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JUSTICE THURGOOD MARSHALL: TAKING THE FOURTH AMENDMENT SERIOUSLY

Tracey Maclin†

INTRODUCTION

"A dangerous, humiliating, sometimes fatal encounter with the police is almost a rite of passage for a black man in the United States."¹ Even a black man who becomes a Justice on the United States Supreme Court can recall such an encounter. For Thurgood Marshall, the incident occurred at a train station in a small Mississippi town during the early 1940s. As Justice Marshall tells the story, pangs of hunger and a long wait for the next train encouraged him to visit a local restaurant next to the station. While considering the thought,

"[a] white man came up beside me in plain clothes with a great big pistol on his hip. And he said, 'Nigger boy, what are you doing here?' And I said, 'Well, I'm waiting for the train to Shreveport.' And he said, 'There's only one more train comes through here, and that's the 4 o'clock, and you'd better be on it because the sun is never going down on a live nigger in this town.' I wasn't hungry anymore."²

While no absolute conclusions about Justice Marshall's judicial philosophy should be drawn from a single episode, this story reveals much about his perception of the effect police actions have on individual lives.

Life experiences and personal perspective often influence how one envisions the substance and function of the Constitution and

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¹ Don Wycliff, *Blacks and Blue Power*, N.Y. TIMES, Feb. 8, 1987, at A22.

² Juan Williams, *Marshall's Law*, in EIGHT MEN AND A LADY 125 (1990). For a slightly different version of this incident, see RICHARD KLUGER, SIMPLE JUSTICE 224 (1976):

In one account of a Southern trip, [Marshall] told how he had stopped off at a small Mississippi town and was contemplating an overnight stay: "I was out there on the train platform, trying to look small, when this cold-eyed man with a gun on his hip comes up. 'Nigguh,' he said, 'I thought you oughta know the sun ain't nevah set on a live nigguh in this town.' So I wrapped my constitutional rights in cellophane, tucked 'em in my hip pocket . . . and caught the next train out of there."

the Bill of Rights.³ Constitutional criminal procedure, in particular, is an area of the law in which one's experiences and point of view regarding governmental power play an important role. General trust in governmental power or deference to governmental decisions may lead one to minimize constitutional liberties or view them as tools for efficient law enforcement. Many consider deference to government authority necessary for effective governance of a complex and violent society,⁴ and evaluate police procedures for their ability to further law enforcement needs. Under this approach, the

³ See Williams, *supra* note 2, at 141-42:

At times [Justice Marshall] becomes terribly frustrated about failing to change his colleagues' minds. "I mean, I didn't persuade them on affirmative action, did I?" I didn't persuade them in [Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978)]. And he is constantly aware of [his colleagues'] innocence. "What do they know about Negroes?" he says. "You can't name one member of this court who knows anything about Negroes before he came to this court. Name me one. Sure, they went to school with one Negro in the class. Name me one who lives in a neighborhood with Negroes. They've got to get over that problem, and the only way they can do it is the person himself. What you have to do—white or black—you have to recognize that you have certain feelings about the other race, good or bad. And then get rid of them. But you can't get rid of them until you recognize them."

See also Owen Fiss, *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 49, 53-54 (1991), noting that Justice Marshall's response to the majority's ruling in *United States v. Kras*, 409 U.S. 434 (1973), requiring a \$50 filing fee as a condition for a voluntary discharge in bankruptcy, did not violate the Constitution. The Court found that the fee could be repaid for an amount that was "less than the price of a movie and a little more than the cost of a pack or two of cigarettes." 409 U.S. at 449. Justice Marshall retorted:

A pack or two of cigarettes may be, for [the poor], not a routine purchase but a luxury indulged in only rarely. The desperately poor almost never go to see a movie, which the majority seems to believe is an almost weekly activity. . . . It is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised on unfounded assumptions about how people live.

409 U.S. at 460 (Marshall, J., dissenting).

⁴ Efforts to effectively regulate and restrain law enforcement methods have always been slow to succeed. Traditionally many express alarm at any effort to regulate police practices considered necessary to fight crime. For example, some have justified police methods for obtaining confessions—even confessions secured under questionable conditions—as necessary without paying much attention to constitutional rights. See, e.g., *Crooker v. California*, 357 U.S. 433, 441 (1958) (police efforts to continue questioning suspect despite repeated requests to see a lawyer does not violate due process; a contrary rule would have "devastating effect" on law enforcement because "it would effectively preclude police questioning—fair as well as unfair—until the accused was afforded opportunity to call his attorney."). See generally Fred E. Inbau, *Police Interrogation—A Practical Necessity*, 52 J. CRIM. L., CRIMINOLOGY & POL. SCI. 16 (1961) (arguing that effective police interrogation requires methods that might be seen as unethical in noncriminal, everyday situations).

