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Twists in the Use of Warren Court Fourth Amendment Rhetoric

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Twists in the Use of Warren Court Fourth Amendment Rhetoric: Searches, Reasonableness, Good Faith

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TABLE OF CONTENTS

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I. INTRODUCTION

The Warren Court is widely believed to have brought about a revolutionary expansion of Fourth Amendment protections against government searches and seizures.[1] As examples of that expansion, State and local officers must adhere to Fourth Amendment requirements or risk having the resulting evidence excluded from the prosecution's case in chief.[2] A "search" no longer requires a physical intrusion by law enforcement officers.[3] Brief investigative stops and regulatory inspections are subject to Fourth Amendment-based rules.[4]

It is also widely believed, however, that the Warren Court's Fourth Amendment revolution fizzled.[5] It seems extreme to label the project a complete failure, as major cases such as the ones just cited have never been overruled. Indeed, rather than overruling Warren Court precedent, the Burger, Rehnquist, and Roberts Courts have applied restrictive interpretations of Warren Court doctrine, twisting the words and concepts to support conclusions quite different than—indeed sometimes opposite to—their original thrust.[6]

Examining the dynamics of this counter-revolution, some commentators have focused on the Court's use of the easily manipulated *Katz* standard for determining

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1. *E.g.,* Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution,* 152 U. PENN. L. REV. 1361, 1363–64 n.14 (2004) (citing authority). Jack Wade Nowlin, *The Warren Court's House Built on Sand: From Security in Persons, Houses, Papers, and Effects to Mere Reasonableness in Fourth Amendment Doctrine*, 81 MISS. L.J. 1017, 1018 (2012); Christopher Slobogin, *Distinguished Lecture Surveillance and the Constitution*, 55 WAYNE L. REV. 1105, 1111 (2009); *cf.* Aya Gruber, *Garbage Pails and Puppy Dog Tails: Is That What Katz is Made Of,* 41 U.C. DAVIS L. REV. 781, 783 (2008) (and sources cited at n.6) (focusing on the revolutionary aspects of *Katz v. United States*).

This article will use the term "government" to apply to State and local actors as well as to federal actors.

2. Mapp v. Ohio, 367 U.S. 643, 660 (1961).

3. *E.g.,* Katz v. United States, 389 U.S. 347 (1967).

4. *E.g.,* Terry v Ohio 392 U.S. 1, 12–13 (1968) (regarding stop and frisk); Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967) (regarding housing inspection). *But see* Lain*, supra* note 1, at 1369 (contending *Terry* "was a complete capitulation to law enforcement interests").

5. *E.g*., Nowlin, *supra* note 1, at 1018.

6. *Accord*, Gruber, *supra* note 1. Gruber focuses on "portions of the [*Katz*] decision that planted the seeds of future jurisprudence subverting privacy." *Id*. at 784–85; *see also, e.g.,* Yale Kamisar, *the Warren Court and Criminal Justice: A Quarter-century Retrospective*, 31 TULSA L.J. 1, 30 (1995) (applying the characterization of Burger Court's approach to Fourth Amendment law as a "'bloody campaign of guerilla warfare,'" quoting Albert W. Alschuler, *Failed Pragmatism: Reflections on the Burger Court*, 200 HARV. L. REV. 1436, 1442 (1987)).

when official activity is a "search."[7] Part II of this Article will contribute to this discussion. The subversion of the Warren Court revolution, however, goes beyond the definition of "search." It includes use of Warren Court rhetoric to justify expansion of Reasonableness Clause[8] doctrines that validate warrantless searches; Part III will examine this dynamic, focusing on administrative and other "special needs" searches. Subsequent Courts have also manipulated Warren Court rhetoric to allow prosecutorial use of evidence obtained in outright violation of the Fourth Amendment, and Part IV will trace this development.

II. IS THE OFFICIAL INTRUSION A "SEARCH"?

The definition of "search" is important. If a government activity is not a "search" or a "seizure," by its very words the Fourth Amendment does not apply. If the Fourth Amendment does not apply, there will be no judicial oversight of the government activity in question absent an applicable alternative provision of the United States Constitution, a state constitution, or a statute. In *Katz v. United States*,[9] the Warren Court changed the definition of "search" to expand the scope of Fourth Amendment coverage; Part A will trace this history. Part B will focus on two of the ways subsequent Courts have twisted the *Katz* rhetoric.

A. *What Was "Revolutionary" About* Katz v. United States*?*

1. "Search" Jurisprudence Prior to Katz

According to the text, the Fourth Amendment covers searches and seizures of "persons, houses, papers, and effects."[10] The pre-Warren Court's adherence to the text, however, was spotty, in part due to the influence of common law property notions.[11] For example, seizure of an effect was not protected by the Fourth Amendment if the effect was stolen, contraband, or forfeit to the government.[12] On the other hand, effects in which the accused had the greater property interest were immune from seizure under the "mere evidence rule" even if they were evidence,

7. *E.g., id.* at 790–91 (labeling this dynamic as a "manipulation problem"). Regarding the standard, *see infra*, Part II.A.2.

8. "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.

9. *Katz*, 389 U.S. 954.

10. U.S. CONST. amend. IV.

11. *See* Boyd v. United States, 116 U.S. 616, 622 (1886); *accord*, *e.g.*, Nowlin, *supra* note 1, at 1031–32 (2012) (describing early Courts as using a "protected interest" approach that focused on the text and on common law property principles).

12. *E.g.,* Carroll v. United States, 267 U.S. 132 (1925) (upholding a search and seizure of contraband liquor); *Boyd*, 116 U.S. 616 (holding order to produce invoices evidencing a crime was a search or seizure subject to the 4th and 5th Amendments). Entrance into the area containing the effect was still governed by Fourth Amendment rules, however. *See,* Amos v. United States, 255 U.S. 313 (1921) (decided same day as *Gouled* and reversing conviction on grounds that entrance into home to seize contraband whiskey was unconstitutional).

instrumentalities, or fruits of crime.[13] As the Court concluded in 1886,

> [t]he search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof [differs from] a search for and seizure of a man's private books and papers [because i]n the one case, the government is entitled to the possession of the property; in the other it is not.[14]

Property interests also explained the Court's approach to the protection afforded to private conversations. Although one's words are arguably part of one's "person," overhearing a private conversation was a "search" if officers trespassed into the building in which the words were spoken, but not if there was no unconsented physical intrusion.[15] And property interests explained why "curtilage,"[16] apartments,[17] hotel rooms,[18] and non-public indoor commercial spaces, such as offices[19] merited Fourth Amendment protection notwithstanding

13. Based in the notion of superior property interests, the rule prohibited officials from searching for or seizing items in which the accused had a greater property interest. Gouled v. United States, 255 U.S. 298, 309–11 (1921) (articulating the "mere evidence rule"); Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 300 (1967) (rejecting the rule).

14. *Boyd*, 116 U.S. at 622. The *Boyd* Court tied this distinction to the English statutory and common law in effect when the Fourth Amendment was adopted as well as to a statute passed by the Congress that proposed adoption of the amendment. *Id*. at 622.

15. Goldman v. United States, 316 U.S. 129, 135–36 (1942) (denying coverage where officers overheard oral communications without physical entrance into the office where they were made); Olmstead v. United States, 277 U.S. 438 (1928) (denying coverage where small wires were inserted into phone wires outside a residence and in common spaces of a large office building). This focus on physical intrusion was based on traditional property law. See generally, e.g., Dressler, Joshua & Alan C. Michaels, UNDERSTANDING CRIMINAL PROCEDURE, VOL. 1: Investigation 68-70 (6th ed. 2013); *Life and Times of Boyd v. United States* (1886–-1976), 76 MICH. L. REV. 184 (1977).

16. Taylor v. United States, 286 U.S. 1 (1932) (search of garage adjacent to residence and seizure of effects; Ct. does not use word "curtilage," but the two buildings were on the same city lot); Amos v. United States, 255 U.S. 313, 315 (1921) (search of home and store in the curtilage, and noting use of "curtilage" by petitioner); *see,* Olmstead v. United States, 277 U.S. 438, 466 (1928) (noting that review of precedent shows no Fourth Amendment violation unless officials physically invaded, *inter alia*, the curtilage). "Curtilage" is "the land immediately surrounding and associated with the home." Oliver v. United States, 466 U.S. 170, 180 (1984) (citing 4 W. Blackstone, Commentaries *225). *See also, e.g.*, Bender, Eric Dean, *Note: The Fourth Amendment in the Age of Aerial Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. REV. 725, 726 n.9 (quoting 2 Oxford English Dictionary 1278 (1893) defining "curtilage" as "[a] small court, yard, garth, or piece of ground attached to a dwelling-house, and forming one enclosure with it, or so regarded by the law; the area attached to and containing a dwelling-house and its out-buildings."').

17. Harris v. United States, 331 U.S. 145 (1947) (search of apartment).

18. United States v. Jeffers, 342 U.S. 48 (1951); Lustig v. United States, 338 U.S. 74 (1949); Johnson v. United States, 333 U.S. 10 (1948) (regarding hotel room that was defendant's "living quarters"). *Accord*, Hoffa v. United States, 385 U.S. 293, 301 (1961).

19. United States v. Lefkowitz, 285 U.S. 452 (1932); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Gouled v. United States, 255 U.S. 298 (1921); Silverthorne Lumber Co. v. U.S., 251 U.S. 385 (1920). *See also,* Hoffa v. United states, 385 U.S. 293, 301 (1966) (assuming that the Fourth Amendment protects offices); Goldman v. United States, 316 U.S. 129, 134–36 (1942) (basing holding that Fourth Amendment did not apply on lack of trespass as opposed to place being an office); *Olmstead*, 277 U.S. 438 (focusing on the lack of trespass as opposed to one target being an office); Nowlin, *supra* note 1, at 1033–34 (discussing this use of the term

the textual limits.[20] On the other hand, reverting to a textual focus, the Court did not allow property interests to result in Fourth Amendment protection for "open fields," which are privately owned outdoor areas other than curtilage.[21]

At first, the Warren Court continued the approach to Fourth Amendment coverage taken by earlier Courts. The Court labeled a government activity a "search" if it involved physical intrusion into a person's body or clothing[22]; into a house, apartment, or hotel room[23]; into non-public office or other commercial space[24]; or into an automobile.[25] As for conversations, the early Warren Court confirmed that if surreptitious monitoring occurred while the parties were in a public place, the Fourth Amendment did not apply.[26] And, the Court clarified that even if the conversation took place in a private space, consent to enter that space

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"houses" as an example of what he calls the "liberal" version of the traditional approach).

20. Some of these early cases involved intrusions into areas that would not give rise to successful Fourth Amendment challenges in later years. McDonald v. United States, 335 U.S. 451 (1948) (rooming house where defendant had rented a room—agents were in common spaces, not Δ's room); Trupiano v. United States, 334 U.S. 699, 701 (1948) (barn-like building that was close to a house that did not belong to the defendant).

21. Hester v. United States, 265 U.S. 57, 59 (1924) (concluding "[T]he special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects,' is not extended to the open fields. The distinction between the latter and the house is as old as the common law"). *See, e.g.,* Nowlin, *supra* note 1, at 1032–33 (discussing *Hester* as an application of the traditional "protected interests" approach and of the "strict" traditional approach that limited interests to dimensions established by common law property rights).

22. Schmerber v. California, 384 U.S. 757 (1966); Beck v. State of Ohio, 379 U.S. 89 (1964); Abel v. United States, 362 U.S. 217 (1960); Draper v. United States, 358 U.S. 307 (1959).

23. Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523 (1967) (decided in term prior to *Katz*) (intrusion into house; overruling *Frank v. Md*., 359 U.S. 360 (1959), which upheld a state court conviction of a homeowner who refused to permit inspection by a municipal health inspector); Lewis v. United States, 385 U.S. 206 (1966) (intrusion into house); United States v. Ventresca, 380 U.S. 102 (1965) (intrusion into house); Mapp v. Ohio, 367 U.S. 643 (1961) (intrusion into house); Silverman v. United States, 365 U.S. 505 (1961) ("spike mike" listening device that physically penetrated the wall into row house); Abel v. United States, 362 U.S. 217 (1960) (intrusion into hotel room); Jones v. United States, 362 U.S. 257 (1960) (intrusion into house); Jones v. United States, 357 U.S. 493 (1958) (intrusion into house); United States v. Jeffers, 342 U.S. 48 (1951) (intrusion into hotel room). Cf. Elkins v. United States, 364 U.S. 206 (1960) (holding search of home would have been covered by Fourth Amendment if done by a federal officer); Chapman v. United States, 365 U.S. 610 (1961) (holding search of home by state officer that would have violated fourth amendment not admissible in federal court).

