice Powell. Justice Powell instead chose to denomnce the costs attendant to the exclusionary rule and found no basis for habeas jurisdiction because no utilitarian purposes are served by applying the exclusionary rule in a habeas proceeding.

136. 389 U.S. 347 (1967).

exceptions."[137] Perhaps no more frequently quoted statement is less true. The narrow exceptions doctrine, premised on the need to abandon time-consuming warrant procedures in situations requiring speedy action,[138] has given way to an extensive list of exceptions. These exceptions invariably have more to do with preserving incriminating evidence than acting quickly in emergency situations.[139]

The initial justification for permitting a warrantless search was tailored narrowly to meet the need for quick action in circumstances in which it was impracticable to obtain a warrant.[140] Thus, in *Carroll v. United States*[141] the Court affirmed a warrantless search of an automobile, which the officers had probable cause to believe contained contraband, because the automobile could leave the jurisdiction before the officers had time to obtain a search warrant. This became known as the "automobile exception."[142]

Over the next fifty years, a host of additional exceptions were added to the the automobile exception. By 1978, situations in which the Court permitted warrantless searches or searches based on a lesser standard than probable cause included: searches incident to a lawful

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137. *Id.* at 357 (footnotes omitted).

138. *See, e.g.*, Schmerber v. California, 384 U.S. 757 (1966) (holding that the taking of a blood sample from an accused without a warrant was an appropriate procedure incident to a valid arrest for driving under the influence of alcohol); Carroll v. United States, 267 U.S. 132 (1925) (recognizing the need for warrantless searches of automobiles when it is impractical to secure a warrant, "because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought").

139. *See, e.g.*, Michigan Dep't of State Police v. Sitz, 110 S. Ct. 2481 (1990) (sobriety checkpoints requiring motorists to stop and answer brief questions by police); Horton v. California, 110 S. Ct. 2301 (1990) (finding that inadvertence is not a requirement to seizure of evidence under the plain view doctrine); Maryland v. Buie, 110 S. Ct. 1093 (1990) (extending the scope of a search incident to lawful arrest to allow a protective sweep throughout the entire premises); United States v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990) (holding that a search of a foreign national's home without a warrant is not prohibited by the fourth amendment); New York v. Burger, 482 U.S. 691 (1987) (junkyards); United States v. Dunn, 480 U.S. 294 (1987) ("open field" observations in a locked barn on private property surrounded by two fences).

140. *See, e.g., Carroll*, 267 U.S. at 153.

141. *Id.* at 132.

142. In *Carroll* the Court explained:

> [T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant. . . .

Id. at 153. *Carroll* actually was nothing more than an exigent circumstance: the officers had probable cause and they had to act quickly or risk losing the contraband. Had the Court simply discussed this as an exigent circumstance, rather than belabor the difference between vehicles and structures, perhaps many later exceptions could have been avoided.

arrest,[143] administrative searches,[144] stop-and-frisk searches,[145] consent searches,[146] plain view seizures,[147] delayed probable cause searches,[148] and border searches.[149] Nevertheless, in *Mincey v. Arizona*[150] Justice Stewart echoed the tenet of *Katz* that warrantless searches are per se unreasonable " 'subject only to a few specifically established and well-delineated exceptions.' "[151] Since 1978, each of these exceptions has expanded to encompass new situations, and the Court also has created additional exceptions.[152] For example, an immobile vehicle now falls within the automobile exception;[153] a search incident to arrest is not limited to the area within the immediate vicinity of the arrestee;[154] a "brief" *Terry*-stop can last for as long as one hour;[155] if police act reasonably, apparent consent is valid even if given by someone with no

143. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969); Schmerber v. California, 384 U.S. 757 (1966).

144. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967).

145. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968).

146. *See, e.g.*, United States v. Matlock, 415 U.S. 164 (1974) (holding that a third party may consent to a search of another's area if the parties have joint access or control over the area and it reasonably can be concluded that any of the cohabitants have the right to consent); Frazier v. Cupp, 394 U.S. 731 (1969) (holding that hy allowing a cousin to use and keep a bag, the defendant assumed the risk of the cousin consenting to a search of its contents and, therefore, the consent and warrantless search was valid).

147. *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971).

148. *See, e.g.*, Texas v. White, 423 U.S. 67 (1975).

149. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

150. 437 U.S. 385 (1978).

151. Citing *Katz*, Justice Stewart wrote: "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.' " *Id.* at 390 (quoting Katz v. United States, 389 U.S. 347, 357 (1967)); *see also* Thompson v. Louisiana, 469 U.S. 17 (1984) (reaffirming that warrantless searches are per se unreasonable).

152. In the 1975 Term alone, the Court decided five cases that reduced the protection of the warrant clause. *See* United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (holding that a fixed-border checkpoint search need not be authorized by a warrant); South Dakota v. Opperman, 428 U.S. 364 (1976) (permitting warrantless inventory search of car); United States v. Santana, 427 U.S. 38 (1976) (upholding the warrantless arrest of a person standing in the doorway of a house); United States v. Watson, 423 U.S. 411 (1976) (permitting warrantless arrest for a felony); Texas v. White, 423 U.S. 67 (1975) (holding that probable cause to search an automobile on the scene supports a warrantless search later at the station house).

153. *See, e.g.*, California v. Carney, 471 U.S. 386 (1985) (holding that the automobile exception includes a stationary mobile home because of the home's potential mobility and society's lesser expectation of privacy because of the pervasive regulation of mobile homes and automobiles); Chambers v. Maroney, 399 U.S. 42 (1970) (ruling that the automobile exception covers an immobile vehicle in a police impound lot).

154. *See, e.g.*, Maryland v. Buie, 110 S. Ct. 1093 (1990) (discussed *supra* note 38); *see also* New York v. Belton, 453 U.S. 454 (1981) (discussed *supra* note 38).

155. *See* United States v. Sharpe, 470 U.S. 675 (1985) (holding that a 20-minute detention alongside a highway of a car suspected of containing drugs is not unreasonable); United States v. Place, 462 U.S. 696 (1983) (holding that a 90-minute detention of luggage was an unreasonable seizure).

lawful authority to consent;[156] warrantless probable cause searches will be upheld days after the determination of probable cause;[157] administrative exceptions include almost any business subject to regulation;[158] a warrantless sixteen-hour detention of a suspected smuggler at a border is reasonable;[159] and finally, the good faith exception allows broad admissibility of the fruits of searches made in good faith reliance on defective warrants.[160]

Exceptions to the warrant requirement would not be so troubling if they fit into what Justice Stewart called the specifically established and well-delineated exceptions.[161] The body of exceptions, however, has consumed the warrant requirement, and justifications for the new exceptions often bear no relation to their original rationale. In *Carroll* the Court loosened a thread from the warrant clause. Each new exception has lengthened that thread. One more substantial tug could unravel completely the fabric of the fourth amendment.

5. The Reasonableness Test

Recently the Supreme Court has been paying great favor to the reasonableness language found in the first clause of the fourth amendment, which protects against "unreasonable searches and seizures."[162] The Court's reasonableness test may be just the tug that leaves the fourth amendment in tatters.

The reasonableness or balancing test looks very similar to an exception to the warrant requirement, accomplishes similar objectives, and arguably is based on the same rationale. For example, if the Court looks only to the reasonableness of a search or seizure, it can circumvent the probable cause and particularity criteria of the warrant requirement in much the same way as an exception. Because the first clause of the fourth amendment can be read separately from the second,[163] however, it is not labeled an exception. Advocates of a reasona-

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156. *See, e.g.*, Illinois v. Rodriguez, 110 S. Ct. 2793 (1990) (discussed *supra* note 3).

157. *See, e.g.*, United States v. Johns, 469 U.S. 478 (1985) (holding that the warrantless search of a vehicle three days after it was seized is not unreasonable if the officers had probable cause to search).

158. *See, e.g.*, New York v. Burger, 482 U.S. 691 (1987) (allowing a warrantless administrative search of a junkyard because junkyards are pervasively regulated).

159. *See* United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (holding that the warrantless detention of a suspected alimentary canal smuggler for over 16 hours is not unreasonable).

160. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984).

161. *Mincey*, 437 U.S. at 390.

162. U.S. CONST. amend. IV.

163. Indeed, recent opinions suggest that certain members of the Court would prefer to change the comma after the word "violated" to a semicolon, making the reasonableness clause independent of the probable clause requirement. In other words: "The right of the people to be

bleness analysis agree that under the fourth amendment a search can be reasonable regardless of whether it is conducted pursuant to a warrant.[164] A warrant is only one element of a reasonable search. Thus, probable cause and particularity are no longer essential prerequisites of a search. The most significant effect of the reasonableness test, however, has been to shift the focus of the fourth amendment from a protection of the people to a threshold for police.[165]

Interpreting the reasonableness clause as separate from the warrant requirement gained acceptance through a gradual evolution of search and seizure law. As part of the evisceration of the warrant requirement and concurrent reduction of fourth amendment protections, the Court shifted its focus away from procedural regularity in the preservation of individual rights toward a reasonableness approach that assesses the conduct of police under the totality of the circumstances of each case.[166] Ironically, this isolation of the warrant clause from the reasonableness clause evolved from decisions that enshrined warrants as the benchmark of a reasonable search or seizure.

a. The Terry-Camara *Legacy*

In two landmark cases in the late 1960s, the Court moved away from a strict probable cause standard as the prerequisite of a search or

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secure . . . against unreasonable searches and seizures, shall not be violated." Deconstruction of the clauses in this fashion legitimizes the simple reasonableness approach when police officers act without a warrant. *See, e.g.*, National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); O'Connor v. Ortega, 480 U.S. 709 (1987); New Jersey v. T.L.O., 469 U.S. 325 (1985). In each of these cases the Court completely skipped over any warrant and probable cause analysis with little or no discussion; all of the searches were executed without a warrant. Many of the lower courts worked painstakingly to decide whether the lack of a warrant or probable cause was, as a preliminary matter, fatal to the search. The Supreme Court, however, went right to reasonableness, which is consistent with the majority's reading of the first clause as separate and distinct from the warrant clause. *See infra* subpart II(B)(5)(b).