At one time, some even urged that society turn a blind eye to third degree tactics. "Bad as the third degree is, we should be very cautious about disrupting the police department and the courts in the hope of abolishing it." Zechariah Chafee, Jr., *Remedies for the Third Degree*, ATLANTIC MONTHLY, Nov. 1931, at 621, 625-26, 630. See also Yale Kamisar, *A Dissent from the Miranda Dissents: Some Comments on the 'New' Fifth Amendment and*

central purpose of the criminal justice process is to separate the guilty from the innocent⁵ with little concern for whether the "suspect was accorded his full *Miranda* warnings at precisely the appropriate time or whether he received the assistance of counsel as he stood in a lineup."⁶

Alternatively, if one has witnessed and lived with the oppression of governmental power or experienced the impact of governmental authority on individual liberty, one may view constitutional rights as substantive safeguards designed to check the government as well as to advance personal liberties. The Bill of Rights helps, but fails to provide a completely even playing field between the citizen and the government. Where the typical police-citizen encounter is inherently unequal, the safeguards of the Fourth, Fifth, and Sixth Amendments, as articulated by the judiciary,⁷ guarantee rights that the executive and legislative branches of government, if left to their own devices, are not likely to respect or enforce. In other words,

the Old 'Voluntariness' Test, in POLICE INTERROGATION AND CONFESSIONS 63 (Yale Kamisar ed., 1980).

For a lively debate about this "bygone" era, compare Joseph D. Grano, *Introduction—The Changed And Changing World of Constitutional Criminal Procedure: The Contribution of the Department of Justice's Office of Legal Policy*, 22 U. MICH. J.L. REF. 395 (1989), with Yale Kamisar, *Remembering the 'Old World' of Criminal Procedure: A Reply to Professor Grano*, 23 U. MICH. J.L. REF. 537 (1990) [hereinafter Kamisar, *Remembering the 'Old World'*]. Although "third degree" police tactics are generally associated with a past era, evidence occasionally surfaces that the police have not forgotten how to use such tactics. See Alex Kotlowitz, *Drug War's Emphasis On Law Enforcement Takes a Toll on Police*, WALL ST. J., Jan. 11, 1991, at A1 ("While interrogating a young man suspected of dealing crack cocaine, [a Dayton, Ohio police officer] grabbed a hot iron off the nightstand and repeatedly touched it to the bare skin of the handcuffed prisoner.").

⁵ This model of criminal procedure, often marched under the banner of "truth-finding" or the "search for truth," is generally associated with conservative critics of the Warren Court and has generated considerable attention. See Office of Legal Policy, *Report to the Attorney General on the Law of Pretrial Interrogation: Truth in Criminal Justice Report No. 1*, 22 U. MICH. J.L. REF. 437 (1989). Of course, notwithstanding the suggestions of those who champion the "truth-finding" model, one should note that this doctrine is "nowhere mentioned in the constitutional text and never articulated in the legislative history, as a guide to constitutional adjudication." Donald S. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REF. 591, 593 (1990). An emphasis on "truth-finding" does, however, allow conservative critics of the Warren Court to minimize or ignore those values that are mentioned in the constitutional text. For instance, the right to be free from unreasonable search and seizure, the right not to be compelled to incriminate oneself, and the right to the assistance of counsel.

⁶ H. RICHARD UVILLER, *TEMPERED ZEAL* xiv (1988).

⁷ Cf. Dripps, *supra* note 5, at 603 ("What most of us have accepted, what most of us invoke when we claim the protection of the Constitution, is not the instrument interpreted historically, but the instrument interpreted judicially."). See also Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition,"* 16 CREIGHTON L. REV. 565, 592 (1983) ("The courts, after all, are the specific addresses of the constitutional command that 'no Warrants shall issue, but upon' certain prescribed conditions.") (emphasis added) (footnote omitted).

constitutional liberties embody substantive values that transcend concerns with efficient police procedure.

In my view, the life and career of Thurgood Marshall—both on and off the Supreme Court—epitomize what the Bill of Rights and the Supreme Court mean to the politically weak and socially vulnerable members of society. Thurgood Marshall's experiences and triumphs as a civil rights lawyer are well known.⁸ Those experiences undoubtedly influenced his views on the meaning of individual freedom and equality. However, another side of Justice Marshall's life is less well known.