24. See v. City of Seattle, 387 U.S. 541, 543 (1967) (locked commercial warehouse, labeling the intrusion an "inspection" covered by the Fourth Amendment). Continuing the practice of previous Courts, the Warren Court declined to give the "search" label to intrusions into commercial spaces open to the public generally. United States v. Rabinowitz, 339 U.S. 56 (1950) (seizure of effects and search of office open to the public).

25. Preston v. United States, 376 U.S. 364 (1964); Rios v. United States, 364 U.S. 253 (1960) (intrusion into taxi cab by city police); Henry v. United States, 361 U.S. 98 (1959). The pre-Warren Court had interpreted "effects" to include automobiles. Brinegar v. United States, 338 U.S. 160 (1949) (seizure of person, search of automobile, seizure of effects); United States v. DiRe, 332 U.S. 581 (1948) (seizure of person and papers in auto); Husty v. United States, 282 U.S. 694 (1931) (search of auto and seizure of effects); Segurola v. United States, 275 U.S. 106 (1927) (seizure of effects from car); Carroll v. United States, 267 U.S. 132 (1925) (seizure of effects from a car).

26. On Lee v. United States, 343 U.S. 747, 749 (1952) (noting that one of the conversations with a wired informant took place on public sidewalks). The conversation that took place in On Lee's laundry may also have been in an area open to the public. *Id*. at 749 (noting that the informant engaged in the conversation "while customers came and went" but not specifying whether the informant was in the public or private areas of the laundry).

was all the Fourth Amendment required; monitoring the conversation was not a "search" even if the monitoring itself was not consensual.[27]

In validating use of conversation evidence, however, the Warren Court also relied on a new line of reasoning: that the aggrieved party had assumed the risk that the other person in the conversation would reveal its content.[28] As we will see, this "assumption of risk" reasoning would be the basis for undermining traditional Fourth Amendment protections in the future.[29]

2. The 1967 Watershed: Hayden and Katz

In the 1966 Term, the Warren Court did away with the "mere evidence rule," which was central to the property-based analysis the Court had used for close to one hundred years.[30] In *Warden, Md. Penitentiary v. Hayden*, the Court said, "[T]he premise that property interests control the right of the Government to search and seize has been discredited."[31] Instead, the Court focused on the Fourth Amendment's role in protecting individual privacy.[32]

Hayden was a mixed blessing for proponents of a robust Fourth Amendment. On one hand, it eliminated Fourth Amendment rights by allowing officers to search for and seize papers and effects in which the possessor had a superior property interest; that trend, however, had already begun.[33] On the other hand, *Hayden*'s rejection of a property-based approach in favor of a focus on privacy opened the door to a potential expansion of Fourth Amendment protections.

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27. Osborn v. United States, 385 U.S. 323, 326 (1966); Lopez v. United States, 373 U.S. 427, 438 (1963) (regarding conversation in private office with obvious federal agent who was not obviously wired); *see also On Lee,* 343 U.S. at 751-52 (using consent rationale where unclear whether conversation took place in a private space). *But see id*. at 766 (Burton, J., dissenting) (arguing that the agent listening in to the monitored conversation had essentially entered private space without consent).

The Warren Court had earlier relied on this reasoning in a statutory case in which officers had, with the consent of one party, listened to a phone conversation on an extension phone. Rathbun v. United States, 355 U.S. 107, 111 (1957) (noting that "[e]ach party to a telephone conversation takes the risk that the other party may have an extension telephone and may allow another to overhear the conversation").

28. *Lopez*, 373 U.S. at 439 (regarding a wired informant). After this, the Warren Court relied on the same "assumption of risk" reasoning in the context of an informant who merely remembered the conversation at issue without use of electronic aids. Hoffa v. United States, 395 U.S. 293, 302 (1966) (regarding conversations conducted in Hoffa's hotel room); Lewis v. United States, 385 U.S. 206, 210 (1966). The Court noted that the informant had consent to be in the hotel room and to hear the conversations at issue. *Hoffa*, 395 U.S. at 302. The Court observed that Hoffa "was relying upon his misplaced confidence that Partin would not reveal his wrongdoing." *Id*. (citing *Lopez*).

29. *See* Part II.B.1.

30. Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 301–02 (1967). Although the rule was established in 1921, it was based on the property analysis established in 1886. Gouled v. United States, 255 U.S. 298, 308-09 (1921). *See* discussion at *supra*, note 13.

31. *Hayden,* 387 U.S. 294 at 304.

32. *Id*. at 301–02, and 304–05.

33. *Id*. at 306–07 (asserting that "[t]he requirement that the Government assert . . . some property interest in material it seizes has long been a fiction, obscuring the reality that government has an interest in solving crime").

The Court consolidated this new approach in its next term. *United States v. Katz* involved electronic monitoring that picked up only the defendant's side of a phone call made from a public telephone booth.[34] Focusing on a privacy rationale, the Court held that overhearing the conversation was a Fourth Amendment "search."[35] Neither the conversation nor the phone booth were Katz's person, house, paper, or effect; while the Court did mention that Katz paid to use the phone and the booth, it did not base its holding on the notion that the booth was the equivalent to a hotel room or on any other notion of a "protected interest."[36] Furthermore, there was no physical penetration into the booth, [37] and the Court rejected reliance on physical entry[38] and on a trespass-based analysis altogether.[39] Instead, in finding the monitoring to violate the Fourth Amendment, the Court announced a standard that has come to be known by its summary in Justice Harlan's concurrence: a government activity is a "search" when it violates a person's "constitutionally protected *reasonable expectation of privacy.*"[40]

In the course of creating this new test and applying it to the eavesdropping in the case, the *Katz* Court used additional rhetoric. The Court distinguished the situation here, where Katz had sought the privacy of the enclosed phone booth, from a situation in which the defendant had not taken such precautions:

> What 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.[41]

As we will see, the Court's use of this "assumption of risk" rationale[42] would later

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

35. *Id.* at 351–53.

36. *Id.* at 352. *But see* Nowlin, *supra* note 1, at 1034 (suggesting the *Katz* Court could have analyzed the issues using the "protected interests" approach for "houses").

37. *Id.* at 348 (noting that the agents placed the listening device on the outside of the phone booth).

38. *Id*. at 353 ("The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.").

39. *Id.* ("We conclude that the underpinnings of Olmstead and Goldman have been so eroded by our subsequent decisions that the 'trespass' doctrine there enunciated can no longer be regarded as controlling"). *But see* Jones v. United States, 565 U.S. 400, 406-07 (2012) (asserting *Katz* did not repudiate the concern for government trespass); *id*. at 409 (asserting "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test) (emphasis in original).

40. *See id*. at 360 (Harlan, J., concurring) (emphasis provided)*; accord,* Dressler & Michaels, *supra* note 15, at 71–73 (noting that the majority opinion in *Katz* did not clearly define "search" but that the concurring opinion "filled the void").

41. Katz v. United States, 389 U.S. 347, 351 (1967) (citations omitted).

42. The *Katz* majority did not use the word "risk," but it cited cases that encompassed that concept. *Id.* (citing Lewis v. United States, 385 U.S. 206 (1966)) (regarding an undercover officer's observations) and United States v. Lee, 274 U.S. 559 (1927) (regarding observations of items in plain view on the deck of a ship)). Justice White, concurring, did use the term in referencing the earlier cases dealing with overheard conversations. *Id.* at 363 n.**.

be used by post-Warren Courts in applying the *Katz* test.

Many believe that the Warren Court adopted the *Katz* test to expand the reach of Fourth Amendment protections.[43] Still, by the time the Warren Court ended in June, 1969, the *Katz* test had made a bottom-line difference in only one case, to support respondent's standing to challenge a warrantless search and seizure.[44]

B. Twists in the Notion of "Reasonable Expectations of Privacy"

Post-Warren Courts pulled back on *Katz*'s promise of a more expansive notion of what constitutes a "search."[45] This Part will address two ways the Court has accomplished this retrenchment within the confines of the "reasonable expectation of privacy" standard. First, in analyzing what expectations of privacy are reasonable, the Court often eschews consideration of what ordinary people realistically expect in normal daily life. Instead, the Court describes abnormal or even socially unacceptable or deviant behavior that people *might* engage in and concludes that law enforcement officers should be able to do the same without judicial oversight.[46] As a second approach, the Court sometimes uses what amounts to a "superior property interest" analysis refashioned in "reasonable expectation of privacy" terms.

1. No Reasonable Expectation of Privacy Regarding Observations that Private Persons "Could" Make

The post-Warren Court combined "assumption of risk" language with the *Katz* "reasonable expectation of privacy" test to deny the "search" label to government

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43. *E.g.,* Gruber, *supra* note 1, at 783; Nowlin, *supra* note 1, at 1038 (stating "[t]he obvious reason behind the reframing in *Katz* was to expand the reach of the Fourth Amendment beyond its enumerated interests"). *But see* Lain, *supra* note 1, at 1369 (arguing *Katz* was a "concession to law enforcement interests on the issue of wiretapping").

44. Mancusi v. DeForte, 392 U.S. 364, 368 (1968). *Katz* did not affect the bottom line on other late Warren Court cases. In some, the "search" label could have been applied under the pre-*Katz* approach, and the focal issue was whether the searches were properly conducted. *See* Chimel v. California, 395 U.S. 752 (1969) (search of house); Terry v. Ohio, 392 U.S. 1 (1968) (search of person). *See also*, Alderman v. United States, 394 U.S. 165, 171-72 (1969) (assuming that the surveillance involved a "search" under both pre-*Katz* and *Katz* holdings and remanding the cases for factual findings regarding standing). In one case, the Court decided that the new test announced in *Katz* would not be applied retroactively. Desist v. United States, 394 U.S. 244 (1969).

45. In addition to the applications to be discussed, the Burger Court also used the "expectation of privacy" test to curtail the scope of defendants' "standing" to raise a 4th Amendment challenge to evidence. *Compare*, Jones v. United States, 362 U.S. 257, 264-64 (1960) *with* United States v Salvucci, 448 U.S. 83, 85 (1980) (overruling *Jones*); Rakas v. Illinois, 439 U.S. 128 (1978).

46. *Accord, e.g.,* George M. Dery III & James R. Fox, *Chipping Away at the Boundaries of Privacy: Intel's Pentium III Processor Serial Number and the Erosion of Fourth Amendment Privacy Expectations*, 17 Geo. State Univ. L. Rev. 331, 345–-46 (2000); Gruber, *supra* note 1, at 791 and 795 (dividing this dynamic into "manipulation" and "normativity" aspects); Susan F. Mandiberg, *Reasonable Officers vs. Reasonable Lay Persons in the Supreme Court's Miranda and Fourth Amendment Cases,* 14 LEWIS & CLARK L. REV. 1481 (2010) and articles cited therein.

examinations that easily could have been "searches" under pre-*Katz* doctrine.[47] The Burger Court began the trend when it used the "assumption of risk" rationale to undercut normal social expectations for anyone who wants to take advantage of the conveniences of modern life. Use of checking accounts and credit cards is one such area, and banks maintain the records that, in an earlier era, individuals might keep in their homes or offices. Ordinary people might expect that the cancelled checks and other information kept in bank records would be safe from warrantless government inspection. On the contrary, however, *United States v. Miller* held that the there is no "legitimate 'expectation of privacy'" in the contents of checks, financial statements, and deposit slips because they "contain only information voluntarily conveyed to the banks and exposed to their employees in the ordinary course of business."[48] That being so, "[t]he depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government."[49] As the government activity is not a "search," the Fourth Amendment does not require judicial oversight through a warrant or otherwise. This rationale came to be known as the "third-party doctrine."[50]

In *Smith v. Maryland,* the Burger Court went on to use the third-party doctrine to conclude that officers did not conduct a "search" when they obtained records of the numbers dialed from defendant's phone. The Court concluded that the defendant lacked a legitimate expectation of privacy in the information because a person voluntarily turns the information over to the phone company.[51] Thus, Smith "assumed the risk that the company would reveal to police the numbers he dialed."[52]

The rationale in these "third-party doctrine" cases—voluntary conveyance of information and assumption of risk that a third party would use it—put the onus on citizens to opt out of modern life if they want to retain privacy. One can prevent government knowledge of one's financial information by choosing to use cash and a cookie jar instead of bank accounts, checks, and credit cards. One can prevent the government from easily tracking the identity and frequency of communication contacts by meeting face-to-face instead of using the telephone. Failure to take

47. *Accord,* Nowlin, *supra* note 1, at 1038 (asserting that the "Katzian 'reasonable expectation of privacy' approach . . . in fact has threatened to undermine the Fourth Amendment's traditional protections"), *id*. at 1039–41 (noting that the *Katz* test has narrowed the reach of the Amendment by reducing the importance of common law principles).