164. For example, in *Skinner* Justice Anthony Kennedy wrote:

> For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. What is reasonable, of course, "depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself." Thus, the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."
>
> In most criminal cases, we strike this balance in favor of the procedures described in the Warrant Clause of the Fourth Amendment. . . . We have recognized exceptions to this rule, however. . . .

Skinner, 489 U.S. at 619 (citations omitted).

165. *See supra* notes 21-27 and accompanying text.

166. While the Court previously had acknowledged a reasonableness approach to fourth amendment jurisprudence, Camara v. Municipal Court, 387 U.S. 523 (1967) and Terry v. Ohio, 392 U.S. 1 (1968), firmly established this principle. *See infra* subpart II(B)(5)(a).

seizure and indelibly altered the warrant requirement.[167] In *Terry v. Ohio*[168] the Court held that a person could be detained briefly upon less than probable cause, and an officer could "pat down" the suspect's outer clothing in the interest of police safety if the officer had a reasonable belief that the person was armed and presently dangerous.[169] *Terry* reflects the Court's sensitivity to the tension between the warrant requirement and the need for police officers to act quickly in the face of crime. The result is a compromise—a relaxation of the standards of probable cause in the name of reasonableness.[170] The *Terry* Court intended to create a narrowly circumscribed exception to the probable cause requirement that was tailored to law enforcement needs without unduly infringing upon individual liberty.[171] The opinion, however, has since become the foundation for the reasonableness analysis that dominates recent fourth amendment decisions. Thus, the Warren Court unintentionally laid the groundwork for separating probable cause from reasonableness.[172] Only Justice William Douglas expressed concern over

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167. *See Terry*, 392 U.S. at 1; *Camara*, 387 U.S. at 523.

168. 392 U.S. at 1.

169. *Id.* at 30-31. Prior to 1968, a seizure of a person was considered an arrest requiring probable cause. Searches of the person could be conducted pursuant to a lawful arrest that was based on probable cause. United States v. Rahinowitz, 339 U.S. 56 (1950).

170. Indeed the Court referred to its recent opinion in *Camara* to assess the contours of the reasonableness standard it was embracing:

> [T]o assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails."

Id. at 20-21 (quoting *Camara*, 387 U.S. at 534-35, 536-37).

171. The *Terry* stop was to be brief—only long enough to confirm or allay an officer's suspicion that criminal activity was "afoot." *See, e.g.*, Dunaway v. New York, 442 U.S. 200 (1979) (holding that the removal of a suspect to the station house exceeded the narrowly circumscribed brief detention permitted by *Terry* and amounted to an unlawful arrest without probable cause). Moreover, the *Terry* frisk was limited to a search only for weapons. *Cf.* Sibron v. New York, 392 U.S. 40 (1968) (holding that pursuant to a *Terry* stop, a search of a suspect's pocket was unlawful because the officer was looking for narcotics, not weapons).

172. The Warren Court gradually created a test that relied on traditional probable cause-warrant analysis to decide reasonableness. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969) (Stewart, J.) (deciding that outside of a search of the area within an arrestee's control, a search of the premises must be made pursuant to a warrant based on probable cause); Desist v. United States, 394 U.S. 244 (1969) (Stewart, J.) (holding that when authorized, electronic eavesdropping can be done only with probable cause); *Sibron*, 392 U.S. at 40 (Warren, C.J.) (ruling that a warrantless arrest must be based on probable cause in order to make a valid search incident to the arrest); *Camara*, 387 U.S. at 523 (White, J.) (holding that a warrantless search of private premises is unreasonable except in well-defined circumstances); Warden v. Hayden, 387 U.S. 294 (1967) (Brennan, J.) (holding that warrantless searches are unreasonable unless there are exigent circumstances); Cooper v. California, 386 U.S. 58 (1967) (Black, J.) (holding that warrantless searches are unreasonable, but an automobile may be searched with probable cause because of its inherent mobility); Schmerber v. California, 384 U.S. 757 (1966) (Brennan, J.) (holding that warrants gener-

the impact of the new ruling, finding it a mystery that a search could be reasonable in the absence of probable cause.[173]

In *Camara v. Municipal Court*[174] and its companion case, *See v. City of Seattle*,[175] the Court created a new warrant—one that was noncriminal and not based on probable cause. Prior to 1967, the Court did not consider noncriminal inspections of residences or businesses for code violations searches within the meaning of the fourth amendment. Because these intrusions were significant and presented a dangerous potential for abuse, however, the Court brought the activities within the jurisdiction of the fourth amendment and imposed a warrant requirement on administrative searches. The Court relaxed the standard for obtaining an administrative warrant, however, which allowed greater flexibility to conduct administrative searches. If the inspection is based on reasonable legislative or administrative standards, then probable cause exists for conducting an "area search." Thus, the Court eliminated the particularity requirement of the warrant clause.

Just as in *Terry*, the *Camara* Court adopted a compromise. The fourth amendment is clear that warrants shall not issue "but upon probable cause . . . *particularly* describing the place to be searched, and the persons or things to be seized."[176] Obviously convinced that the judgment of a neutral and detached magistrate should precede an administrative search, the Court chose to apply a warrant requirement; cognizant that the rule might be too burdensome, however, it eliminated the particularity demand.[177] The area warrant, therefore, began

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ally are needed to make a search reasonable, but exigencies or a search incident to a lawful arrest do not require a warrant); United States v. Ventresca, 380 U.S. 102 (1965) (Goldberg, J.) (holding that a warrant must be based on probable cause, not conclusions about probable cause); Aguilar v. Texas, 378 U.S. 108 (1964) (Goldberg, J.) (requiring that the evaluation of the constitutionality of a search begins with a warrant based on probable cause); Stoner v. California, 376 U.S. 483 (1964) (Stewart, J.) (finding that the search of a hotel room without a warrant is unreasonable even with clerk's consent); Preston v. United States, 376 U.S. 364 (1964) (Black, J.) (finding that a search without a warrant, remote in time or place from arrest, is unreasonable). In addition, several cases were decided on the premise that searching a home without a warrant or exigent circumstances is unreasonable. *See, e.g.*, Chapman v. United States, 365 U.S. 610 (1961) (Whittaker, J.); Abel v. United States, 362 U.S. 217 (1960) (Frankfurter, J.).

173. *Terry*, 392 U.S. at 38.

174. 387 U.S. 523 (1967).

175. 387 U.S. 541 (1967).

176. U.S. CONST. amend. IV (emphasis added).

177. While the Court recently has given its imprimatur to far more egregious intrusions without a warrant, in the late 1960s the Court apparently found the inspection of a home or business for noncriminal activity unreasonable in the absence of a warrant or exception. In United States v. Montoya de Hernandez, 473 U.S. 531 (1985), for example, the 27-hour detention of a woman suspected of smuggling drugs in her alimentary canal was found reasonable given the "longstanding concern for the protection of the integrity of the border." *Id.* at 538. Justice Brennan candidly observed:

> Something has gone fundamentally awry in our constitutional jurisprudence when a neu-

the Court's departure from the strict probable cause required to issue a warrant.[178] This new probable cause standard represented a broader concept of reasonableness based on weighing governmental and individual interests.[179]

The *Terry-Camara* reasonableness test balances the individual's interest in privacy with the government's interest in crime prevention and safety. The *Terry* stop is reasonable because when a police officer has an articulable suspicion that a particular individual has or is about to engage in criminal activity, the officer's need to investigate outweighs the intrusion on the individual. The area warrant in *Camara* is reasonable because such a search is noncriminal, it is practically impossible to adhere to a strict particularity standard, and the danger presented by a potential code violation outweighs the individual's privacy interest.

In *New Jersey v. T.L.O.*[180] the Court abandoned its *Terry-Camara* compromise attitude and eliminated completely the need for warrants and probable cause in certain circumstances. In addressing the authority of a public school official to conduct a warrantless search of a student's purse for evidence of a school rule violation, the Court signaled that perhaps it was beginning to tackle the substantive dimension of the fourth amendment. Justice White, writing for a five-member majority, reasoned that the fourth amendment requires all searches and seizures to be reasonable, but although " 'both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . *in certain limited circumstances neither is required.*' "[181] The Court struck a balance between the legitimate expectation of privacy of school children and the school's "equally legitimate" need to

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tral and detached magistrate's authorization is required before the authorities may inspect "the plumbing, heating, ventilation, gas, and electrical systems" in a person's home, investigate the back rooms of his workplace, or poke through the charred remains of his gutted garage, but *not* before they may hold him in indefinite involuntary isolation at the Nation's border to investigate whether he might be engaged in criminal wrongdoing.

Id. at 555-56 (Brennan, J., dissenting) (footnotes omitted) (emphasis in original).

178. Historical analysis of the fourth amendment may amount to nothing more than speculation. When we speak of the Framers' intent, we must acknowledge that they surely were not all of one mind. Nevertheless, it seems rather apparent that administrative searches were the violations with which the Framers were intimately familiar and primarily concerned at the time of the drafting. Intrusions by King George's roving patrols, authorized by writs of assistance to look for administrative violations of the tax and customs rules, were the very searches against which the colonists were reacting. It is, thus, most ironic that modern interpretation reduces fourth amendment protections in just the situation that we most clearly can trace back to its origin.

179. *See, e.g.*, Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383, 385 (1988) (discussing *Camara* and *Terry* as the precursors to a "broad reasonableness standard and an ill-defined balancing test").

180. 469 U.S. 325 (1985).

181. *Id.* at 340 (emphasis added) (quoting Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring)).

maintain a positive learning environment.[182] The Court's finding that the unique nature of the school setting required its exemption from warrants and probable cause illuminated a shift in philosophy. Reasonableness now dominates the Court's inquiry. *T.L.O.*'s promise to start a substantive discussion of the breadth and scope of the fourth amendment, however, remains unfulfilled. Rather, the legacy of *T.L.O.* is just as Justice William Brennan predicted when he denounced the reasonableness-balancing test as a step toward a "neutral utilitarian calculus"[183] that renders the warrant requirement meaningless and leads to "doctrinally destructive nihilism."[184] While a reasonableness standard acknowledges the need to address the substantive choices required by competing interests, it establishes a balancing scale of justice that too easily can be tipped by the heavy hand of government.[185]

b. *The Fourth Amendment As a Due Process Test*

Little more than twenty years after *Camara* and *Terry*, we witness not only the breakdown of both the warrant and probable cause requirements, but also the emergence of a sliding-scale reasonableness test. In the reasonableness cases that follow *T.L.O.*,[186] the Court ad-

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182. *Id.*

183. *Id.* at 369 (Brennan, J., dissenting).