48. United States v. Miller, 425 U.S. 435, 442 (1976). Defendant objected to ATF agents obtaining his records from banks, arguing "that he has a Fourth Amendment interest in the records kept by the banks because they are merely copies of personal records that were made available to the banks for a limited purpose and in which he has a reasonable expectation of privacy."

49. *Id.* at 443 (citing *United States v. White*, 401 U.S. at 751–52; the Court also cited the pre-*Katz* cases *Hoffa* and *Lopez*). The Court of Appeals found that the subpoenas did not "constitute adequate 'legal process' and suppressed the evidence. *Id.* at 439.

50. *See, e.g.,* Carpenter v. United States, 138 S. Ct. 2206, 2216 (2018); Kerr, Orin S., *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561 (2009).

51. Smith v. Maryland, 442 U.S. 735, 739–44 (1979). The Fourth Amendment was at issue because police had requested the phone company to install a "pen register" to capture the dialed numbers. *Id*. at 739 n.4.

52. *Id*. at 744.

these extreme measures, however, is tantamount to assuming the risk of government surveillance and therefore "voluntarily" agreeing to it.[53]

Furthermore, without citing the "third-party doctrine" cases or using their precise language, the Burger Court extended this privacy-destroying rationale to another activity essential to modern life: driving a car. In *Texas v. Brown*, the defendant's car was validly halted at a "routine driver's license checkpoint"; with the driver still inside, officers shined a light and peered into the interior of the car. The Burger Court concluded that this behavior did not constitute a Fourth Amendment "search."[54] This was so because the driver had no "legitimate expectation of privacy" in the car's interior, as "inquisitive passersby" could also view that area from outside the vehicle.[55] It is debatable whether member of the general public could bend down, use a flashlight, and look into a car that was, for example, stopped at a traffic light, and it is even more debatable whether a member of the general public would even do so. In the Court's view, however, this abnormal example of possible behavior becomes the norm for judging whether the officer violated a reasonable expectation of privacy.

The following discussion will review how the Rehnquist Court continued to combine an abnormal view of behavior with the "assumption of risk" rationale and apply the combination to a broader swath of everyday life. One line of cases involved observations of activity in the curtilage; in these cases, while ostensibly applying the *Katz* standard, the Court came to the same conclusions it might have adopted under the old property-based analysis. On the other hand, in a case involving trash left at the curb for collection, the Court used an arguably abnormal interpretation of the *Katz* test and thereby got around limits that the property-based approach might have imposed.

a. Aerial Observations of Curtilage

The Court's adoption of an abnormal behavior approach to the "search" standard emerges clearly in its cases regarding aerial searches of curtilage. Houses have traditionally occupied a special place in Fourth Amendment jurisprudence,[56]

53. *Accord, e.g.,* William C. Heffernan, *Fourth Amendment Privacy* Interests, 92 J. CRIM. L. & CRIMINOLOGY 1, 6 (2001) (labeling the Court's approach as a "vigilance model of privacy"); *cf, e.g.*, Gruber, *supra* note 1, at 791 (noting that *Katz* itself "hinges privacy on an individual's cautionary behavior") and at 804–05 (developing this theme). *See also, e.g.,* Kamisar, *supra* note 6, at 35 (challenging the Court's notion that the assumption of risk involved in the third-party doctrine cases is "voluntary").

54. Texas v. Brown, 460 U.S. 730, 740 (1983).

55. *Id.* at 740.

56. *See, e.g.,* United States v. Karo, 468 U.S. 705, 714–15 (1984) (asserting that society recognizes as justifiable the expectation that private residences are free of governmental intrusion and that warrantless searches and seizures inside a home are presumptively unreasonable absent exigencies); Payton v. New York, 445 U.S. 573, 589-90 (1980) (noting that the "zone of privacy" is most clearly defined by "the physical dimensions of an individual's home" and that the right to be free of unreasonable governmental intrusion into the home is at the core of the Fourth Amendment); Hester v. United States, 265 US 57, 59 (1924). Stephanie M. Godfrey & Kay Levine, *Much Ado About Randolph: The Supreme Court Revisits*, 42 Tulsa L. Rev. 731, 732 (2007); Thomas Y.

and the curtilage has been treated as an integral part of the house.[57] Nevertheless, the Rehnquist Court[58] concluded that people who effectively use high walls to screen their yards from observation by normal passersby knowingly expose those yards to government observation from fixed-wing planes flying at 1000 feet or from helicopters hovering at 400 feet over the yard.[59] As these flights are not illegal,[60] "any member of the public" could rent a plane or helicopter and do the same thing.[61] The Court concluded "that respondent's expectation that his garden was protected from such observation is unreasonable and is not an expectation that society is prepared to honor."[62] Thus, it is not a "search" for government officials to undertake these activities.

The Court's application of the "reasonable expectation of privacy" standard reflects an abnormal view of expectable human behavior. Common sense suggests that it is not "reasonable" to expect people to put a covering over their yards to prevent aerial snooping. In addition while it is technically possible that someone with an interest in another's activities would use planes or helicopters to peer into a walled yard, common sense would tell us that this would be unusual, not to say aberrant behavior. It is likely that such behavior by a private individual, once discovered, would be strongly disapproved as a violation of acceptable social norms.[63] By not acknowledging that mainly government agents would want to take

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Davies, *Recovering the Original Fourth Amendment*, 98 Mich. L. Rev. 547, 642 (1999).

57. *See supra* note 16.

58. The Burger Court opened the door to this line of reasoning by applying *Katz*'s "knowingly expose" language to conclude that when police observed a woman's behavior as she stood in the doorway of her house she was in a public place. United States v. Santana, 427 U.S. 38, 40, 42 (1976). Although the doorway of her house was part of the curtilage (if not the house itself), she had no reasonable expectation of privacy because "[s]he was not merely visible to the public but was as exposed to public view, speech, hearing, and touch as if she had been standing completely outside her house. *Id*. (quoting *Katz,* 389 U.S. at 351). *Id.* at 212–13 (concluding that the area observed was curtilage). It is common for passersby to observe people on their front porches or yards, and as Santana took no steps to shield herself from the view of passersby, the reasoning is hard to refute.

59. Florida v. Riley, 488 U.S. 445, 450 (1989) (plurality) (regarding a helicopter flying at 440 feet over the curtilage and viewing the inside of a greenhouse through holes in the roof); California v. Ciraolo, 476 U.S. 207, 209 (1986) (regarding warrantless observation, from a fixed-wing plane at 1000 feet, of a backyard that was completely enclosed by a six-foot outer fence and a 10-foot inner fence).

60. The *Ciraolo* opinion was at pains to point out that the plane was "within navigable air space." *Ciraolo,* 476 U.S. at 209. Similarly, the *Riley* plurality mentioned that helicopter flights in public airways are routine in the United States and are not "unheard of" in the county at issue; that it was not "contrary to law or regulation" for a helicopter to fly below the allowed altitude for fixed-wing aircraft; and (putting the burden on the accused) that there was no evidence that the helicopter interfered with Riley's use of his greenhouse or curtilage. *Riley*, 488 U.S. at 450–52.

61. Florida v. Riley, 488 U.S. 445, at 451 (1989) (plurality); California v. Ciraolo, 476 U.S. 207, at 213–14 (1986). Interestingly, in a case decided the same day as *Ciraolo* but not involving domestic curtilage, the Court and Government conceded that "surveillance of private property by using highly sophisticated surveillance equipment not generally available to the public . . . might be constitutionally proscribed absent a warrant." Dow Chemical v United States, 476 U.S. 227, 238 (1986) (using satellite technology as an example). The *Dow Chemical* Court, however, did not think a sophisticated aerial mapping camera qualified because it could not penetrate walls or windows or hear conversations. *Id*. at 239.

62. *Ciraolo*, 476 U.S. at 214.

63. *See, e.g.,* Steven Dale, "Not Over My Back Yard," The Gondola Project, Nov. 15, 2009, *available at* http://gondolaproject.com/2009/11/15/not-over-my-back-yard/ (regarding neighborhood outrage at proposed

such steps—and by declining to consider seriously the problems posed by use of sophisticated technology to see what could not be viewed without a physical trespass—the Court was out of touch with the *Katz* promise.

Of course, the aerial observations would probably not have been "searches" under the pre-*Katz* property approach as there was no physical trespass into the curtilage.[64] However, *Hayden* and *Katz* had seemed to replace the physical trespass approach in favor of the "reasonable expectation of privacy" standard.[65] Without rejecting that standard, the post-Warren Court reinstated the previous bottom line.

b. Rummaging Through Trash

In *California v. Greenwood,* the Court held that it is not a Fourth Amendment "search" for officers to rummage through garbage placed in closed containers at the curb for pick-up.[66] The curb was outside the curtilage, but the Court did not conclude that it had been abandoned.[67] Thus, the garbage was still Greenwood's property, and people often take their effects into public. If the Court had focused its "reasonable expectation of privacy" analysis on socially approved behavior of neighbors and passersby, it arguably would have found the rummaging to be a "search." As Justice Gorsuch later observed,

> I doubt . . . that most people spotting a neighbor rummaging through their garbage would think they lacked reasonable grounds to confront the rummager. Making the decision all the stranger, California state law expressly *protected* a homeowner's property rights in discarded trash. . . . Yet rather than defer to that as evidence of the people's habits and reasonable expectations of privacy, the Court [in *Greenwood*] substituted its own curious

aerial tram route over houses and backyards). Faced with a *fait accompli*, residents remain resentful. *See, e.g.,* Randy rag and Aaron Scott, "From Controversy to Icon: Portland's Aerial Tram Turns 10," Oregon Public Broadcasting, Feb. 13, 2017, *available at* https://www.opb.org/radio/programs/state-of-wonder/article/portland-aerial-tram-ohsu-10-year-anniversary/ (on file with *The University of the Pacific Law Review*). Objections exist even though the tram moves quickly and does not hover; as a frequent rider, I can attest that it would be difficult to make detailed observations of backyard activities.

64. *See supra* at notes 22–25.

65. Katz v. United States, 389 U.S. 347, 353 (1967); Warden v. Hayden, 387 U.S. 294, 304 (1967); *accord, e.g.,* United States v. Dionisio, 410 U.S. 1, 8 (1973); United States v. White, 401 U.S. 745, 748–49 (1971) (plurality); Mancusi v. DeForte, 392 U.S. 365, 368 (1969). *But see* Jones v. United States, 565 U.S. 400, 406-07 (2012); (asserting *Katz* did not repudiate the concern for government trespass); *id*. at 409 (asserting "the *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test) (emphasis in original).

66. California v. Greenwood, 486 U.S. 35, 37 (1988).

67. *Cf.* Gruber, *supra* note 1 (noting that the Court's apparent concession that Greenwood might have retained a subjective expectation of privacy in his trash). Note that finding abandonment might have been a stretch. In the closest Supreme Court precedent at that time, the Court found that a guest had abandoned trash left in his hotel-room wastepaper basket after he had checked out. Abel v. United States, 362 U.S. 217, 241 (1960). On the other hand, the Court previously found that a person had abandoned a jar containing contraband whiskey by dropping the jar on the ground. Hester v. United States, 265 U.S. 57, 58 (1924).

judgment.[68]

One aspect of the *Greenwood* Court's "curious judgment" was the notion that Greenwood had "voluntarily"[69] given his effects to the trash collector, who acceded to official requests to hand the effects over to police.[70] The Court did not use the term "assumption of risk," but it used the elements of that approach: first, that "the trash collector . . . might himself have sorted through respondents' trash or permitted others, such as the police, to do so"[71]; and second, that "respondents exposed their garbage to the public sufficiently to defeat their claim" of a reasonable expectation of privacy.[72] This conclusion was based on the Court's sense of what people *could* do, which was in turn based on abnormal or socially disapproved behavior:

> [i]t is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public. . .. Accordingly, having deposited their garbage 'in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having strangers take it' . . . respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded.[73]

While the Court buttressed its assertion with one example each of trash being disturbed by "animals . . . scavengers, [and] snoops,"[74] its analysis "employ[ed] the worst case scenario as its standard."[75]

Greenwood was decided in 1988, and the rise of homelessness had already increased the incidence of people going through garbage left at the curb; people were generally unhappy with the situation, although some found ways to accommodate the problem.[76]

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68. Carpenter v. United States, 138 S. Ct. 2206, 2266 (2018) (Gorsuch, J., dissenting, objecting to the "often unpredictable—and sometimes unbelievable—jurisprudence" engendered by the *Katz* standard) (citation omitted).

69. *See Greenwood,* 486 U.S. at 41 (analogizing the placement of garbage at the curb to "voluntarily" exposing dialed phone numbers and backyard activities). *Greenwood* was required by local ordinance to place his trash on the curb for pickup. *Id.* at 54–55 (Brennan, J., dissenting).

70. *Id*. at 37.

71. *Id.* at 40–41.

72. *Id*. at 40.

73. California v. Greenwood, 486 U.S. 35, 40–41 (1988) (quoting United States v. Reicherter, 647 F.2d 397, 399 (3d Cir. 1981).

74. *Id*. at 40 (also listing "children" without an example).

75. *Accord, e.g.,* Dery, *supra* note 46, at 345–46; Gruber, *supra* note 1, at 799.

76. *See, e.g.,* Allan R. Gold, *Seeking the Middle Ground With the Homeless on Trash*, N.Y. TIMES, Nov. 26 1990, at B.1. Thirty years later, people are still complaining about the problem of others going through their

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The premise behind the Court's reasoning in these "assumption of risk" decisions is disturbing. Essentially, if ordinary, everyday people could undertake the examination at issue, even if their doing do is unlikely or disapproved, government agents should be able to do the same thing without judicial Fourth Amendment oversight.[77] It may be worth noting that the Court takes a different approach once it has determined by official activity is, in fact, a "search." In determining whether an acknowledged "search" is reasonable without a warrant, the Court sometimes declines to accept deviant or socially unacceptable behavior as the Fourth Amendment standard.[78] The contrast in approaches is striking: if the question is the reasonableness of a "search," judicial oversight for Fourth Amendment adherence is guaranteed (either at the warrant stage or through a post-search suppression motion). There is no judicial oversight once the Court decides that the activity is not a "search' at all, and so the Court's "assumption of risk" analysis leaves the Fourth Amendment out of the picture.

2. No Reasonable Expectation of Privacy in Some Contraband Investigations

The Court has always interpreted the Fourth Amendment to allow officers to seize contraband such as illegal drugs. Under the pre-*Katz* approach, the government's power to seize the drugs was based on its superior property interest.[79] Even then, however, officers needed a warrant or an alternative Fourth Amendment doctrine to enter the place where the drugs were kept.[80] Yet notwithstanding disavowal of the property-based approach in *Hayden* and *Katz,*[81] the post-Warren Court has relied on the government's interest in contraband to conclude that there may be no "reasonable expectation of privacy" in a closed

trash. *See, e.g.,* "Keeping hobos out of your trash?" (Question and Answer discussion on Yelp), *available at* https://www.yelp.com/topic/las-vegas-keeping-hobos-out-of-your-trash (on file with *The University of the Pacific Law Review*); "Someone is digging through my trash and recycling. . .is this legal?" (Thread on reddit), *available at* https://www.reddit.com/r/legaladvice/comments/68tkdh/ma_someone_is_digging_through_my_trash_and/ (on file with *The University of the Pacific Law Review*).

77. *Accord*, Heffernan, *supra* note 53, at 4–6 (describing the Court's approach as exempting police from everyday expectations of forbearance and requiring them to avoid only egregious violations of privacy norms).

78. Georgia v. Randolph, 547 U.S. 103, 113 (2006) (basing the requirement of a warrant to enter a home on the conclusion that ordinary people would decline to enter if one co-tenant refused permission despite the other co-tenant granting it). While the Court has said that one test of "legitimate" privacy expectations is "understandings that are recognized and permitted by society," its approach does not include at least some behavior that is criminal. Rakas v. Illinois, 439 U.S. 128, 143 n.12 (1978).

79. *See supra*, Part II.A.2.

80. *E.g.,* Carroll v. United States, 267 U.S. 132 (1925) (applying an "automobile exception" to the search of a vehicle for contraband liquor); Amos v. United States, 255 U.S. 313 (1921) (reversing conviction due to unconstitutional entry into home to seize contraband whisky).

81. *See supra* notes 10, 27, 28 & note 30 and accompanying text.

container when the target of the search is unlawful drugs. That being the case, intrusion into the container is not a "search," and so no warrant or Reasonableness Clause validation is necessary.

This line of reasoning began with the "drug dog" cases. These are cases in which a trained dog sniffed the outside of a container and alerted if it sensed narcotics inside. The Burger Court concluded that the canine sniff does not violate the container owner's reasonable expectation of privacy because it reveals only contraband.[82] The Rehnquist Court agreed.[83]

Toward the end of its run, the Burger Court extended this reasoning beyond the drug dog context. *United States v. Jacobsen* involved agents properly taking control of a package that Fed Ex employees had opened to reveal a suspicious white powder.[84] The agents' field testing of the powder was an "additional intrusion."[85] The Court noted, however, that this intrusion was not a "search," as "[a]chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy."[86]

3. Is the Official Intrusion a "Search"?

When is police activity a Fourth Amendment "search"? The *Katz* "reasonable expectation of privacy" standard is still the main test, and the cases and doctrines

82. United States v. Place, 462 U.S. 696, 707 (1983) (Noting the sniff does "not expose *noncontraband items* that otherwise would remain hidden . . . Moreover, the sniff discloses only the presence of absence of narcotics") (emphasis supplied).

The rationale in *Place* does not extend to emanations that do not involve contraband. *See* Kyllo v. United States, 533 U.S. 27 (2001) (invalidating the warrantless use of a thermal-imaging device to confirm the use of heat lamps in a suspected marijuana growing operation in a private home); United States v. Karo, 468 U.S. 705, 715 (1984) (invalidating the warrantless use of an electronic tracking device to detect the existence of a non-contraband can of ether inside a house); United States v. Jacobsen, 466 U.S. 109, 123 n.23 (1984) (distinguishing from drugs the private possession of obscenity). In addition, the lack of Fourth Amendment protection applies only to the odor itself: gaining access to the object to be investigated could involve a Fourth Amendment "search" or "seizure. *E.g.,* Florida v. Jardines, 569 U.S. 1 (2013) (finding a Fourth Amendment violation in officer and dog making an unconsented entry into the curtilage for the dog to sniff at the front door of the house); *Jacobsen,* 466 U.S. at 120–21 (noting that the agent's "assertion and control over the package and its contents" was a "seizure," but finding the seizure reasonable); *Place,* 462 U.S. at 707-10 (declining on the facts to validate the seizure of luggage without probable cause); Amos v. United States, 255 U.S. 313 (1921) (reversing conviction on grounds that entrance into home to seize contraband whiskey was unconstitutional).

83. Illinois v. Caballes, 543 U.S. 405, 408 (2005) ("Official conduct that does not '"compromise any legitimate interest in privacy" is not a search subject to the Fourth Amendment. We have held that any interest in possessing contraband cannot be deemed '"legitimate," and thus governmental conduct that *only* reveals the possession of contraband "compromises no legitimate privacy interest"); City of Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) ("The fact that officers walk a narcotics-detection dog around the exterior of each car. . . does not transform the seizure into a search [because, as in *Place*] an exterior sniff of an automobile does not require entry into the car and is not designed to disclose any information other than the presence or absence of narcotics"); *see also Caballes*, 543 U.S. at 409 (rejecting challenge to premise that dog sniffs reveal only narcotics); *cf. Jardines*, 466 U.S. at 10 (not disputing that the dog sniff itself is not a "search," but focusing, in a property-based analysis, on the officer's entry into the curtilage with the dog).

84. United States v. Jacobsen, 466 U.S. 109, at 121 (1984).

85. *Id*. at 122.

86. *Id*. at 123 (asserting that this conclusion was "dictated" by *United States v. Place*).

reviewed in this Part are still good law. There are signs, however, that the extreme intrusiveness possible with modern technology may be giving the Roberts Court pause. The Court has resurrected the property-based approach to apply the "search" label to official use of a GPS tracking device[87] and has applied a property-related rationale to label one use of drug-sniffing dogs as a "search."[88] Similarly, but without reliance on the property rationale, the Court has partially retreated from application of the third-party doctrine in cases involving a information stored on a mobile-phone[89] and cell-site location data.[90] These pull-backs are few, however, leaving a vast array of ordinary behavior and locations open to official investigation without judicial oversight based on the Fourth Amendment.

III. WAS THE WARRANTLESS "SEARCH" NEVERTHELESS "REASONABLE"?

Part II explored how post-Warren Courts used the "reasonable expectation of privacy" standard to conclude that the Fourth Amendment did not apply. Post-Warren Courts have also used the notion of "reasonable expectations of privacy" to broaden government power to conduct what are admittedly "searches" without a warrant and, at times, without individualized suspicion. The Court has done this by using a balancing test to determine whether a warrantless intrusion is reasonable and by putting a finger on the government side of the balance through the concept of a "diminished" or "lesser" expectation of privacy.[91] And, as before, Warren Court decisions that seemed to expand Fourth Amendment protections set the stage for use of Warren Court rhetoric to restrict Fourth Amendment rights.

A. The Expansion of Fourth Amendment Coverage in Camara and See

In 1967, the Warren Court treated as a "search" a type of intrusion to which the Court had not previously applied the Fourth Amendment: administrative inspections for violations of civil statutes and regulations. *Camara v. Municipal Court of the City and County of San Francisco* applied the Fourth Amendment to housing inspections for code violations sanctioned by civil fines[92]; *See v. Seattle* applied the Fourth Amendment to civil inspections of non-public portions of

87. United States v. Jones, 565 U.S. 400, 404–06 (2012).

88. Florida v. Jardines, 569 U.S. 1, 5–6 (2013).

89. Riley v. California, 573 U.S. 373 (2014).

90. Carpenter v. United States, 138 S. Ct. 2206 (2018).

91. There are, of course, other ways the Court has undermined "reasonableness" analysis to further law-enforcement interests. *See, e.g.,* Nowlin, *supra* note 1, at 1050–51 (discussing use of reasonableness analysis in police creation of exigent circumstances).

92. Camara v. Municipal Court of the City and County of San Francisco, 387 U.S. 523, 538 (1967) (approving administrative searches with warrants based on "reasonable legislative or administrative standards [that are] satisfied with respect to a particular dwelling."). *Camara* overruled *Frank v. State of Maryland*, 359 U.S. 360 (1959), which had upheld conviction for refusing to allow a health inspector to make a warrantless inspection of a home. *Id.* at 528.

commercial premises.[93]

As it extended the concept of "search" to these inspections, the Warren Court introduced two new concepts. First was the use of a balancing test to evaluate the reasonableness of a warrantless search: "the need to search [balanced] against the invasion which the search entails."[94] The second was the notion that it is sometimes "reasonable" to eliminate traditional criminal probable cause and individualized suspicion as pre-requisites to a valid "search."[95] These new concepts opened the door to the additional restriction of Fourth Amendment protections.

B. Twists in the Use of Administrative Search Rhetoric

Although the Warren Court ended in 1969, Justice Douglas, a member of that Court, extended the thrust of the *Camara* and *See* opinions when authoring *Colonnade Catering Corp. v. United States* in 1970.[96] *Camara* and *See* had relaxed traditional requirements by approving administrative searches without criminal probable cause or individualized suspicion, but the Court required inspectors to get an administrative warrant.[97] *Colonnade Catering* suggested that even the relaxed administrative warrant was not required if there was a long history of regulation of the industry at issue and an adequate statutory framework existed to define the limits of the search.[98] In *United States v. Biswell* the Court clarified that the inspection must be central to the government's enforcement efforts.[99]

A few years later, the Burger Court added a new wrinkle to the analysis by folding in the "reasonable expectation of privacy" rhetoric: pervasive regulation means that the business at issue has a diminished expectation of privacy.[100] Bolstered by this new combination of ideas, the Court began to extend the concepts of diminished privacy and close regulation beyond the administrative search context.

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93. See v. City of Seattle, 387 U.S. 541 (1967).

94. *Camara,* 387 U.S. at 537.