184. *Id.* (Brennan, J., dissenting). For a more general discussion of the reasonableness trend and the controversy among lower courts, practitioners, and scholars, see Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583 (1989); Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173 (1988); and Wasserstrom, *The Court's Turn Toward a General Reasonableness Interpretation of the Fourth Amendment*, 27 AM. CRIM. L. REV. 119 (1989).

185. *See* Bradley, *supra* note 4, at 1472; Wasserstrom, *supra* note 184, at 126-30. Professor Craig Bradley has suggested that adopting a pure reasonableness standard would be a suitable means to ameliorate fourth amendment confusion. *See* Bradley, *supra* note 4, at 1472. Bradley calls his reasonableness test Model I. He advocates that "Model I, by presenting an unabashedly *unclear* rule that provides no guidelines, will never have to be modified to suit an unusual fact situation." *Id.* (emphasis in original).

Later on he states that Model I will "extract the Court from the tarbaby of fourth amendment law," *id.* at 1488, because the Court rarely will have to "involve itself in decisions that are unique to the facts of each case." *Id.* Bradley concludes that "exclusionary law can be restored to the common sense proposition that evidence obtained unreasonably must always be excluded and evidence obtained reasonably should always be admitted. Such a rule makes far better sense." *Id.*

It is completely baffling to me how an unclear rule can advance constitutional doctrine, eliminate confusion, reduce litigation, and still make sense. I reject the reasonableness analysis because it fails to recognize the essence of fourth amendment values. Reasonableness is appealing because it eliminates fourth amendment confusion simply by eliminating all the rules. A pure reasonableness test, however, focuses too much on after-the-fact evaluations of police conduct. In so doing, it sacrifices the personal guarantees of the fourth amendment.

186. *See, e.g.*, National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (finding reasonable the suspicionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs and the carrying of a firearm); Skinner v. Railway Labor

vances a fourth amendment "special needs" test. Unlike the *T.L.O.* balancing test, however, the special needs test fails even to address the competing interests at stake.[187] Instead of defining the parameters of the limited circumstances in which warrants and probable cause are unnecessary, the Court refers to special needs in a vague and conclusory manner. As Justice Antonin Scalia charged in his concurring opinion in *O'Connor v. Ortega*, the special needs test becomes a "standard so devoid of content that it produces rather than eliminates uncertainty."[188]

Traditional fourth amendment jurisprudence[189] requires a multistage procedural analysis to determine the following: (1) whether a search or seizure of a protected person or area occurred;[190] (2) whether the warrant that authorized the search or seizure was based on suffi-

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Executives' Ass'n, 489 U.S. 602 (1989) (holding that blood, breath, and urine tests of railroad employees to determine drug usage should be judged by a standard of reasonableness, not particularized suspicion); O'Connor v. Ortega, 480 U.S. 709 (1987) (holding that a public employer's intrusions into the privacy interests of government employees for investigations of work-related misconduct should be judged by a standard of reasonableness). For a discussion of *Skinner* and *Von Raab*, see *supra* note 36.

187. Arguably, while the *T.L.O.* Court discussed the competing interests at stake, it failed to address them as candidly as it should have. In further defining reasonableness, the Court adopted the two-prong test from Terry v. Ohio, 392 U.S. 1, 20 (1968): a search must be (1) justified at its inception and (2) reasonable in scope. *See T.L.O.*, 469 U.S. at 341.

The search in *T.L.O.*, however, fails both elements of the test. First, the search was not justified at its inception because smoking was a school violation, carrying cigarettes was not. Assistant Vice Principal Choplick's search of a student's bag could reveal only possession of cigarettes, which is not a reasonable basis to initiate this search. Second, if Choplick were searching for cigarettes or marijuana, opening and reading the letter most likely would not reveal the physical presence of marijuana. Thus, by searching a place in which the marijuana reasonably could not be found, the scope of the search was too broad.

188. 480 U.S. at 730 (Scalia, J., concurring). Justice Blackmun, the author of the special needs language first appearing in *T.L.O.*, filed a strong dissent in *O'Connor*. He charged the Court with failing to pay attention to the facts and fabricating a dispute. He stated: "The plurality, however, discovers what it feels is a factual dispute: the plurality is not certain whether the search was routine or investigatory." *Id.* at 733 (Blackmun, J., dissenting).

Because a special needs test always will be fact specific, he expresses serious concern with the plurality's willingness to apply the standard when the facts remain in dispute. Justice Blackmun correctly highlights the dangers of loosely applying a fact-specific standard:

> Because this analysis, when conducted properly, is always fact specific to an extent, it is inappropriate that the plurality's formulation of a standard does not arise from a sustained consideration of a particular factual situation. Moreover, given that *any* standard ultimately rests on judgments about factual situations, it is apparent that the plurality has assumed the existence of hypothetical facts from which its standard follows. These "assumed" facts are weighted in favor of the public employer, and, as a result, the standard that emerges makes reasonable almost any workplace search by a public employer.

Id. at 733-34 (Blackmun, J., dissenting) (emphasis in original) (footnotes omitted).

189. Traditional interpretation emphasizes the warrant clause as essential to the meaning of the fourth amendment. Justice Stewart is credited as being the advocate of this traditional approach to the fourth amendment. *See, e.g.*, Chimel v. California, 395 U.S. 152 (1969), in which he first advocated this strict approach.

190. *See* Katz v. United States, 389 U.S. 347 (1967) (explaining that a search is a violation of the defendant's reasonable expectation of privacy).

cient probable cause[191] and particularity;[192] (3) if no warrant preceded the search or seizure, whether the activity falls into one of the accepted exceptions to the warrant requirement;[193] and (4) if no warrant is obtained and the activity is not within one of the well-defined exceptions, whether the search or seizure, nonetheless, is legal because it was based on probable cause.[194] The reasonableness approach to fourth amendment jurisprudence asks, regardless of whether the police had a warrant: Was their conduct in this particular search reasonable?[195] Among the traditional elements of the reasonableness test are two fundamental inquiries: (1) Was the search justified at its inception—as in *Terry*, did the police officer have a particularized suspicion before approaching the person? and (2) Was the search justified in scope—again, as in *Terry*, was it limited to a protective nonevidentiary search?[196] The Court abandons the elements of both the traditional and the reasonableness approaches when it uses the special needs test.

The move toward a basically standardless standard—a special needs test—was first evident in *O'Connor v. Ortega*[197] when the plurality suggested almost casually that individualized suspicion may not be a prerequisite of a reasonableness analysis.[198] Although individual suspicion always was a major consideration in the balancing test, the plurality's ambivalence undermined its role in subsequent decisions.

The Court seized the opportunity to cultivate the *O'Connor* suggestion in the two employee drug testing cases the following Term. In *Skinner v. Railway Labor Executives' Association*,[199] and its companion case *National Treasury Employees Union v. Von Raab*,[200] the Court eliminated the individualized suspicion requirement when the government has a special need to perform drug testing.[201] In *Von Raab*

191. *See* Illinois v. Gates, 462 U.S. 213 (1983) (holding that probable cause is determined by evaluating the totality of the circumstances).

192. *See* Wheeler v. United States, 226 U.S. 478 (1913).

193. Mincey v. Arizona, 437 U.S. 385 (1978).

194. United States v. Ross, 456 U.S. 798 (1982).

195. C. WHITEBREAD & C. SLOBOGIN, *supra* note 69, at 136.

196. *See, e.g.*, Sibron v. New York, 392 U.S. 40 (1968) (holding that a search of a suspect's pockets after a *Terry* stop was unreasonable because the officer had no reason to fear the suspect was armed).

197. 480 U.S. 709 (1987).

198. Justice O'Connor stated: "Because petitioners had an 'individualized suspicion' of misconduct by Dr. Ortega, we need not decide whether individualized suspicion is an essential element of the standard of reasonableness that we adopt today." *Id.* at 726; *see also* United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976).

199. 489 U.S. 602 (1989).

200. 489 U.S. 656 (1989).

201. Although *Skinner* received media attention, *Von Raab* presents the greater challenge to the fourth amendment. Because of the dangers associated with smuggling and interdiction of illegal narcotics, the Court reasoned that warrants, probable cause, and individualized suspicion were

the government convinced five members of the Court that a special need existed to test. Justice Scalia noted in a pointed dissent, however, that the drug testing policy could not solve any present problems in the Customs Service because the government failed to provide any evidence that any of the alleged problems actually existed. In Justice Scalia's own words, the government failed to recite "even a single instance in which any of the speculated horribles actually occurred."[202]

The employment drug testing searches sharply highlight the deconstruction of fourth amendment principles that occurs when the Court abandons warrants and probable cause and adopts a broad reasonableness approach.[203] The result of this deconstruction is highly discretionary searches and seizures, which require a post hoc determination of reasonableness. As *Skinner* and *Von Raab* reveal, however, the special needs test ignores even fourth amendment reasonableness requirements. Such an approach dooms the fourth amendment.

The problem with a general reasonableness standard is that it really is no standard at all because the determination depends on who is gauging reasonableness. What is reasonable to one person, or one judge, may be unreasonable to another. The sliding scale of reasonableness leads to special needs tests, which are subject to abuse from conservative and liberal ideolognes. A liberal need only decide that a search is unreasonable. Conservatives, such as a majority of the presently constituted Court, can find all but the most egregious activity reasonable. Accordingly, absent a grievously outrageous intrusion,[204] the Court deems almost all searches reasonable. As Professor Uviller states, "the Court has loosened its commitment to rigorous enforcement of privacy rights,

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not necessary to test customs workers. The Court justified its opinion without any hard data that customs officers were succumbing to smugglers' temptations and with the misleading reference to the fact that several officers had been terminated for bribes and other integrity violations. Almost no instances of drug usage by persons in the targeted category actually occurred. Moreover, those officers removed from the force for bribes took them in cases unrelated to the facts at issue. *See id.* at 668-77.