95. *Id*. at 538–39; *See*, 397 U.S. at 545–46.

96. Colonnade Catering Corp. v United States, 397 U.S. 72, 76–77 (1970) (regarding inspection of a liquor licensee for possible violation of excise tax law). In *Colonnade Catering* the search was unconstitutional, however, because Congress had not authorized forcible warrantless entry. *Id*. at 77. It would be disingenuous to credit the Burger Court with this case, as Chief Justice Burger authored the dissent, joined by Justices Black and Stewart. *Id*. at 77. The Court referred to "the special treatment of inspection laws of this kind" as set out in *Boyd v. United States*, 116 U.S. 616 (1886). *Id.*

97. *Camara,* 387 U.S. at 538–39; *See,* 387 U.S. at 545–46.

98. *Colonnade Catering*, 397 U.S. at 76–77.

99. United States v. Biswell, 406 U.S. 311, 315–16 (1972) (involving inspection under the Gun Control Act of 1968); *see also*, New York v. Burger, 482 U.S. 691, 702, 708–10 (1987) (involving inspection under New York vehicle dismantler statute); Donovan v. Dewey, 452 U.S. 594, 602, 606 (1982) (involving inspection under the Federal Mine Safety & Health Act of 1977).

100. *Biswell,* 406 U.S. at 315–16; *see also, Burger*, 482 U.S. at 703; *Dewey*, 452 U.S. at 605.

"Close" or "pervasive" regulation means refers to regulation specific to the type of industry, not the amount of generally applicable regulation that applies. *Burger*, 482 U.S. at 703–06; Marshall v. Barlow's, Inc., 436 U.S. 307, 313–14 (1978).

1. A New Rationale for Auto Searches

In 1973, in *Cady v. Dombrowski,* the Court considered the warrantless search of a car that had been impounded following an accident.[101] No existing doctrine was directly on point. The so-called "auto exception," adopted in 1925, involved a car that was mobile on the highway, which was not this car.[102] The Warren Court's "inventory search" doctrine applied to searches conducted for the protection of the police and the car's operator, which was not this search.[103]

To validate this search, the Court adopted a new rationale. The Court relied on the pervasive regulation of cars by the states and the sense that state and local police often come in contact with cars for "community caretaking functions" as opposed to crime.[104]

> The constitutional difference between searches of and seizures from houses and similar structures and from vehicles stems both from the ambulatory character of the latter and from the fact that extensive, and often noncriminal contact with automobiles will bring local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband.

Tellingly, the Court cited an administrative search case, *United States v. Biswell,* as analogous.[105]

In 1974, a plurality in *Cardwell v. Lewis* further expanded the rationale for searching cars, folding in the Warren Court's "knowingly expose to public" rhetoric[106]:

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101. Cady v. Dombrowski, 413 U.S. 433 (1973) (regarding a car that had been impounded following an accident).

102. Carroll v. United States, 267 U.S. 132, 153 (1925) (allowing the warrantless search of vehicles on the highway if police had probable cause to search them, as the mobility of the vehicle made it easy for the driver to leave the jurisdiction before a warrant could be obtained); *accord, e.g*., United States v. Ross, 456 U.S. 798, 804–09 (1982) (reviewing basis for Carroll and noting importance of probable cause); South Dakota v. Opperman, 428 U.S. 364, 367 (1976).

103. The search in *Dombrowski* was to find evidence, that is, the defendant police officer's service revolver, and no inventory of the car was attempted. 413 U.S. at 436-37. Inventory searches are not searches for evidence. *See* Harris v. United States, 390 U.S. 234 (1968) (explaining that a police department regulation required the impounding officer to remove all valuables from the car and attach a property tag to it); Cooper v. State of California, 386 U.S. 58, 61–62 (1967) (concluding that where the car was potentially subject to forfeiture and had to be kept for considerable time, the Court concluded that it was reasonable for police to search the car for their own protection The *Dombrowski* Court noted the inventory search cases but did not rely on them. 413 U.S. at 442.

104. *Dombrowski*, 413 U.S. at 441.

105. *Id.* at 442 (citing *United States v. Biswell*, 406 U.S. 311 (1972); *see supra* note 100 and accompanying text.

106. Katz v. United States, 389 U.S. 347, 351 (1967) (asserting "[w]at a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection"). *See supra* text accompanying note 41.

> [a vehicle's] function is transportation and it seldom serves as one's residence or as the repository of personal effects. A car has little capacity for escaping public scrutiny. It travels public thoroughfares where its occupants and its contents are in plain view. . . . 'What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.' This is not to say that no part of the interior of an automobile has Fourth Amendment protection; the exercise of a desire to be mobile does not, of course, waive one's right to be free of unreasonable government intrusion. But insofar as Fourth Amendment protection extends to a motor vehicle, it is the right to privacy that is the touchstone of our inquiry.[107]

The Court thus came to combine a variety of rationales to cover searches of both mobile and immobile vehicles. The Court used this multi-faceted approach to reaffirm the reasonableness of inventory searches of the interior of lawfully impounded vehicles,[108] the warrantless search of the interior of some mobile homes,[109] and the suspicionless and warrantless search of the dashboard of an automobile to observe the vehicle identification number.[110] The "reduced expectation of privacy" rationale for vehicle searches has also, indirectly, affected the search of closed containers found inside a vehicle.[111]

2. Closely Regulated Persons

The Fourth Amendment specifically extends its protection to "persons."[112] Nevertheless, the Court has used the "close regulation" rationale to validate warrantless searches of persons, without individualized suspicion, for evidence of

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107. Cardwell v. Lewis, 417 U.S. 583, 590–91 (1974) (plurality) (citations omitted) (finding a reduced expectation because the vehicle's "function is transportation and it seldom serves as one's residence or as the repository of personal effects" and because a car "travels public thoroughfares where its occupants and its contents are in plain view"). The Court of Appeals had considered taking the paint scrapings to be a search (417 U.S. at 589), and the Court's analysis proceeded on that basis. *Id*. at 591–92.

108. *See* South Dakota v. Opperman, 428 U.S. 364, 367–68 (1976) (regarding inventory search of a car impounded for parking violations). *See also*, Pennsylvania v. Labron, 518 U.S. 938, 940 (1996) (hinting that warrantless searches of cars are valid, even without the exigency of mobility, based on the reduced expectation of privacy that comes with the pervasive regulation of automobiles); *see also* California v. Carney, 471 U.S. 386, 392 (1985) ("[t]he public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation").

109. *Carney*, 471 U.S. at 388, 392 (treating the structure as an auto, as opposed to the "house," when the mobile home "is found stationary in a place not regularly used for residential purposes—temporary or otherwise").

110. New York v. Class, 475 U.S. 106, 112–19 (1986) (focusing on the physical characteristics of an automobile and its pervasive regulation and noting that placement of papers obscuring the VIN was insufficient to create a privacy interest).

111. *See* California v. Acevedo, 500 U.S. 565, 574–76 (1991) (allowing officers who are validly searching vehicles to open closed containers in the vehicle that could hold the item being sought).

112. U.S. CONST. amend. IV.

use of alcohol or other drugs. This line of cases began when the Court approved administering drug tests to persons in specific occupations in given circumstances. In *Skinner v. Railway Labor Executives' Ass'n*, for example, the circumstance was involvement in "certain train accidents."[113] The Rehnquist Court concluded that the government's interest in breath, blood, and urine tests outbalanced what the Court saw as a minimal intrusion on railroad employees:

> [T]he expectations of privacy of covered employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees.[114]

Similarly, in *National Treasury Employees Union v. Von Raab*, the Court upheld a program mandating that Customs Service employees undergo suspicionless drug tests when they applied for promotion to positions involving interdiction of illegal drugs that required them to carry firearms or handle classified materials.[115]

The fact of close regulation was evidently crucial to the holdings in these cases, as the Court has declined to approve suspicionless drug tests for those in an occupation not considered to be closely or pervasively regulated.[116] Nevertheless, there are evidently limits to the reach of that rationale. Although automobiles are closely regulated[117] and driving them can be dangerous, in 2013 the Court rebuffed prosecutors' attempt to apply the diminished expectation of privacy in vehicles to the person driving the car, at least when a test more intrusive than collection of urine was involved.[118]

The Court has, however, applied the "pervasively regulated" rationale outside of the business context. Specifically analogizing "students who voluntarily participate in school athletics" with "adults who choose to participate in a 'closely regulated industry,'" the Court approved the suspicionless, warrantless urine

113. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 606 (1989) (noting that the tests were authorized by regulations under the Federal Railroad Safety Act of 1970).

114. *Id.* at 627 (balancing the government's interest against a reduced expectation of privacy to find a required blood test). *See also id*. at 620–24, 628–33 (evaluating the government's interest); *id*. at 616–18, 624–27 (concluding intrusions were minimal); *id*. at 619 (articulating the balancing approach); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665–66 (1989) (decided the same day as *Skinner* and applying the same approach).

115. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989). The Court noted that the program was "not designed to serve the ordinary needs of law enforcement," that the government had "substantial interests" similar to those in *Skinner*, and that these outweighed the employees' privacy interests. *Id*. at 666, 668.

116. Chandler v. Miller, 520 U.S. 305, 305 (1997) (regarding candidates for political office).

117. *See supra* notes 103–04.

118. Missouri v. McNeely, 569 U.S. 141, 159 (2013) (rejecting the suggestion that drivers be subject to warrantless blood tests for blood alcohol level in favor of requiring a case-by-case determination of exigency based on the probability of dissipation of the alcohol before a warrant could be obtained). The Court concluded that the reduced privacy in vehicles does not carry over to piercing a motorist's skin.

testing of school children who participate in interschool athletics; citing *Skinner* and *Biswell*, the Court concluded that both "have reason to expect intrusions upon normal rights and privileges, including privacy."[119] The Court later applied this holding to students engaged in a broad range of extra-curricular activities.[120]

3. The "Reasonableness" of Government "Special Needs"

Searches involving closely regulated businesses and persons are one example of activities that involve a concept known as "special needs" searches, "not designed to serve the ordinary needs of law enforcement."[121] The analysis folds the "special need" into the government side of the balancing test.[122] The government's "special need" is often seen as considerable, so when the other side of the balance involves a "diminished" expectation of privacy—for example due to pervasive regulation—the Court easily finds warrantless and even suspicionless searches to be acceptable.

It is important to note that even though "special needs" do not include ordinary law enforcement, an official conducting the "special needs" investigation can seize evidence of crime in "plain view."[123] Thus, "special needs" searches can and do lead to criminal prosecution and conviction.[124]

Protection of individual Fourth Amendment rights will inevitably lose in this balance.

IV. ALLOWING UNREASONABLE WARRANTLESS "SEARCHES"

As the following discussion will trace, federal courts have excluded evidence obtained in violation of the Fourth Amendment since the late nineteenth century, and the Warren Court extended this requirement to the states.[125] Nevertheless, the Warren Court also made an exception to allow prosecutors to use such evidence to impeach the testimony of defendants who take the stand at their criminal trials.[126]

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119. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 657, 664–65 (1995); *see also, id.* at 652–54 (citing *Skinner* for use of a balancing test and both *Skinner* and *VonRaab* for examples of suspicionless searches that comport with the Fourth Amendment).

120. Board of Education of Independent School Dist. No. 92 of Pottawatomie Co. v. Earls, 536 U.S. 822, 829–34 (2002); Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 652–665 (1995).

121. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 666 (1989); *cf.* New Jersey v. T.L.O., 469 U.S. 325, 351–52 (1985) (Blackmun, J. concurring in the judgment) (coining the term and applying it more broadly to include searches based on less than probable cause and a warrant such as stops and frisks).

122. Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 653 (1995); *see also, e.g.,* City of Los Angeles, California v. Patel, 135 S. Ct. 2443, 2452 (2015); Maryland v. King, 569 U.S. 435, 462–63 (2013); Missouri v. McNeely, 569 U.S. 141, 159 (2013).

123. *See, e.g.*, Dressler & Michaels., *supra* note 15, at 227–232.

124. This dynamic is especially fraught when both civil and criminal sanctions attend a regulatory violation. *E.g.,* New York v. Burger, 482 U.S. 692 (1987).

125. *See infra*, Part IV.A.1.

126. Walder v. United States, 347 U.S. 62 (1954) (regarding defendant's testimony on direct examination). *See also* United States v. Havens, 446 U.S. 620 (1980) (extending the rule to defendant's testimony on cross-

In addition, prosecutors may use evidence obtained in violation of the Fourth Amendment in presenting a case to the grand jury.[127] While it is certainly possible to object to these holdings, the grand jury does not determine guilt or innocence, and defendants can avoid impeachment by not taking the stand.

The following discussion addresses an arguably more extreme use of evidence obtained in violation of the Fourth Amendment: the introduction, in the prosecutor's case in chief, of evidence obtained in unreasonable warrantless searches. This development is the result of the so-called "good faith" exception. "Good faith" does not mean the "search" comported with Fourth Amendment requirements; it means the trial court cannot exclude the unconstitutionally obtained evidence. Thus, the "good faith" exception to exclusion results in convictions based at least in part on evidence that has no Fourth Amendment validity.

A. How the Warren Court Set the Stage for a "Good Faith" Exception

Federal courts have excluded evidence obtained in violation of the Fourth Amendment since 1886.[128] In 1961, the Warren Court required state courts to do so as well.[129] Nevertheless, a number of Warren Court opinions contain rhetoric that later Courts would combine to make it easier for prosecutors to introduce in the case in chief evidence seized in direct violation of the Fourth Amendment.[130] Two examples of such rhetoric seem particularly significant: the shift in articulating the rationale supporting exclusion, and the increased use of the term "good faith" in discussing official behavior.

1. Rationales Supporting Exclusion

The Supreme Court first excluded evidence as a reaction to Fourth Amendment violations by courts, not police. The first instance occurred in *Boyd v. United States,* decided in 1886. The *Boyd* Court's use of the Fourth Amendment looked very different from today's practice. This was a forfeiture case,[131] and the "search and seizure" was the court's order to produce an invoice, not a direct physical intrusion.[132] The Court found that the Fourth Amendment was

examination).

127. United States v. Calandra, 414 U.S. 338 (1974).

128. Boyd v. United States, 116 U.S. 616 (1886).

129. Mapp v. Ohio, 367 U.S. 643 (1961).

130. It is important to distinguish the situation where evidence is admitted because the court concludes that violation of the Fourth Amendment did not *cause* seizure of the item at issue. Doctrines include "attenuation" (*e.g.* Hudson v. Michigan, 547 U.S. 586 (2006); *Wong Sun v. United States*, 371 U.S. 471, 491 (1963); "independent source" (*e.g.*, Murray v. United States, 487 U.S. 533 (1988)); and "inevitable discovery" (*e.g.,* Nix v. Williams, 467 U.S. 431, 445–46 (1984)).

131. *Id*. at 634 (asserting that "forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal").

132. *Id.* at 634. By statute, failure to produce the invoice would be treated as a confession of the

inextricably linked with the Fifth Amendment Self-Incrimination Clause, holding that the court's order to produce a document constituted an unreasonable "seizure" and that the Fifth Amendment prohibited admission of the evidence.[133]

Almost thirty years later,[134] in *Weeks v. United States,* the Court again determined that exclusion of evidence was required for a trial court's violation of the Fourth Amendment. The defendant had moved for return of letters taken from his house allegedly in violation of the Fourth Amendment.[135] The lower court denied the motion as to material intended to be used as evidence in the criminal trial against Weeks. A unanimous Supreme Court reversed, holding that the lower court's refusal to turn over the papers involved "a denial of the constitutional rights of the accused, . . ."[136] The Court was clear that the Fourth Amendment violation was on the part of the lower court, not just the federal officers who had seized the letters:

> The effect of the 4th Amendment is to put *the courts* of the United States . . . in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. . . and the duty of giving [this protection] force and effect is obligatory upon all intrusted [sic] under our Federal system with the enforcement of the laws.[137]

The *Weeks* Court considered the issue be a court's right to use evidence seized in violation of the Fourth Amendment in a criminal case.[138] It believed that courts would be complicit if allowed to do so:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures . . . *should find no sanction in the judgments of the courts,* which are

government's criminal allegations. *Id.* at 620. "In order to apply the fourth amendment to the factual situation in *Boyd*, Justice Bradley had to interpret 'search and seizure' as including the compulsory production of documents." *The Life and Times of Boyd v. United States*. 1886-1976, 76 MICH. L. REV. 184, 186–87 (1977).

133. *Boyd,* 116 U.S. at 633–34.

134. An intermediate case, *Adams v. New York*, decided in 1904, applied an exclusionary rule based on evidentiary principles. 192 U.S. 585 (1904). *Accord,* Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases*, 83 COLUM. L. REV. 1365, 1374 (1983) (naming *Adams* as one of the three seminal cases leading to adoption of the fourth amendment exclusionary rule but noting that *Adams* turned out to be "just a wild turn in the exclusionary rule roller coaster track").

135. Weeks v. United States, 232 U.S. 383, 388–89 (1914). The Court expressly limited the exclusionary rule to evidence obtained by federal officers, as it did not consider the Fourth Amendment to apply to state officers. *Id*. at 398.

136. *Id.*, 232 U.S. at 398.

137. *Id*. at 391–92 (emphasis supplied).

138. *Id.* at 393.

> charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.[139]

The lower court should have returned the documents to Weeks.[140] While the words "deter" and "deterrence" do not appear in the opinion,[141] the *Weeks* Court saw the Fourth Amendment as restraining both federal officers and the federal courts[142] and saw the exclusion of evidence as affecting law enforcement and the federal courts equally.[143]

The Fourth Amendment exclusionary rule as we know it grew out of these cases.[144] In the 1920s, the Court applied the rule to situations that presented issues quite different from those in the prior cases, and so broadened the scope of the rule's application.[145]

The sense that courts were participants in Fourth Amendment violations appeared next in a majority opinion in the 1943 case, *McNabb v. United States*.[146] The Court excluded evidence based on its supervisory powers over federal trials, not the Fourth Amendment[147]; the search had been conducted by state officers, and

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139. *Id*. at 392 (emphasis supplied); *see also, id.* at 394 ("To sanction [the unlawful search and seizure] proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action").

140. *Id*. at 398.

141. *See also, e.g.,* Kamisar, *supra* note 6, at 31 (noting that *Weeks*' use of the exclusionary rule did not rest on a deterrence rationale but on the "principled basis" of avoiding "'sanctioning' or 'ratifying' the police lawlessness that produced the proffered evidence. . ..").

142. *Weeks,* 232 U.S. at 391–92 ("The effect of the 4th Amendment is to put the *courts of the United States and Federal officials*, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority . . . .") (emphasis added).

143. *Id.* at 394 ("To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution . . . .").

144. *Accord, e.g.,* Potter Stewart, *The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases,* 83 COLUM. L. REV. 1365, 1372 (1983) ("[n]one of the three Supreme Court cases credited with producing the rule focused on whether the exclusionary rule, as we know it, should exist-yet somehow, in 1914, after all three cases had been decided, the rule was established"). The third case was *Adams v. New York*, 192 U.D. 585 (1904), in which the exclusion argument was based on evidentiary, not constitutional, principles. Stewart at 1374.

145. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391–92 (1920); Gouled v. U.S., 255 U.S. 298, 306–11 (1921), *abrogated by* Warden v. Hayden, 387 U.S. 294 (1967); Agnello v. U.S., 269 U.S. 20, 33–34 (1925); Stewart, *supra* note 135, at 1375–76 (discussing how *Silverthorne Lumber* and *Gouled* "significantly broadened the narrow rule of exclusion of the *Boyd* and *Weeks* cases).

146. McNabb v. U.S., 318 U.S. 332 (1943). Strong articulations of this perspective also appeared in dissents to the Court's finding of no Fourth Amendment violation in *Olmstead v. U.S*., 277 U.S. 438, 463–65 (1928). Justices Brandeis and Holms would have found a violation based on the federal officers' committing a criminal act under State law. *Id*. 469–70 (Justice Holmes); *id.* at 489–90 (Justice Brandeis). Justice Brandeis based his conclusion in part on a sense that when prosecutor knowingly seeks to use evidence obtained by criminal means, "the government itself would become a lawbreaker." *Id*. at 483 (Brandeis, J., dissenting). Justice Holmes agreed: "[N]o distinction can be taken between the government as prosecutor and the government as judge. If the existing code does not permit district attorneys to have a hand in such dirty business it does not permit the judge to allow such iniquities to succeed." *Id*. at 470 (Holmes, J., dissenting).

147. *McNabb*, 318 U.S. at 341–42.

the Fourth Amendment did not yet apply to them.[148] In excluding the evidence at issue, however, the Court relied on the judicial integrity rationale, specifically comparing courts that permitted such evidence to accessories after the fact.[149]

At first, the Warren Court also seemed to focus on judicial integrity. In *Elkins v. United States,* the Court exercised its supervisory powers over federal courts to require exclusion of evidence unconstitutionally obtained by state officers.[150] The Court discussed at length the need to promote "healthy federalism" and the "imperative of judicial integrity.""[151] Regarding the latter point, the Court asserted that federal courts should not "be accomplices in the willful disobedience of a Constitution they are sworn to uphold."[152]

The shift came a year after *Elkins,* in *Mapp v. Ohio,* when the Warren Court for the first time imposed the exclusionary rule on the states—the forums for the majority of criminal prosecutions.[153] Perhaps because this was such a big step, or because judicial integrity can also be implicated when exclusion prevents the factfinder from having all the facts,[154] the Court gave a number of reasons for doing so. First it noted changes in "factual considerations" since *Wolf.*[155] Next, it discussed the importance of the Fourth Amendment itself: avoiding turning the Amendment into a mere "form of words," citing the ability to exclude evidence as an essential part of the Fourth Amendment "right," and expressing the desire to treat the Fourth Amendment similarly as the other right-granting amendments.[156]

The *Mapp* Court also mentioned precedent but reviewed it quite selectively. Notwithstanding the long history of cases emphasizing judicial integrity, the *Mapp* Court's review of exclusionary rule precedent emphasized deterrence. It implied that the exclusion in *Weeks* was based on deterrence even though that case did not mention the word or even focus on the concept; its focus was preventing the federal

148. The Court applied the Fourth Amendment to state officers in *Mapp v. Ohio*, 67 U.S. 643 (1961).

149. McNabb v. U.S., 318 U.S. 332, 345 (1943) ("Plainly, a conviction resting on evidence secured through such a flagrant disregard of the procedure which Congress has commanded cannot be allowed to stand without making the courts themselves *accomplices* in wilful [sic] disobedience of law.") (emphasis added).

150. Elkins v. United States, 364 U.S. 206 (1960). *Elkins* eliminated the "silver platter doctrine," which had allowed federal criminal courts to use evidence seized by state and local officers in violation of the Fourth Amendment as long as no federal officers were involved in the violation. *Id.* at 208. Use of the supervisory powers was necessary, as the Court had earlier declined to require state courts to exclude evidence obtained in violation of the Fourth Amendment. Wolf v. Colorado, 338 U.S. 25 (1949). In discussing exclusion, the Court mentioned "deterrence" in passing, but did not specify whether it was police or courts that would be deterred. *Id.* at 31–32. The dissent in *Wolf* also mentioned deterrence and focused on deterring police and prosecutors. *Id*. at 42–43 (Murphy, J., dissenting).

151. *Id.* at 221–23.

152. *Id*. at 223. The Court asserted that the purpose of excluding evidence is to deter, but it did not specify the target of the deterrence. *Id.* at 217.

153. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

154. *See, e.g.*, John Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027, 1036 (1974).

155. *Id.* at 653. The Court mentioned changes in state rules (651–52), changes in rules developed by the Supreme Court to eliminate the "silver platter" doctrine (*Elkins*), to formulate "a method to prevent state use of evidence unconstitutionally seized by federal agents" (*Rea v.* United States*.,* 350 U.S. 214 (1956) and to relax requirements (*Jones v.* United States, 362 U.S. 257 (1960) (653)).

156. *Id.* at 655–56.

system generally from benefitting from the unconstitutional behavior.[157] The *Mapp* Court mentioned *McNabb* without noting that case's reliance on the judicial integrity rationale.[158] Finally, going further, the *Mapp* Court said that "*the purpose* of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it'," quoting *Elkins,* but not mentioning that case's equal reliance on judicial integrity.[159]

The *Mapp* Court did mention judicial integrity, but in a way that relegated it to secondary status, thus giving impetus to the Court's retreat from what some commentators have called the "majestic exclusionary rule."[160] The consideration did not appear in the opinion until the Court was finished discussing precedent and had begun discussing why extending the exclusionary rule to the states "makes very good sense."[161] In this context, the Court mentioned the "'imperative of judicial integrity'"[162] along with "avoidance of needless conflict between state and federal courts"[163] and the inability to assume "that, as a practical matter, adoption of the exclusionary rule fetters law enforcement."[164] At the end of the opinion, however, the Court seemed to give judicial integrity and police deterrence equal billing: "Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice."[165]

After *Mapp*, the Warren Court discussed the rationale for the exclusionary rule in only three cases,[166] and its justifications for the rule were inconsistent. One case

157. *Mapp*, 367 U.S. at 648.