202. Justice Scalia stated:

> The Court's opinion . . . will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees. . . .
>
> What is absent in the Government's justifications—notably absent, revealingly absent, and as far as I am concerned, dispositively absent—is the recitation of *even a single instance* in which any of the speculated horribles actually occurred: an instance, that is, in which the cause of bribetaking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use.

Id. at 681, 683 (Scalia, J., dissenting) (emphasis in original).

203. For a thorough discussion of the erosion of the warrant requirement and a criticism of the reasonableness approach as applied to government drug testing of employees, see Note, *Government Drug Testing: A Question of Reasonableness*, 43 VAND. L. REV. 1343 (1990).

204. The Court requires action so gross that it shocks the conscience of the Court. *See* Rochin v. California, 342 U.S. 165, 169 (1952).

abandoning the field to the 'conservative' due processors, who are adept at finding a reasonable reason for most law enforcement activity."[205]

Of the various attacks on the warrant requirement and fourth amendment protections, this recent due process approach epitomizes the continuing dismemberment of the fourth amendment. If only those acts that are contrary to the principles of ordered liberty and justice are deemed unreasonable,[206] the Court reduces the fourth amendment to a due process test. Because the Constitution already has a due process clause in the fourteenth amendment,[207] the fourth amendment, thus, becomes superfluous.

III. The Need for a New Standard

Drastic action is needed to revitalize the fourth amendment. Inconsistent and conflicting decisions on warrants and the procedures attendant to their use have eroded the fourth amendment. Meanwhile, the reasonableness test has become so subject to the political and social passions of the moment that it threatens to obliterate completely the personal protections that the fourth amendment safeguards.

Over about the last twenty years, the warrant has evolved from being an absolute prerequisite of police intrusions upon persons and their possessions and to the use of the fruits of any search or arrest,[208] to a procedural requirement sometimes acknowledged and rarely enforced.[209] Current fourth amendment doctrine is so muddy, and the Court's message is so deprecatory of fourth amendment rights, that an officer need only act reasonably in bringing contraband and criminals into court. Courts invariably affirm the warrantless activity, receive the

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205. Uviller, *supra* note 73, at 30. Professor Uviller provides some telling statistics that connect the rise of the reasonableness approach with the retirement of Justice Stewart, the proponent of the prescriptive, warrant-based fourth amendment jurisprudence.

Professor Uviller argued: "Since Stewart's retirement, the Court has excluded the evidence of the warrantless search or seizure in only 23.7 percent of the cases it has reviewed." During the last seven years of Justice Stewart's term, the Court excluded the evidence more than twice as often: in 51.6% of the cases presented. *Id.* at 38. Furthermore, warrantless searches have been found "reasonable in 70 percent of the cases since 1982, whereas in the preceding seven years only 62.5 percent passed muster." *Id.*

206. Justice Frankfurter stated: "Due process of law, as a historic and generative principle, precludes defining, and thereby confining, these standards of conduct more precisely than to say that convictions cannot be brought about by methods that offend [our] 'sense of justice.'" *Rochin*, 342 U.S. at 173.

207. *See* U.S. Const. amend. XIV, § 1.

208. *See, e.g.*, United States v. Ventresca, 380 U.S. 102, 105-06 (1965) (establishing an absolute preference for warrants).

209. *See supra* text accompanying notes 189-207. Recent cases like *Skinner*, 489 U.S. at 602, *Von Raab*, 489 U.S. at 656, and Illinois v. Rodriguez, 110 S. Ct. 2793 (1990), reveal that the reasonableness analysis has become so government oriented that it shifts the focus of the fourth amendment away from an individual right to some vague, ruleless evaluation of iustitutional concerns.

evidence, and try the defendant.[210] The inquiry has moved from a before-the-fact assessment of objective facts, to an after-the-fact evaluation of evidence of crime. It is not surprising that courts are more prone to find that police had reasonable grounds for suspecting crime when the criminal and his instruments already are in the courtroom.

While exceptions to the warrant requirement originally were justified because warrant applications were a time-consuming procedure that prevented police from responding to the immediacy of crime, this justification no longer is valid. Technology enables a neutral and detached magistrate to review unfolding facts virtually instantaneously. For years law enforcement officers have been authorized to obtain warrants over the telephone.[211] Today more sophisticated technologies, such as mobile telecopiers, video transmitters, and radio links, permit immediate and easy communication with a judge or magistrate.[212] Paradoxically, however, as access to warrants has become easier, the Court has made them less necessary to obtain.[213]

In *United States v. Leon*[214] the Court surprisingly affirmed a strong preference for warrants. The issue presented was whether a search based on a warrant that is later found to be defective nonethe-

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210. Some lower courts apparently are concerned that the Supreme Court has gone too far. In response, these courts are resisting federal doctrine by finding greater individual protections in their state constitutions. *See, e.g.*, State v. Marsala, 216 Conn. 150, 579 A.2d 58 (1990) (Connecticut rejects the good faith exception to the exclusionary rule); Bryan v. State, 571 A.2d 170 (Del. 1990) (Delaware holds that a defendant cannot exercise a knowing waiver of right to counsel when the state prevents retained counsel from contact with defendant, which rejects a contrary finding of the Supreme Court in Moran v. Burbine, 475 U.S. 412 (1986)); State v. Novembrino, 105 N.J. 95, 519 A.2d 820 (1987) (New Jersey rejects the good faith exception to the exclusionary rule); Pennsylvania v. Edmunds, 586 A.2d 887 (Pa. 1991) (Pennsylvania rejects the good faith exception). *See generally* Brennan, *The Bill of Rights and the States: The Revival of State Constitutions As Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986).

211. *See* FED. R. CRIM. P. 41(c)(2). Recent revisions proposed by the Supreme Court to Rule 41 of the Federal Rules of Crininal Procedure would permit federal magistrates and state courts to issue a warrant for a search of property or for a person either within or outside the magistrate's district, provided that the property or person is within the district when the warrant is sought. The amendment is designed to make it easier for the government to obtain a warrant for persons or property moving from jurisdiction to jurisdiction. *See* 58 U.S.L.W. 1176 (May 15, 1990).

212. A procedure could be established easily by routing all calls to a 24-hour on-duty magistrate. Jurisdictions lacking the volume to justify a 24-hour magistrate could pool resources with other localities.

213. *See supra* subparts II(B)(4)-(5).

214. 468 U.S. 897 (1984). *Leon* created an exception which provided that whenever an officer executed a search pursuant to a warrant that later proved invalid, his good faith belief in the warrant would preserve otherwise excludable evidence. With this protection, astute officers should have incentive to nse warrants. *See generally* Uchida, Bynum, Rogan, Murasky, *Acting in Good Faith: The Effects of* United States v. Leon *on the Police and Courts*, 30 ARIZ. L. REV. 467, 485 (1988). Indeed, the good faith standard has proven so hard to challenge that after *Leon*, the numher of motions to suppress filed in warrant cases has diminished significantly and of those filed even fewer are granted. *Id.* at 492-93.

less may be valid because of the officer's good faith.[215] In sanctioning this good faith exception, the Court also endorsed the warrant requirement.

Because a search warrant "provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime,' " the Court has expressed a strong preference for warrants and has declared that "in a doubtful or marginal case a search under a warrant may be sustainable where without one it would fall."[216] While the good faith exception drastically deflects emphasis from the elements of probable cause, it nonetheless affirms a preference for warrants and the procedures attendant to obtaining them. Furthermore, the unstated, and perhaps unintended, corollary of *Leon* is that if searches with warrants are presumptively reasonable, then warrantless searches must be presumptively unreasonable.

Although cases like *Leon* and *Illinois v. Gates*[217] should have increased the use of warrants because they virtually assure issuance of a warrant and admissibility of the fruits of a search made pursuant to a warrant, police officers surprisingly neglect to follow the warrant procedure.[218] The police thus signal their ability to function efficiently without intervention by neutral magistrates and brazenly flout the warrant requirement. Search and seize now, because it is possible to justify and explain later. Why heed procedural details if a sympathetic audience will hear the case anyway?

The fourth amendment's warrant requirement is the only meaningful protection against unreasonable searches and seizures.[219] The warrant requirement cannot be dispensed with; it must be revitalized.

A. The Presumptively Unreasonable Standard

Neither the per se approach nor the reasonableness standard has proven to be the proper measure of the warrant requirement. The per se approach is too rigid; in defending the right of the people to be pro-

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215. The Court stated that " 'A warrant issued by a magistrate normally suffices to establish' that a law enforcement officer has 'acted in good faith in conducting the search.' " *Leon*, 468 U.S. at 922 (quoting United States v. Ross, 456 U.S. 798, 823 n.32 (1982)).

216. *Id.* at 913-14 (citations omitted).

217. 462 U.S. 213 (1983) (discussed *supra* notes 21-26 and accompanying text).

218. R. VAN DUIZEND, L. SUTTON & C. CARTER, THE SEARCH WARRANT PROCESS: PRECONCEPTIONS, PERCEPTIONS, PRACTICES 75-92 (1985) [hereinafter NCSC STUDY]. Among the reasons presented for police reluctance to apply for warrants is a perception by officers that because of the rigid warrant requirements, their request will be denied if they do not follow exact procedure. *Id.* at 75-85. As discussed below, if warrants are easier to obtain, this roadblock should disappear.

219. *See infra* subpart III(A).

tected from unreasonable searches and seizures, the per se rule compromises the right of the people to have criminals arrested, prosecuted, and convicted. Accordingly, the Court created such numerous exceptions to the per se rule that it eliminated any meaningful notion of a per se standard.[220] On the other hand, the reasonableness standard is hardly very meaningful either. It is virtually immune from review and does not prevent police intrusion. To the contrary, by inviting courts to find productive police conduct reasonable rather than requiring courts to suppress illegally obtained evidence of crime, the reasonableness standard creates an incentive for police to search first and seek approval later.[221] The failure of these two extremes highlights the need for an honest application of a workable standard.