158. *Id*. at 649–50.

159. *Id.* at 656 (quoting *Elkins,* 364 U.S. at 217) (emphasis added).

160. Scott E. Sundby & Lucy B. Ricca, *The Majestic and the Mundane: The Two Creation Stories of the Exclusionary Rule,* 398 TEXAS TECH L. REV. 391, 398 (2010).

161. Mapp v. Ohio, 367 U.S. 643, 657 (1961).

162. *Id.* at 659 (again citing *Elkins*, 364 U.S. at 222).

163. *Id*. at 657–58 (citing *Elkins*, 364 U.S. at 221).

164. *Id*. (citing *Elkins*, 364 U.S. at 218).

165. *Id*. at 660.

166. In some other cases the Court found no "search" or "seizure," so the Fourth Amendment did not apply. Harris v. United States, 390 U.S. 234 (1968); Hoffa v. United States, 385 U.S. 293, 302 (1966); Lewis v. United States, 385 U.S. 206, 211 (1966); Lopez v. United States, 373 U.S. 427, 440 (1963); Wheeldin v. Wheeler, 373 U.S. 647, 649 (1963); Lanza v. State of New York, 370 U.S. 139, 143 (1962). In other cases the Court found the "search" or "seizure" to have been reasonable. Cooper v. State of California, 386 U.S. 58, 62 (1967); Warden, Md. Penitentiary v. Hayden, 387 U.S. 294, 310 (1967); Ker v. State of California, 374 U.S. 23 (1963).

In some cases where the Court found Fourth Amendment violations, the posture of the case made it unnecessary to discuss the exclusionary rule's validity. *See* Shipley v. California, 395 U.S. 818, 819 (1969); Von Cleef v. New Jersey, 395 U.S. 814, 816 (1969); Mancusi v. Deforte, 392 U.S. 364 (1968); Camara v. Mun. Court of City & Cty. of San Francisco, 387 U.S. 523 (1967); See v. City of Seattle, 387 U.S. 541 (1967); Berger v. State of N.Y., 388 U.S. 41, 44 (1967); Stanford v. State of Texas, 379 U.S. 476, 486 (1965); Aguilar v. State of Tex, 378 U.S. 108 (1964). In cases where exclusion was an issue, the Court merely applied the rule without discussing its rationales. Chimel v. California, 395 U.S. 753 (1969); Davis v. Mississippi, 394 U.S. 721 (1969); Sibron v. New York, 392 U.S. 40, 65 (1968); Katz v. United States, 389 U.S. 347 (1967); Preston v. United States, 376 U.S. 364

emphasized a deterrence rationale without mentioning judicial integrity.[167] Another case emphasized deterrence and judicial integrity equally.[168] The third case emphasized deterrence of "lawless police conduct" as a justification for the exclusionary rule (again mischaracterizing precedent) and mentioned the need to avoid reducing the Fourth Amendment to a "mere 'form of words'"[169]; however, the Court also acknowledged judicial integrity as a "vital function," hinting at the "accessory after the fact" metaphor[170] and ultimately saw the deterrence and judicial integrity rationales as intertwined.[171]

2. Use of the Term "Good Faith" in Fourth Amendment Jurisprudence

The Supreme Court's first mention of "good faith" in a Fourth Amendment case occurred in 1925. The term popped up in *Carroll v. United States* as part of a discussion of whether officers had probable cause to stop the car they searched.[172] The Court quoted from a 1923 civil suit for false imprisonment in which the defendant had the burden to establish lack of probable cause for the arrest at issue: "[G]ood faith is not enough to constitute probable cause. That faith must be grounded on facts within knowledge of the Director General's agent."[173]

The term does not appear again in a Supreme Court Fourth Amendment opinion until 1947. *Harris v. United States* involved the search of an entire apartment incident to an arrest in the living room. The Supreme Court found the search to be reasonable and mentioned in passing that the Circuit Court of Appeals had affirmed the conviction, in part, because the agents had conducted the search in good faith.[174] As it found the search to be constitutional, the Court did not reach any issue involving the exclusionary rule.

The Warren Court did not use the notion of "good faith" in discussing application of the Fourth Amendment exclusionary rule. It did, however, use the term more frequently than previous Courts had done: while commenting on the motives or intent of government agents in cases regarding a non-Fourth Amendment exclusionary rule[175]; commenting in passing on the rationale of a

(1964); Silverman v. U.S., 365 U.S. 505 (1961).

167. Linkletter v. Walker, 381 U.S. 618, 636–37 (1965) (declining to give *Mapp* retroactive effect).

168. Wong Sun v. United States, 371 U.S. 471, 485–86 (1963) (extending the exclusionary rule to derivative evidence).

169. Terry v. Ohio, 392 U.S. 1, 12 (1968) (extending both the Fourth Amendment and the exclusionary rule to stops and frisks). *Id.* at 12.

170. *Id*. ("Courts which sit under our Constitution *cannot and will not be made party to lawless invasions of the constitutional rights* of citizens by permitting unhindered governmental use of the fruits of such invasions").

171. *Id.* at 12–13.

172. Carroll v. United States, 267 U.S. 132, 161–62 (1925).

173. *Id*. at 161 (quoting *Director General v. Kastenbaum*, 263 U.S. 25, 28 (1923)).

174. Harris v. United States, 331 U.S. 156, 154–55 (1947).

175. Fuller v. Alaska, 393 U.S. 80, 81 (1968) (declining to order retroactive application a newly interpreted statutory exclusionary rule, saying that doing so "would overturn every state conviction obtained in good-faith reliance" on previous precedent); Marcus v. Search Warrants of Property at 104 East Tenth St., Kansas City, Mo.,

lower court[176]; in noting that an officer's good faith is not enough to establish probable cause or reasonable suspicion[177]; and allowing a "good faith" defense to a local judge sued for civil rights violations.[178] The Warren Court's use of the term "good faith," however, when combined with its elevation of the deterrence rationale, set the stage for subsequent Courts to seriously undermine enforcement of the Fourth Amendment's Warrant Clause.

B. Development of the "Good Faith" Exception

The Burger Court soon began exploring and developing a connection between the "good faith" and deterrence" notions. It ultimately used the combination as a basis for creating a "good faith" exception to the Fourth Amendment exclusionary rule. The journey to a "good faith" exception can be described in three discrete components: (1) the elimination of judicial integrity as a reason to exclude evidence obtained in violation of the Fourth Amendment; (2) the combination of the now-focal rationale of deterrence with the notion of an officer's subjective good faith; and (3) the downgrading of exclusion of evidence from a "rule" to a "remedy." For ease of writing, this discussion will use the term "unconstitutionally obtained evidence" for evidence obtained in violation of the Fourth Amendment.

The first component was the elimination of judicial integrity as a reason to exclude unconstitutionally obtained evidence. The Burger Court accomplished this over the course of a number of decisions.[179] In a 1974 opinion, the Burger Court did not mention judicial integrity at all when it allowed use of unconstitutionally obtained evidence in front of the grand jury.[180] In 1975, the Court articulated judicial integrity and deterrence as equally deserving of consideration when declining to give retroactive effect to a substantive Fourth Amendment ruling.[181]

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367 U.S. 717, 732 (1961) (regarding a due process challenge to State procedures authorizing searches and seizures for obscene material); Abel v. United States, 362 U.S. 217, 219, 226 (1960) (noting, in a case in which exclusion of improperly seized evidence was still based on the Fifth Amendment, the scarcity of evidence in the record that the behavior would be "serious misconduct" if true, but a "finding of bad faith is . . . not open to us on this record" and pointing to the trial court's conclusion that the actions were taken in "good faith").

176. Chimel v. California, 395 U.S. 752, 754 (1969) (assuming for purposes that officers had probable cause to arrest, but noting that lower courts had relied on the officer's good faith in procuring an arrest warrant that turned out to be invalid).

177. Terry v. Ohio, 392 U.S. 1, 21 (1968) ("And simple "good faith on the part of the arresting officer is not enough.' * * * If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police'"); Beck v. State of Ohio, 379 U.S. 89, 97 (1964) ("We may assume that the officers acted in good faith in arresting the petitioner. But 'good faith on the part of the arresting officers is not enough'"); Henry v. United States, 361 U.S. 98, 102 (1959) ("Evidence required to establish guilt is not necessary. On the other hand, good faith on the part of the arresting officers is not enough").

178. Pierson v. J.L. Ray, 386 U.S. 547, 557 (1967).

179. *Accord,* Kamisar, *supra* note 6, at 31 (noting the shift to a deterrence rationale and interest balancing).

180. United States v. Calandra, 414 U.S. 338 (1974). The Court's opinion never mentioned judicial integrity despite that consideration being raised by the dissent. *Id.* at 360 (Brennan, J., dissenting).

181. United States v. Peltier, 422 U.S. 531, 539 (1975).

Nevertheless, relying on a revisionist history that cited no cases earlier than *Mapp,* the opinion asserted that "the Court has relied principally upon the deterrent purpose served by the exclusionary rule"[182] and rested its decision on the premise that "the purpose of the exclusionary rule is to deter unlawful police conduct. . .."[183] That same year, declining to allow some prisoners to raise Fourth Amendment issues in postconviction suits, the Court noted the Warren Court's mention of deterrence in *Elkins* and principal reliance on deterrence in *Mapp.*[184] It went on to assert that judicial integrity had played a "limited role" in post-*Mapp* opinions[185] and concluded that deterrence of police misconduct is the "primary justification" for excluding evidence.[186] In a 1976 holding declining to exclude evidence in a civil tax proceeding, the Court focused on deterrence of police officers as the reason to exclude evidence obtained in violation of the Fourth Amendment.[187] The Court did mention judicial integrity in a footnote, but treated it as a variation of the deterrence rationale.[188] Finally, in several cases, the Court buttressed its downgrading of the judicial integrity rationale by commenting on the negative effect exclusion of relevant evidence has on factfinding.[189]

The second component was the combination of the now-focal deterrence rationale with the notion of an officer's subjective good faith.[190] The connection for the Court was its conclusion that it was either impossible or extremely difficult to deter officers who had a good faith belief in that their actions comported with

182. *Id*. at 536.

183. *Id*. at 542.

184. Stone v. Powell, 428 U.S. 465, 484 (1975) (addressing the ability to raise Fourth Amendment issues in post-conviction suits).

185. *Id.* at 485 (mentioning cases that did not address objections to use of evidence in the prosecution's case in chief made by a defendant with standing).

186. *Id.* at 486.

187. United States v. Janis, 428 U.S. 433, 454 (1976); *see also, id.* at 446 (asserting, with citations to *Calandra* and *Peltier*, that "the Court . . . has established that the 'prime purpose' of the rule, if not the sole one, 'is to deter future unlawful police conduct'").

188. *Id*. at 458 n.35. The Court noted that "[t]he primary meaning of 'judicial integrity' in the context of evidentiary rules is that the courts must not commit or encourage violations of the Constitution"; since the Fourth Amendment violation occurs at the time of the search, the question is "whether the admission of the evidence encourages violations of Fourth Amendment rights," and this is the same as asking "whether exclusion would serve a deterrent purpose."

189. United States v. Havens, 446 U.S. 620, 626, 627 (1980) (regarding use of evidence seized in violation of the Fourth Amendment to impeach the defendant's testimony at trial); United States v. Payner, 447 U.S. 727, 735 n.8 (1980) (regarding a defendant who the Court concluded lacked standing to challenge the search); *Janis,* 428 U.S. at 447,, 448–49; *Peltier*, 422 U.S. at 535–38 (finding it crucial that exclusion of "concededly relevant evidence" is done to "enforce a constitutional guarantee that does not relate to the integrity of the factfinding process"); *Stone*, 428 U.S. at 485 (concluding that he judicial integrity concern "has limited force as a justification for the exclusion of highly probative evidence"); *see also*, Williams v. United States, 401 U.S. 646, 653 (1971) (rejecting retroactive application of a post-*Mapp* holding); *cf.* Nix v. Williams, 467 U.S. 431, 445 (1984) (making same observation in context of a 6th Amendment right-to-counsel confession case).

190. As a precursor to this conclusion, the Court asserted that judicial integrity is not "offended" when officers act in good faith. *Peltier*, 422 U.S. at 537–38. *See also,* Sundby & Ricca, *supra* note 161, at 424 (crediting the combination of the deterrence rationale with themes hostile to viewing exclusion as a Fourth Amendment right as contributing to curtailing exclusion of evidence).

the Fourth Amendment.[191]

The third component was to view the exclusion of evidence obtained in violation of the Fourth Amendment as a mere remedy. As Sundby and Ricca have explained, the Warren Court had continued the tradition of viewing exclusion of evidence as a "rule" that was an integral part of the Fourth Amendment right.[192] The "counter-narrative" that sees exclusion of evidence as a mere remedy also has a long history.[193] Despite the Warren Court's adherence to the exclusionary "rule" as inherent in the Fourth Amendment, "remedy" rhetoric crept into at least one Warren Court opinion.[194] The view of exclusion as a mere remedy did not dominate, however, until the Burger Court,[195] where it played an important role in developing the "good faith" exception.

The Court's combination of deterrence, good faith, and "mere remedy" finally came to fruition in 1984 when *United States v. Leon* firmly established a "good faith" exception to the Fourth Amendment exclusionary rule for cases where the Fourth Amendment violation was made by the magistrate who had issued the warrant.[196] The Court found officers' reliance on the warrant to be reasonable,[197] and the opinion focused on deterrence as the justification for the exclusionary rule.[198] With that in mind, the Court balanced the costs and benefits of the exclusionary rule and concluded that the balance usually favored adoption of a

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191. *Janis*, 428 U.S. at 438 n.35 (noting that in addition to other considerations diminishing any deterrent effect, "the officers here were clearly acting in good faith . . . a factor that the Court has recognized reduces significantly the potential deterrent effect of exclusion"); *accord, e.g.,* Kamisar, *supra* note 6, at 31 (noting that the deterrence rationale bloomed in the post-Warren Court era); *see,* Franks v. Delaware, 438 U.S. 154, 164 (1978) (declaring that the affiant's good faith was an inherent premise of the Fourth Amendment's Warrant Clause and holding that a hearing is required to determine existence of a false material statement in a search warrant affidavit made in bad faith); Michigan v. DeFillippo, 443 U.S. 31, 38 n.3 (1979) (asserting that "[n]o conceivable purpose of deterrence would be served by suppressing evidence which, at the time it was found on the person of the respondent, was the product of a lawful arrest and a lawful search. To deter police from enforcing a presumptively valid statute was never remotely in the contemplation of even the most zealous advocate of the exclusionary rule"); *cf.* Michigan v. Tucker, 417 U.S. 433, 447 (1974) (asserting, in a pre-*Miranda* confession case, that where police have acted in good faith, as opposed to engaging in willful or negligent violation of the law, "the deterrence rationale loses much of its force"). *But see* United States v. Johnson, 457 U.S. 537, 562 (1982) (rejecting government's argument that 4th Amendment. decisions should not be applied retroactively to all convictions not yet final at the time of the decision if officers acted in good faith).

192. Sundby & Ricca, *supra* note 161, at 411–14 (noting that the pre-Warren Court had referred to exclusion as a "remedy" in *Wolf v. Colorado*, but the Warren Court restored the "rule" language in *Mapp*); *see also, e.g.*, Kamisar, *supra* note 6, at 31 (noting the Burger Court's "'deconstitutionalizing'" the exclusionary rule).

193. *Id.* at 414–23.

194. *Id.* at 423–24 (reviewing Justice Stewart's opinion in *Elkins v. United States*, 364 U.S. 206 (1960)).

195. *Id*. at 424–33 (reviewing the opinions in *United States v. Calandra* and *Stone v. Powell*).

196. U.S. v. Leon, 468 U.S. 897, 920–21 (1984). *See also*, Massachusetts v. Sheppard, 468 U.S. 981 (1984) (applying *Leon* and discussing why the officer's reliance was reasonable); Kamisar, *supra* note 6, at 33 (calling the "good faith" exception a "reasonable mistake" doctrine).

197. *Leon*, 468 U.S. at 926.

198. *Id.* at 906 (repeating the language from *Calandra* regarding the rule being "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect" and asserting that deterrence can be accomplished without automatic exclusion in all cases); *see also id*. at 918 et seq. (focusing entirely on deterrence).

"good faith" exception when officers acted on the basis of a facially valid warrant.[199] The Court considered deterrence to apply only to law enforcement officers, not to courts.[200] In fact, the Court's only mention of judicial integrity was to downgrade that consideration in the face of the dissenting opinions' urging that the concern should remain an important consideration.[201] The Court did not discuss at all the origin of exclusion of evidence to address Fourth Amendment violations by courts.[202]

After *Leon* the Burger, Rehnquist, and Roberts Courts applied the "good faith" exception when officers, relying on officially provided misinformation, acted on what they reasonably thought was probable cause[203]; when officers relied on a statute, later found unconstitutional, that authorized warrantless administrative searches[204]; and when officers relied on "binding judicial precedent."[205]

C. The "Good Faith" Exception and the Allowance of Unreasonable Warrantless Searches

Once upon a time, searches compatible with the Warrant Clause were the standard (or at least the preference) and searches validated by Reasonableness Clause doctrines were "exceptions to the warrant requirement."

> Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes,' and 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 and well-delineated exceptions.[206]

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199. *Id.* at 907–924.

200. *Id.* at 916.

201. *Id.* at 921 & n.22. Among other points, Justice Brennan's dissent objected to making deterrence the sole purpose of the exclusionary rule, asserting that this view "relegates the judiciary to the periphery" and reminding that the fourth amendment restrains the government as a whole. *Id.* at 932 (Brennan, J., dissenting, joined by Marshall). Brennan also noted that deterrence was not a relevant concern in the early exclusionary rule decisions. *Id.* at 938. Justice Stevens' dissent did focus on deterrence, asserting that the Court's holding diminishes its effect. *Id.* at 974–75 (Stevens, J., dissenting). However, Stevens also asserted that the holding "tarnishes the role of the judiciary" and the original rationale for exclusion (judicial integrity) "retains its force as well as its relevance." *Id.* at 921 n.2.

202. *See supra* notes 130–49.

203. Herring v. United States, 555 U.S. 135, 145–46 (2009) (involving misinformation provided by clerks in police departments other than that of the arresting officer); Arizona v. Evans, 514 U.S. 1, 4 (1995) (involving misinformation provided by court clerks).

204. Ill v Krull, 480 U.S. 340, 355 (1987) (asserting that an officer cannot "be said to have acted in good-faith reliance upon a statute if its provisions are such that a reasonable officer should have known that the statute was unconstitutional").

205. Davis v. United States, 564 U.S. 229, 249–50 (2011) (discussing reliance on a Supreme Court doctrine that was later modified).

206. Katz v. United States, 389 U.S. 347, 357 (1967) (citations omitted).

The list of "reasonable" warrantless searches has grown since the Warren Court, but the Court has continued to repeat this mantra[207] and to state that the Warrant Clause is "the bulwark of Fourth Amendment protection."[208]

Thus, it is striking that in cases where the "good faith" exception applies there is neither a valid warrant nor an applicable Reasonableness Clause doctrine. In *United States v. Leon*, there was no Fourth Amendment warrant because the document purporting to be a warrant lacked probable cause.[209] In the two "good faith" cases decided by the post-Burger Court there was no warrant at all at the time of the search because the warrant had been withdrawn or quashed.[210] In these cases lacking a valid warrant, no Reasonableness Clause doctrine surfaced to validate seizure of the evidence. Similarly, two "good faith" cases that involved admittedly warrantless searches also lacked a supporting Reasonableness Clause doctrine.[211]

The Fourth Amendment was violated in all of these cases, but so what? The Court now considers exclusion of evidence to be a mere "remedy" instead of an integral part of the Fourth Amendment right.[212] Treating exclusion as a remedy may be justifiable if there is another remedy to make the right operational. In 1961, the Warren Court did, in fact, authorize such a remedy against state and local officials under 42 U.S.C. § 1983,[213] and in 1971 the Burger Court created a similar remedy against federal officials, modeled on § 1983.[214] It is arguable that these remedies are illusory given the barriers the Court has placed on successful use of these causes of action.[215]

So far, the "good faith" exception applies only when a Fourth Amendment

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207. *E.g.,* Mitchell v. Wisconsin, 139 S. Ct. 2525, 2543 (2019); Carpenter v. United States, 138 S. Ct. 2206, 2221 (2018); City of Ontario, Calif., v. Quon, 560 U.S. 746, 760 (2010); Horton v. California, 496 U.S. 128, 133 & n.4 (1990); United States v. Karo, 468 U.S. 705, 717 (1984); Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); Mincey v. Arizona, 437 U.S. 385, 390 (1978); Coolidge v. New Hampshire, 403 U.S. 443, 470–71 (1971).

208. Franks v. Delaware, 438 U.S. 154, 164 (1978). Consistent with its move toward a "good faith" exception, however, the Court continued to note that the Warrant Clause "takes the affiant's good faith as its premise." *Id.*

209. United States v. Leon, 468 U.S. 897, 903–05 (1984).

210. Herring v United States, 555 U.S. 135, 137–38 (2009); Arizona v. Evans, 514 U.S. 1, 4–5 (1995).

211. In *Illinois v. Krull*, 480 U.S. 340 (1987), the officer relied on a statute later found unconstitutional. In *Davis v. United States*, 564 U.S. 229 (2011), the officer relied on a Reasonableness Clause doctrine contained in binding precedent that was later overturned.

212. *Supra* notes 191–94.

213. Monroe v. Pape, 365 U.S. 167 (1961).

214. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971).

215. *See., e.g.,* Harrington, James C., *Overcoming Section 1983 Hurdles: Using the Americans with Disabilities Act to Re-open the Civil Rights Door and Hold Government and Police Accountable*, Georgetown University Law Center Continuing Legal Education 25th Annual Section 1983: Civil Rights Litigation (2007), 2007 WL 5269445 at *1, n.1 and at *2-3; *cf.* Kamisar, *supra* note 6, at 33 (noting "[t]he 'substantial' costs said to be exacted by the exclusionary rule would also be exacted by *any other* means of enforcing the Fourth Amendment *that worked*") (emphasis in original); *id.* at 39 (noting that a meaningful tort remedy also puts pressure on courts to water down search-and-seizure rules).

violation was on the part of actors other than law enforcement officers themselves, and there may even be limits to the exception where it does apply.[216] Nevertheless, use of the exception means that prosecutors may freely use evidence seized in violation of the Fourth Amendment making their case against those accused of crimes.

As the Supreme Court said in *Marbury v. Madison*, "[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress."[217] As the Warren Court observed in *Terry v. Ohio*,

> [I]n our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions . . . . A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.[218]

The current Court's use of the "good faith" exception is tantamount to authorizing a category of searches that may be conducted in violation of the Fourth Amendment.

V. CONCLUSION

By employing rhetoric that is easily manipulatable, the Warren Court planted the seeds that later Courts would use to frustrate an expansive interpretation of Fourth Amendment protections. This article has traced ways that counter-revolution occurred in three basic areas of Fourth Amendment law: determining whether government activity is covered by the Amendment at all, determining whether a warrantless search was "reasonable," and determining whether evidence seized through an unreasonable, warrantless search is nevertheless admissible in the prosecution's case in chief.[219] Although the current Court may be reversing the trend in some areas—especially those involving intrusive technology—the promise of a Warren Court expansion of Fourth Amendment rights has often been defeated by use of the tools that Court itself provided.

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216. *But see*, Herring v. United States, 555 U.S. 135, 146 (2009) (suggesting that recklessness in maintaining a warrant system or systemic errors might eliminate a "good faith" exception).

217. Marbury v. Madison, 5 U.S. 137, 147 (1803); *see also, id*. at 163 (noting that affording a remedy for injury is the "very essence of civil liberty" and citing Blackstone).

218. Terry v. Ohio 392 U.S. 1, 12–13 (1968).

219. As Professor Kamisar noted, "[t]here are two principal ways to reduce the impact of *Mapp v. Ohio*: (a) by narrowing the thrust of the exclusionary rule . . . and (b) by shrinking the scope of the amendment itself. . . ." Kamisar, *supra* note 6, at 30. As this article has traced, the Court has used Warren Court rhetoric to do both.