Every warrantless search should be presumptively unreasonable. Law enforcement officers should be permitted to rebut this presumption only by the strongest showing of inability to obtain a warrant. As stated by Justice Robert Jackson, officers acting as their own magistrate must be able to justify a warrantless search by demonstrating "some real immediate and serious consequences" if they had applied for a warrant before acting.[222]

Unfortunately, the Court has used presumptively unreasonable language, on occasion, rather carelessly and almost interchangeably with the per se test. For example, in *Horton v. California*[223] the Court wrote: "[T]he 'plain view' doctrine is often considered an exception to the general rule that warrantless searches are presumptively unreasonable."[224] The Court cited *Mincey v. Arizona*[225] for this proposition, which states: "[S]earches conducted outside the judicial process . . . are *per se* unreasonable."[226] Such usage is imprecise and misleading, and suggests a

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220. As defined in BLACK'S LAW DICTIONARY (6th ed. 1990), per se means: "By itself; in itself; taken alone; by means of itself; through itself; inherently; in isolation; unconnected with other matters; simply as such; in its own nature without reference to its relation." *Id.* at 1142.

221. *Cf.* L. CARROLL, THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE (1930). Carroll wrote:

> "[T]here's the King's Messenger. He's in prison now, being pimished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all."
>
> "Suppose he never commits the crime?" said Alice.
>
> "That would be all the better, wouldn't it?" the Queen said . . . .

Id. at 95-96.

222. McDonald v. United States, 335 U.S. 451, 460 (1948) (Jackson, J., concurring). Justice Frankfurter, dissenting in United States v. Rabinowitz, 339 U.S. 56 (1950), noted that "a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity." *Id.* at 70 (Frankfurter, J., dissenting). The majority opinion in *Rabinowitz* was overruled in Chimel v. California, 395 U.S. 752, 768 (1969).

223. 110 S. Ct. 2301 (1990).

224. *Id.* at 2306.

225. 437 U.S. 385, 390 (1978) (quoting Katz v. United States, 389 U.S. 347, 357 (1967)).

226. *Horton*, 110 S. Ct. at 2306 n.4; *see also* Payton v. New York, 445 U.S. 573, 586 (1980)

standard that does not exist.[227]

The proposed presumptive unreasonableness standard is less rigid than the per se test because it allows the burden of proof to shift to the government. The Court must apply the standard more rigidly than the reasonableness test, however, to eliminate most of the present exceptions to the warrant requirement. When a warrantless search is challenged under the proposed standard, the government would have the opportunity to present evidence of emergency or other necessity that precluded an officer from obtaining a warrant. A judge then would determine if the evidence is sufficient to rebut the presumption of unreasonableness.[228] This determination would be made on a case-by-case basis. Although this is essentially what happens today, it is a perversion of the present finite per se rule.

Two critical assumptions underlie the proposed presumptively unreasonable test: (1) that the core of the fourth amendment is its requirement that "no warrants shall issue, but upon probable cause;"[229] and (2) that a reasonable search is one executed with a valid warrant except in very limited circumstances.

1. The Core of the Fourth Amendment

The fourth amendment protects against unreasonable searches and warrants because King George's soldiers relied on general warrants and writs of assistance[230] to ransack houses, papers, and effects in the name of the King.[231] These general warrants were a creature of English law,

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(holding that "searches and seizures inside a home without a warrant are presumptively unreasonable"). The Court in *Payton* cited Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971), for the proposition that "a search or seizure carried out on a suspect's premises without a warrant is *per se* unreasonable." *Payton*, 445 U.S. at 586 n.25.

227. Perhaps this unexplained change in language was intended subtly to shift the standard much in the same way the standing requirement shifted from a reasonable to a legitimate expectation of privacy in United States v. Salvucci, 448 U.S. 83 (1980). It did not change the test, however, and only furthered confusion.

228. *See* BLACK'S LAW DICTIONARY 1185 (6th ed. 1990) (defining a presumption as "a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted"); *see also* MCCORMICK ON EVIDENCE §§ 336-349 (E. Cleary 3d ed. 1984).

229. U.S. CONST. amend. IV.

230. The writ of assistance actually resembled a general warrant. *See* Fraenkel, *Concerning Searches and Seizures*, 34 HARV. L. REV. 361, 364 (1920).

231. To raise funds, colonial justices issued writs of assistance empowering customs officials to search (and forcibly enter, if necessary) homes to seize and secure contraband. In Paxton's Case, Quincey Mass. 7, 51 (1761), Oxenbridge Thatcher and James Otis were hired to challenge the legality of these general warrants. Despite Otis's argument that the writs were contrary to fundamental principles of law that recognized the sanctity of the home, the Massachusetts Supreme Court ruled that these warrants were legal. *Id.* at 57. *See generally* 2 LEGAL PAPERS OF JOHN ADAMS 106-47 (L. Wroth & H. Zobel eds. 1965) [hereinafter LEGAL PAPERS]. Otis's plea, however, did inspire John Adams to write that " '[t]hen and there the child Independence was born.' " LEGAL

which were brought to the colonies with the customs officers and soldiers sent to enforce tariffs and customs duties.[232] In *Entick v. Carrington*,[233] however, Lord Camden held a search warrant invalid because it failed to name the specific papers sought, and no oath of probable cause had been required.[234] Soon thereafter, William Blackstone wrote that "a *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty."[235] Nevertheless, general warrants were still available in the colonies. The American Revolution fomented in the shadow of these events.

After the Revolution, the states drafted individual declarations of rights.[236] Each declaration contained a prohibition on the use of general warrants.[237] James Madison referred to the individual state declarations when drafting the federal Bill of Rights.[238] Thus, history shows that the fourth amendment was a response to the abuses of general warrants and the violations of personal liberty that they engendered.[239]

When the fourth amendment originally was approved by the House Committee of the Whole, it contained but one clause.[240] The amendment stated:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated *by* warrants issuing without probable cause, supported by oath or affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.[241]

Historians claim that in an effort to strengthen the warrant language, Representative Egbert Benson of New York amended the draft by adding a comma and the words "shall not be *violated, and no warrants*

PAPERS, *supra*, at 107 (quoting Letter from John Adams to William Tudor (Mar. 29, 1817)).

232. *See* R. RUTLAND, THE BIRTH OF THE BILL OF RIGHTS 1776-1791, at 11 (1955).

233. 19 Howell's St. Tr. 1029 (1765).

234. *Id.* at 1063-73.

235. 4 W. BLACKSTONE, COMMENTARIES GN THE LAWS OF ENGLAND: A FACSIMILE OF THE FIRST EDITION OF 1765-1769, at 288 (1979) (emphasis in original) (footnote omitted).

236. *See* R. RUTLAND, *supra* note 232, at 41-77.

237. *See, e.g.*, Virginia Declaration of Rights, 1776, *reprinted in* 2 B. SCHWARTZ, THE ROOTS OF THE BILL OF RIGHTS 234 (1980). Article X of the Virginia Declaration provides:

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

Id. at 235. For reprintings of the declarations of all the original states, see the complete volumes of THE ROOTS OF THE BILL OF RIGHTS.

238. J. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT 41 (1966).

239. *See* Boyd v. United States, 116 U.S. 617, 624-30 (1886).

240. 1 ANNALS OF CONG. 452 (1789); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 100 n.77 (1937).

241. 1 ANNALS OF CONG. 783 (Gales and Seaton eds. 1834) (emphasis added).

shall issue but upon."[242] The significance of this change is questionable because the Framers ratified the fourth amendment without debate or discussion as part of the package of amendments that made up the Bill of Rights. Professor Silas Wasserstrom concludes that little reason exists to support the notion that the Framers intended the fourth amendment to be interpreted literally or that such an interpretation shows what the Framers thought about the relation between the two clauses of the amendment.[243] Warrantless searches, however, were almost unheard of at the time that the document was drafted.[244] Therefore, when the fourth amendment speaks of "unreasonable searches," it is only logical to view this in the context of the warrant clause.[245]

The fourth amendment, like the whole Constitution, was designed as a living document to grow with the government and the people that it purports to govern.[246] While the nature of government intrusions may differ today, the need for protection against them remains essential. Modern technology provides the opportunity to invade privacy in ways that the drafters of the Constitution probably never imagined.[247] Electronic surveillance,[248] parabolic microphones,[249] beepers,[250] com-

242. 5 B. SCHWARTZ, *supra* note 237, at 1112. Perhaps it is nothing more than a drafting oversight that the present amendment contains two clauses connected by a comma. Representative Benson of New York chaired a committee of three appointed to arrange the amendments for final passage. In a draft sent to the Senate, he submitted the fourth amendment as presently constructed, without noting the change. Apparently, no one else noticed the change either. This was the exact language voted down in Benson's earlier proposal to the House, which sought to strengthen the ban on general warrants. N. LASSON, *supra* note 240, at 101.

243. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389, 1391 (1989).

244. *Id.* at 1392, 1395.

245. When the fourth amendment was adopted, warrants were used to give law enforcement officials authority that they otherwise would not have possessed. In contrast, the present function of warrants is to limit the otherwise sweeping authority of today's law enforcement officers. *Id.* at 1395-96. At common law, warrantless searches and seizures in most circumstances could be resisted lawfully. The function of the warrant was to outlaw resistance and immunize from civil liability those acting under the authority of the warrant. *See* Chevigny, *The Right to Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1129-32 (1969).

246. The Framers worked in an atmosphere that encouraged transcendence. They knew the perpetual growth of freedom: it cannot be less meaningful today or tomorrow than it was at the birth of the nation. *See generally* I. BRANT, THE BILL OF RIGHTS (1965).

247. As Justice Louis Brandeis prophesied in his famous dissent in Olmstead v. United States, 277 U.S. 438 (1928):

> But "time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.

Id. at 473 (Brandeis, J., dissenting).

248. *See, e.g.*, United States v. White, 401 U.S. 745 (1971) (police used an informant carrying a microphone to record conversations about the sale of illegal drugs on eight occasions without procuring a warrant before "wiring" the informant).

249. *See, e.g.*, Clark v. Township Falls, 890 F.2d 611 (3d Cir. 1989).

puters,[251] telephone pen registers,[252] urinalysis,[253] and even DNA testing,[254] are only some of the techniques employed by the government. These more sophisticated means of searching for evidence require greater protection from the overreaching arm of the government than ever before. The warrant requirement of the fourth amendment can and should provide this protection.[255]

2. A Reasonable Search Is Only One Conducted Pursuant to a Valid Warrant, Except in Certain Limited Circumstances

When Justice Potter Stewart was on the Court, he asserted the position that reasonable searches require valid warrants with few exceptions, and he generally was able to get a majority of the Justices to support him.[256] In 1974 Professor Anthony Amsterdam noted that the Supreme Court consistently has followed the "one governing principle" of the fourth amendment that a search always requires a search warrant,[257] except in "a few specifically established and well-delineated exceptions."[258] Chief Justice Rehnquist, however, interprets reasonableness as separate from the warrant requirement, and his view predominates the present majority.[259] This view denies the essence of the fourth amendment protections.

When a warrant is sought, a magistrate must measure its issuance

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250. *See, e.g.*, United States v. Knotts, 460 U.S. 276 (1983).

251. *See generally* Miller, *Personal Privacy in the Computer Age: The Challenge of a New Technology in an Information-Oriented Society*, 67 MICH. L. REV. 1091, 1129-40 (1969).

252. *See, e.g.*, Smith v. Maryland, 442 U.S. 735 (1979) (holding that the use of a pen register on an individual's telephone is not a search within the meaning of the fourth amendment).

253. *See, e.g.*, National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

254. *See, e.g.*, New York v. Bailey, 156 A.D.2d 846; 549 N.Y.S.2d 846 (1989).

255. *See generally* Van Patten, *The Partisan Battle over the Constitution: Meese's Jurisprudence of Original Intention and Brennan's Theory of Contemporary Ratification* 70 MARQ. L. REV. 389, 402-04, 416-17 (1987); Note, *In Defense of the Framer's Intent: Civic Virtue, The Bill of Rights, and the Framers Science of Politics*, 75 VA. L. REV. 1311 (1989).

256. *See* Uviller, *supra* note 73, at 33-34; *cf. supra* note 205.

257. Amsterdam, *supra* note 60, at 374.

258. *Id.* (quoting Katz v. United States, 389 U.S. 347, 357 (1967)); *see also* Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

259. Today's Court espouses two viewpoints on how searches and seizures should be judged. The "conservative" members of the Court, led by Chief Justice Rehnquist, are more willing to find warrantless searches and seizures reasonable in favor of promoting governmental and societal interests. *See* Michigan Dep't of State Police v. Sitz, 110 S. Ct. 2481 (1990) (Rehnquist, C.J.). *Sitz* held fixed sobriety checkpoints constitutional. Although the Court concluded that the checkpoint was a fourth amendment seizure without a warrant, the Court permitted the stop because it effectively advanced the state's interest in preventing drunk driving. *Id.* at 2488.

The more liberal Justices, represented by Justice Marshall, maintain that all warrantless searches and seizures, absent exigent circumstances or consent, are unreasonable. *See id.* at 2488-90 (Brennan, J., joined by Marshall, J., dissenting); *id.* at 2490-99 (Stevens, J., joined by Brennan, J., and Marshall, J., dissenting).

against the standard of probable cause.[260] A warrantless search, however, is measured only against an enigmatic reasonableness standard after the intrusion occurs.[261] As Justice Brennan insists, the orderly procedure attendant to proper, narrow warrants, reviewed and issued by a neutral magistrate, is "[t]he cornerstone of this society, indeed of any free society."[262] Moreover, our constitutional heritage demands this procedural right.[263] Thus, a prior determination of probable cause and adherence to the requisite procedures protect principles of government and individual freedoms in a way that a post hoc reasonableness test simply cannot.

Consistent with the genius of checks and balances of our constitutional democracy, the warrant requirement places the judiciary between the executive branch and the people. The police are an arm of the executive branch. Before the executive can invade the protected privacy rights of the people, it must get authority from a judicial officer. It is this judicial intercession in executive actions that provides security against unconstitutional intrusions. The probable cause requirement and reasonableness clauses also protect against unconstitutional intrusions. These provisions, however, only provide the measure by which intrusions are judged. The warrant requirement alone grants a procedural right and places another branch of government between the executive and the people.

The additional step of procuring a warrant before searching or seizing a person, place, or thing is neither outdated nor unnecessary.

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260. Even a watered-down *Gates* probable cause standard requires evaluation of all the circumstances before the search, as opposed to after-the-fact totality of circumstances review. *See supra* notes 209-19 and accompanying text.

261. In Johnson v. United States, 333 U.S. 10 (1948), Justice Robert Jackson explained the warrant requirement in the context of a home search:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 13-14.

262. United States v. Martinez-Fuerte, 428 U.S. 543, 578 (1976) (Brennan, J., dissenting).

263. Justice Brennan wrote:

> The Constitution as originally adopted, was therefore, in great measure, a procedural document. For the same reasons the drafters of the Bill of Rights largely placed their faith in procedural limitations on government action. The Fourth Amendment's requirement that searches and seizures be reasonable enforces this fundamental understanding in erecting its buffer against the arbitrary treatment of citizens by government. But to permit . . . police discretion to supplant the objectivity of reason and, thereby, expediency to reign in the place of order, is to undermine Fourth Amendment safeguards and threaten erosion of the cornerstone of our system of government, for, as Mr. Justice Frankfurter reminded us, "[t]he history of American freedom is, in no small measure, the history of procedure."

Id. (Brennan, J., dissenting) (quoting Malinski v. New York, 324 U.S. 401, 414 (1945)).

Rather, it is a strong symbol of limited government, a valuable check on unbridled police discretion, and an important protector of the right of the people to individual privacy.

B. *The Presumptively Unreasonable Test Applied*

If a defendant files a motion to suppress evidence based on a warrantless search, the presumptively unreasonable test requires that the court grant the motion unless the government can rebut the presumption. Otherwise, the exclusionary rule demands that the court suppress the fruits of the warrantless search.

Presently, numerous exceptions to the exclusionary rule exist. These exceptions include: searches incident to a valid arrest,[264] consent,[265] the automobile exception,[266] the inventory exception,[267] the plain view exception,[268] the border search exception,[269] the administrative exception,[270] the regulated industries exception,[271] the stop-and-frisk exception,[272] the inevitable discovery exception,[273] the independent source exception,[274] the special needs exception,[275] the good faith exception,[276] and a catch-all serious crime exception.[277] The presumptively unreasonable standard eliminates most of these categorical exceptions. Only a true exigent circumstance could overcome the presumption of unreasonableness of a warrantless search.[278] Exigent circumstance is defined as a situation of real, immediate, and serious con-

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264. *See, e.g.*, United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969).

265. *See, e.g.*, Illinois v. Rodriguez, 110 S. Ct. 2793 (1990); Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

266. *See, e.g.*, Carroll v. United States, 267 U.S. 132 (1925).

267. *See, e.g.*, Florida v. Wells, 110 S. Ct. 1632 (1990); Illinois v. Lafayette, 462 U.S. 640 (1983).

268. *See, e.g.*, Horton v. California, 110 S. Ct. 2301 (1990); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

269. *See, e.g.*, United States v. Montoya de Hernandez, 473 U.S. 531 (1985).

270. *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523 (1967).

271. *See, e.g.*, New York v. Burger, 482 U.S. 691 (1987).

272. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968).

273. *See, e.g.*, Nix v. Williams 467 U.S. 431 (1984).

274. *See, e.g.*, United States v. Ceccolini, 435 U.S. 268 (1978).

275. *See, e.g.*, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

276. *See, e.g.*, United States v. Leon, 468 U.S. 897 (1984).

277. *See* Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 19 (1987) (discussing how the Supreme Court may tend to create more exceptions to the exclusionary rule to allow evidence in cases dealing with "serious crimes," such as drug offenses, into the courts).

278. *See* Welsh v. Wisconsin, 466 U.S. 740 (1984) (defining exigent circumstances); McDonald v. United States, 335 U.S. 451, 460 (1948) (stating that "[w]hen an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant").

sequence that is not created by law enforcement.[279]

For example, an officer hotly pursuing a fleeing felon could enter a residence to arrest the suspect.[280] While inside the residence, the officer also could conduct a cursory search of areas within the immediate control of the suspect to secure the area and the officer's safety.[281] As in *Michigan v. Tyler*,[282] an officer likewise could enter a burning building without a warrant and conduct a cursory search for persons or evidence of crime.[283] A search of the premises incident to arrest, however, such as the protective sweep authorized in *Maryland v. Buie*,[284] would not rebut the presumption because the police created the exigency. In *Buie* the defendant was in custody outside his house when an officer decided to enter the basement.[285] Although the police stated that they thought that an accomplice could be on the premises, no evidence supported this hunch.[286] The police had more than adequate time to return to the squad car and call in for a warrant to search the premises more thoroughly for either an accomplice or evidence while still keeping watch over the premises.

The presumptively unreasonable test is premised on an honest application of a simple standard—true exigency. To preserve its meaning it is necessary to abolish the presently accepted exceptions that bear little relation either to exigent circumstances or impracticability, which in most cases was their original justification. While new situations will arise to challenge the test, some current exceptions can be discussed with certainty. Consent, the automobile exception, inventory, special needs, inevitable discovery, independent source, and good faith exceptions all can be eliminated. Some remaining exceptions, such as the stop-and-frisk, administrative, [287] and plain view exceptions, need not be eliminated. They should be narrowed significantly, however, to allow warrantless searches only in situations with the most minimal potential

279. *See Welsh*, 466 U.S. at 749-50; *McDonald*, 335 U.S. at 451-60 (Jackson, J., concurring).

280. *See, e.g.*, Warden v. Hayden, 387 U.S. 294 (1967). The government, however, would bear the burden of persuading the Court why it was necessary to search inside containers pursuant to this exigency. Thus, the washing machine and toilet tank searches that were upheld in *Warden* automatically would not be permitted. *See id.*

281. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969). Unlike Maryland v. Buie, 110 S. Ct. 1093 (1990), however, the officer could not conduct a protective sweep unless he observed more than one person fleeing into the residence.

282. 436 U.S. 499 (1978).

283. If the officer had information that the building was going to be set afire, however, the officer could not wait until it was burning or charred to conduct a warrantless search.

284. 110 S. Ct. 1093 (1990).

285. *Id.* at 1100 (Stevens, J. concurring).

286. *Id.* This suspicion actually turned out to be incorrect.

287. These are hybrids of the original exceptions.

for abuse and unnecessary intrusion.[288]

For example, except for routine customs searches at international borders,[289] the Court should eliminate the consent exception totally. Presently, a finding of voluntary consent is sufficient to legalize almost any kind of search.[290] Accordingly, police find consent an attractive alternative to the warrant procedures. Consent, however, must fail an honest application test because it offers too much room for subtle or overt coercion for it to overcome the presumption of unreasonableness. The routine traffic stop provides a useful example. Assume that pursuant to a traffic stop, an officer asks for a license and registration. If the officer suspects anything, a common practice is to ask for consent to search the vehicle.[291] A driver who has just been pulled over, however,

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288. For example, the administrative warrant based upon less than probable cause issued to search for code violations falls within the rules proposed here. The noncriminal nature of the search and the inability to state particularly the locus of the search justify proceeding with an administrative warrant. The expansion of the *Camara* principle, however, must be curbed. There is no justification for the warrantless search of dangerous or highly regulated premises. Even in a dangerous industry such as mining, sufficient time exists to get a warrant unless police arrive immediately following an explosion or fire. The degree of industry regulation is insufficient to rebut a presumption of unreasonableness. New York v. Burger, 482 U.S. 691 (1987), showed how lax that classification became when the Court determined that a junkyard in New York was a "closely regulated" industry. *Id.* at 703-05 & n.14. There is no exigency or voluntary consent to warrantless searches in most regulated industries, and thus, they cannot be exempted from the warrant requirement.

The plain view exception also falls within the rule, but may need some tailoring. If police are legitimately on the premises, there is no need to eliminate the plain view exception. This type of seizure is in accord with the presumptively unreasonable warrant standard because the initial intrusion is valid only if preceded by a warrant, voluntary consent, or a true exigent circumstance. If, however, the initial intrusion is a ruse to obtain evidence, fruits, or contraband, the seizure must fail. Although the Supreme Court recently found that inadvertence is not a prerequisite for a valid plain view search, *see* Horton v. California, 110 S. Ct. 2301 (1990), that finding is inapposite to the standard proposed by this Article. If law enforcement has reason to believe that a residence, office, or vehicle contains something subject to seizure, they must obtain a warrant before entering the premises.

289. When a person crosses the United States border through a routine customs station, she is put on notice that her person and possessions are subject to being searched. Thus, she implicitly consents to the intrusion. United States v. Ramsey, 431 U.S. 606 (1977). This consent is subject to none of the overt or subtle coercion inherent in other situations. Furthermore, questions about actual or apparent authority to consent do not arise in these circumstances. United States v. Martinez-Fuerte, 428 U.S. 543 (1976). The justifications for the border exception remain valid under the presumptively unreasonable test. Roving patrols, however, do not possess the same elements of voluntary consent and, therefore, only can be valid subject to a warrant.

290. *See infra* notes 291-93 and accompanying text.

291. This scenario is taken from a series of actual stops that took place on a small portion of Interstate 95 in Delaware. *See infra* note 293. One particularly vigilant patrol officer, Officer Durnan, stepped cars traveling north on I-95 according to a pattern. Although he would testify that he "knew nothing of a drug courier profile," the cars that he pulled over for "traffic violations" invariably had out of state license plates and were driven by Hispanics. He routinely testified that the drivers "appeared nervous," arousing his suspicion that they may be carrying contraband. Durnan would ask the drivers to exit the car and sit in the patrol car. The facts at this point are in dispute. Durnan has testified that he asked for consent to search the vehicle. The

often is nervous and upset, and depending on the locus of the stop, is totally at the mercy of the officer.[292] Moreover, regardless of whether the driver actually consented, an officer conducting a warrantless search pursuant to a traffic stop may justify his actions by claiming that the driver consented.[293] Thus, the officer's word often is pitted against the defendant's, leaving courts and litigants with an uneasy feeling about the actual facts.

A consent exception simply is not needed. If circumstances truly are exigent, officers may conduct a warrantless search. Otherwise, if police feel a pressing need to search a person, home, vehicle, or container, they can obtain a warrant rapidly by using one of the expedited warrant procedures such as the radio or telefax warrant.

Similarly, the automobile exception, as we know it, must be eliminated.[294] Only when a vehicle search fits within the definition of exigent circumstance will it meet the presumptively unreasonable test. At the time the Court decided *Carroll v. United States*,[295] the need for officers to proceed expeditiously because of the car's inherent mobility was a valid justification for a warrantless search.[296] Labeling *Carroll* an "automobile exception," however, was an unfortunate misnomer that fostered some of the ridiculous results seen in modern cases such as *Chambers v. Maroney*[297] and *California v. Carney*.[298] Quite simply, *Carroll* was an

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defendants, on the other hand, have testified that Durnan told them that he was giving them a ticket and requested that they sign the bottom. They testified further that they were unaware they were signing a consent form. Signed consent forms invariably were introduced into evidence at the suppression motions.

All these cases pitted defendants' word against that of Officer Durnan's. The warrantless searches consistently were approved based on consent. *See infra* note 293.

292. Although Schneckloth v. Bustamonte, 412 U.S. 218 (1973), holds that a person need not know of her right to refuse consent for that consent to be valid, certainly a person must feel that she has the option to refuse.

293. *See, e.g.*, United States v. Velasquez, 885 F.2d 1076 (3d Cir. 1989) (finding that a police officer received permission to search after testifying that pursuant to a traffic stop, he asked the driver to sit in the patrol car and asked if there was any contraband in the car), *cert. denied*, 110 S. Ct. 1321 (1990); United States v. Morales, 861 F.2d 396 (3d Cir. 1988) (finding that pursuant to a traffic stop, a police officer asked the driver to sit in his patrol car where he asked the driver if there were guns, fireworks, or untaxed cigarettes in the car, and the driver's negative reply authorized full search of car); United States v. Ospina, 679 F. Supp. 402 (D. Del. 1988) (finding that pursuant to a traffic stop, an officer seated the driver in his patrol car and inquired if the driver had any weapons, untaxed cigarettes, or fireworks in the car, and the officer stated to the court that he deliberately omitted drugs from his question because it would have been harder to get consent).

294. Currently there are two justifications for the automobile exception: (1) the fleeting nature of the vehicle, and (2) a lesser expectation of privacy in a vehicle that is subject to regulation and exposed to the public. *See* United States v. Ross, 456 U.S. 798, 806, 811 (1982).

295. 267 U.S. 132 (1925).

296. *See supra* notes 140-42 and accompanying text.

297. 399 U.S. 42 (1970) (holding that an impounded vehicle could be searched without a warrant because it could have been searched earlier out on the road).

exigent circumstances case.

Today, the radio or telefax warrant procedure allows officers to act without delay during a vehicle stop when they have probable cause to suspect that a vehicle contains contraband. Police can obtain a warrant almost immediately by a simple radio call to a magistrate designated to review probable cause for radio warrant applications. Vehicles even could be equipped with telefax machines, permitting written documentation of the warrant application and an actual warrant for police to present to a subject prior to conducting a search. Once the exigency is eliminated from the situation, no justification exists for proceeding without a warrant. If the exigency cannot be eliminated, then the officer may proceed without a warrant, and the government should be able to rebut the presumption of unreasonableness.

The Court also should eliminate the inventory exception. Inventory searches present no exigency. Moreover, it is easy to obtain a warrant based on the same justifications of protection of property and insurance for police against civil liability that prompted the development of this exception. A special warrant similar to the administrative warrant approved in *Camara v. Municipal Court*[299] should be issued. While adherence to written procedures governing inventories somewhat limits the inventory exception, some jurisdictions today still have no formal procedures.[300] Thus, it is preferable to adhere to the new rule and proceed formally. This approach will protect police departments and eliminate future cases such as *Florida v. Wells* in which the Court suppressed evidence because a police department did not have a standardized policy.[301]

Additionally, the Court must eliminate the special needs exception discussed in the employment search cases.[302] Although the employment context may present special needs that are more demanding than those of normal law enforcement,[303] the mandate of the warrant clause still applies if a public employer is conducting a search of an individual's possessions or person. The employment context, perhaps even more so than many other circumstances, presents few of the exigencies that preclude a warrant application. An ongoing investigation or some suspi-

298. 471 U.S. 386 (1985) (holding that police validly searched a parked mobile home without a warrant because automobiles are mobile and there is a lesser expectation of privacy in them).

299. 387 U.S. 523 (1967); *see supra* notes 174-79 and accompanying text.

300. *See, e.g.*, Florida v. Wells, 110 S. Ct. 1632 (1990).

301. *Id.* (holding that the opening of a closed container found in a vehicle inventory search violates the fourth amendment if the police department lacked any standardized inventory policy).

302. For a more complete discussion of the fallacy of the special needs exceptions, see *supra* subpart II(B)(5)(b). *See also* Bookspan, *Jar Wars: Employee Drug Testing, The Constitution, and the American Drug Problem*, 26 AM. CRIM. L. REV. 359 (1988).

303. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985).

cious employee activity usually precedes workplace searches. Except in the rare instance in which an employee presents an immediate danger to himself or others, there is no reason to proceed without a warrant.

In *O'Connor v. Ortega*,[304] for example, administrators suspected Dr. Ortega for some time before proceeding to search his office.[305] Ample opportunity existed for them to obtain a warrant. Similarly, in *National Treasury Employees Union v. Von Raab*[306] the Customs Service knew well in advance which employees met its testing protocol.[307] No reason existed for proceeding without a warrant. Employees do not consent automatically to invasions of privacy simply by accepting employment with a public employer. Thus, absent exigency, the special needs exception fails the presumptively unreasonable standard.

Inevitable discovery also must be eliminated under the new test. If law enforcement fails to follow the warrant procedures, the Court must not allow them to benefit from the possibility or even probability that they would have found the evidence, articles, or information regardless of the search's illegality.[308] This exception just invites post hoc determinations of what would have happened and fails to penalize precisely the behavior that should be avoided.

Finally, the Court must eliminate the good faith doctrine if the new test is to have any viability or impact. Although, as mentioned earlier, the *Leon* decision should encourage the use of warrants, no such incentive is needed under the presumptively unreasonable test. A good faith exception only undermines the honest application rule of the new test. Moreover, the good faith exception essentially reduces the probable cause requirement to a reasonableness test.[309] If the presumptively un-

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304. 480 U.S. 709 (1987).

305. *Id.* at 712.

306. 489 U.S. 656 (1989) (indicating that the commissioner knew which employees were eligible for promotion).

307. *See id.* at 660.

308. *See, e.g.*, Nix v. Williams, 467 U.S. 431 (1984).

309. Justice White stated:

> If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment.

United States v. Leon, 468 U.S. 897, 919 (quoting United States v. Peltier, 422 U.S. 531, 542 (1974)).

At least one commentator contends that the high "costs of the warrant process," in the form of lost police time, are themselves sufficient to ensure that the police have probable cause. *See* Dripps, *Living with* Leon, 95 YALE L.J. 906 (1986). Thus, if these costs are maintained, the good faith exception "will have no bite." Taking this to the extreme, Professor Donald Dripps posits that the warrant application can be considered as evidence of probable cause. *Id.*; *accord* NCSC STUDY, *supra* note 218, at 81-82. The problem with his thesis is that it encourages lengthy, time-intensive warrant applications. This rigid procedure, however, discourages most officers from ap-

reasonable standard were nothing more than a reasonableness test, then the stringent emphasis on warrants in all cases except valid exigency would not be necessary.

The purpose of the presumptively unreasonable standard is to revive the probable cause and particularity protections articulated in the fourth amendment. Judicial approval of searches must occur before, not after, the intrusion if the fourth amendment is to have any meaning. While the good faith exception endorses the presearch warrant procedure[310] by emphasizing whether an officer went to a magistrate, it is unacceptable under the proposed rule because it dilutes the presearch review. To effect any significant change, the Court must strictly adhere to the presumptively unreasonable standard and not allow loopholes that circumvent the rule.

The presumptively unreasonable test is premised strongly on warrants being physically easier to obtain. Consequently, some of the formal procedures attendant to the warrant process are streamlined. It is most essential, however, that the probable cause determination remain foremost in the minds of the magistrate and the policer officer. Additionally, to the extent that *Illinois v. Gates*[311] has eased the probable cause standard to a fair probability test, further eroding the test by sanctioning questionable or wrong determinations of probable cause is unnecessary. The emphasis is on warrants issued upon probable cause, not searches executed in good faith.

C. *Benefits of the Presumptively Unreasonable Standard*

Courts need to state fourth amendment requirements more simply and clearly, and they must establish more effective lines of communication to police.[312] Because the Court previously has chosen fact-style decision making,[313] it has failed abysmally to establish reliable,

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plying for warrants at all. Professor Steven Duke made a thoughtful response to Professor Dripps's article. *See* Duke, *Making* Leon *Worse*, 95 YALE L.J. 1405 (1986).

310. *See supra* notes 214-19 and accompanying text.

311. 462 U.S. 213 (1983); *see also* Alabama v. White, 110 S. Ct. 2412 (1990) (holding that *Terry* requires a lesser showing of probable cause than *Gates*).

312. The NCSC Study concludes that although police officers receive some formal training in search and seizure law and the procedures for obtaining a search warrant, "such training was generally viewed—by police as well as other officials involved in the warrant process—as extremely limited and of little practical use." NCSC STUDY, *supra* note 218, at 87-88. Officers generally have indicated that the best kind of training they received about the fourth amendment was " 'on the job,' as they rode and worked with more experienced officers, tried their own hand at drafting an affidavit, and otherwise 'learned the ropes.' " *Id.* at 88.

313. *See* Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329, 334 (1973) (taking facts and attempting to fit them into "legal molds broad enough to permit free form decision making, but narrow enough to prevent the most extreme outrages").

substantive fourth amendment law. Naturally, this confusion trickles down to the states that are bound by the federal exclusionary rule and to the police who are directed to obey the fourth amendment.

The case-by-case approach to fourth amendment law does not resolve successfully the types of constitutional questions raised by the cases. Rather than pursue a reasonableness litmus test for fourth amendment questions, which appears to be the Court's present predilection, the Court must provide definitional clarity. A reasonableness analysis only muddies already dark waters, essentially pronouncing that "it is reasonable if a judge thinks that it is reasonable." This does nothing to further substantive doctrine.

The presumptively unreasonable standard establishes an unquestionable preference for warrants in all searches but truly exigent circumstances. It creates a bright line for police to follow, offering clear direction and easy application.[314] The penalty for proceeding without a warrant is firm and certain. Thus, the rule encourages police to obtain warrants whenever possible. This, in turn, encourages police to abide by constitutional law.[315] Similarly, the rule will influence prosecutors to direct police behavior toward obedience to the fourth amendment.

The rule also encourages more careful judicial intervention in the early stages of an investigation. A presearch determination of probable cause requires attention to the totality of the circumstances, and the

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314. A preference for clear direction and bright lines is evident in other situations. In Miranda v. Arizona, 384 U.S. 436 (1966), for example, the Court created a simple four-part incantation for police to recito before questioning a suspect in custody. After the decision was rendered, police and prosecutors complained incessantly that this was too great a burden on police. *See* Agronsky, Meese v. Miranda*: The Final Countdown*, 73 A.B.A. J. 86 (1987); Ervin, Miranda v. Arizona*: A Decision Based on Excessive and Visionary Solicitude for the Accused*, 86 AM. CRIM. L.Q. 125 (1966). Police departments, however, quickly rose to the occasion and printed "rights cards" that conveniently could be carried in an officer's uniform pocket. The cards became so popular that today probably all law enforcement agencies use rights cards of some form. In fact, many cards now have a place for the defendant to sign indicating that he was read his rights, understood them, and chose to waive them. A signed waiver card makes the prosecution's burden of proving voluntary waiver much lighter.

Today, most law enforcement personnel readily admit that they prefer the *Miranda* rules to the previous requirements. *See* Jacoby, *Fighting Crime by the Rules: Why Cops Like* Miranda, NEWSWEEK, July 18, 1988, at 53. Although members of the Justice Department may wish to abolish *Miranda*, *see, e.g.*, *Report to the Attorney General on the Law of Pretrial Interrogation*, Feb. 12, 1986, *reprinted in* 22 MICH. J.L. REFORM 437 (1989), police are not among those clamoring to overrule the decision.

315. As Professor Ronald Dworkin states:

> Those who see the exclusionary rule as representing the wrong choice in the battle between criminals and the police misconceive the basic issue. The choice is not between criminals on the one hand and police on the other, but rather between two different kinds of lawbreakers. Why the lawbreaking police should prevail in a choice between evils is not at all clear. Indeed, in terms of societal danger a police officer who violates constitutional rights poses a greater threat than almost any "criminal" imaginable.

Dworkin, *supra* note 313, at 330.

postsearch hounty does not color that determination. Even under a fair probability standard, a magistrate bears the weight of evaluating seriously whether an intrusion is appropriate.

Through their objectivity, magistrates and judges are able to see in ways that police officers cannot. Thus, they are likely to have differing assumptions about who is likely to have committed a crime and when intervention and intrusions are necessary. Because of their different socioeconomic backgrounds, the social contexts, biases, and prejudices of magistrates and judges will differ from those of the on-the-street officer.[316] When magistrates respect their role, their second opinion is not just a formality or rubber stamp.[317] Furthermore, early judicial intervention reduces judicial burdens later on in the system. Eliminating the case-by-case reasonableness determinations that are necessary under the present system reduces case load at the motions and appellate levels, freeing judges to handle other matters on crowded dockets.

Finally, the rule emphasizes substance as well as procedure in fourth amendment matters. It recognizes the language, intent, and transcendence of the Framers of the Constitution. It does not demand that the Framers rule our constitutional jurisprudence from the grave, but rather that we respect the continued integral importance of warrants to the protections inherent in the fourth amendment. It counterattacks the passions of the moment—as reflected in the reasonableness analysis—and reflects more deeply held moral principles about the integrity of persons, the value of privacy, and the foundation of our government. The rule revitalizes the fourth amendment, rescuing it from the due process test it has become.

IV. Conclusion

This Article presumes a preference for procedural process, a clear standard, and honest application of that standard. It condemns the enigmatic post hoc reasonableness evaluation currently in favor. Thus, the Article focuses on abandoning dishonest application of the per se unrea-

316. *But see* Uviller, *supra* note 73, at 36 n.21 (asserting that police officers are raised in the same cultural traditions as state judges).

317. In *Leon* the Supreme Court concluded that no evidence exists to suggest that judges and magistrates "are inclined to ignore or subvert the Fourth Amendment." 468 U.S. at 916. Others differ on this point. *See, e.g.*, 2 W. LaFave, Search and Seizure § 4.1 (1978); Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule*, 69 Geo. L.J. 1361, 1412 (1981). While it is still debatable whether magistrates become "rubber stamps" for police, there clearly is great variance among magistrates, which inevitably leads to magistrate shopping. NCSC Study, *supra* note 218, at 80-81. The proposed rules eliminate magistrate shopping to some extent by reducing in-person police appearances before magistrates and subjecting the oral or written affidavits to whomever is the on-duty telephone-telefax magistrate. To the extent that determinations of probable cause vary, higher courts will provide guidance.

sonable test and creating and enforcing a new standard against which to measure warrantless searches.

The Court should hold warrantless searches presumptively unreasonable and eliminate all exceptions to the warrant requirement except exigent circumstances. Accordingly, police should be able to obtain warrants more easily. When police nonetheless proceed without a warrant, the government would have the opportunity to overcome the presumption of unreasonableness if the facts permit.

The test recognizes the importance of attention to procedure and endorses the warrant requirement as the only means for protecting the rights inherent in the fourth amendment. A presumptively unreasonable standard would promote the Court's own preference for bright line tests and eliminate much of the confusion in modern fourth amendment jurisprudence. It also would reestablish incentives for police to renew the practice of applying for warrants. Moreover, if the Court strictly follows the proposed standard it would reduce fourth amendment litigation by eliminating the need for case-by-case determinations of reasonable behavior, give form back to the content of the warrant clause, and breathe new life into the fourth amendment.