Thurgood Marshall "cut his teeth" as a lawyer "in backwater southern towns, overwhelmed but not overmatched by a twisted white justice wrought by judges and sheriffs who had few second thoughts about beating in black heads."⁹ Marshall's experiences as a young lawyer confronting police officials and representing black defendants probably account for some of his views on the death penalty,¹⁰ the relevance of the Fifth Amendment privilege against self-incrimination to police interrogation practices,¹¹ and the impor-

⁸ See KLUGER, *supra* note 2 (1976); *A Tribute to Justice Thurgood Marshall*, 105 HARV. L. REV. 23 (1991); *Tributes: "In Honor of Justice Thurgood Marshall,"* 26 VAL. U. L. REV. xxxvii (1991).

⁹ Williams, *supra* note 2, at 114-15.

¹⁰ Shortly after graduating from law school, Marshall helped to defend a black man, George Crawford, charged with murdering a white man in Loudoun County, Virginia. Crawford was convicted and given a life sentence. Marshall viewed the disposition as a victory: "We won it. . . . If you got a Negro charged with killing a white person in Virginia and you got life imprisonment, then you've won. Normally they were hanging them in those days." Williams, *supra* note 2, at 122.

While on the Court, Justice Marshall consistently advocated the position that capital punishment violates the Eighth Amendment's prohibition against cruel and unusual punishment. See *Gregg v. Georgia*, 428 U.S. 153, 231-41 (1976); *Furman v. Georgia*, 408 U.S. 238, 315-71 (1972). One author attributes Marshall's current views on the death penalty to his early experiences as a lawyer representing capital defendants. Williams, *supra* note 2, at 124 ("[Marshall's] repeated contact with black defendants accused of capital crimes helped convince him that his fellow man should not be given the power to condemn others to death. He remembers many stories about lives that could easily have been snuffed out by the capriciousness of the white man's law.").

¹¹ As an attorney, Marshall was well acquainted with coercive police interrogation methods. During his testimony to the Senate Judiciary Committee considering his nomination to the Supreme Court, Senator Ervin peppered Marshall with questions about the meaning of the word "compelled" in the Self-Incrimination Clause of the Fifth Amendment. Marshall probably convinced the Senators that he knew what an "involuntary" confession was when he noted that he had "tried a case in Oklahoma where the man 'voluntarily' confessed after he was beaten up for 6 days." *Hearings Before The Committee on the Judiciary United States Senate*, 90th Cong., 1st Sess. 53 (1967). Marshall was probably referring to *Lyons v. Oklahoma*, 322 U.S. 596 (1944), which he argued before the Court. He was also responsible for writing the petitioners' brief in *Chambers v. Florida*, 309 U.S. 227 (1940), another case involving constitutionally dubious police interrogation methods.

As member of the Court, Justice Marshall was a strong defender of *Miranda v. Arizona*, 384 U.S. 436 (1966), and he opposed the efforts of the Burger and Rehnquist

tance of the Sixth Amendment's guarantee of effective counsel in criminal cases.¹²

Justice Marshall's train station encounter may also offer insight into his views on how police behavior impacts individual liberty and personal security. Most police confrontations implicate the protections delineated in the Fourth Amendment, which guarantees a citizen's right to be free from unreasonable searches and seizures.¹³ Justice Marshall's views on Fourth Amendment questions have been very consistent. Some officials have described his views as "anti-police,"¹⁴ a simplistic, yet unsurprising criticism. In our current polit-

Courts to cut back on the rationale supporting *Miranda*. See, e.g., *Pennsylvania v. Muniz*, 110 S. Ct. 2638, 2654 (1990) (Marshall, J., concurring in part and dissenting in part) (dissenting from plurality's recognition of a "routine booking exception" to *Miranda*); *Illinois v. Perkins*, 110 S. Ct. 2394, 2401 (1990) (Marshall, J., dissenting) (dissenting from a majority's recognition of an exception to *Miranda* that applies when an undercover officer posing as an inmate asks questions that may elicit an incriminating response). One notable exception is Justice Marshall's opinion for the Court in *Berkemer v. McCarty*, 468 U.S. 420 (1984) (roadside questioning of a motorist detained for a routine traffic stop is not considered custodial interrogation and does not require *Miranda* warnings). In *McCarty*, Justice Marshall concluded that traffic stops did not exert pressures upon detained motorists that would sufficiently impair the free exercise of their Fifth Amendment privilege. The bases for this conclusion—a motorist who sees a police officer's flashing lights behind him expects "that he will be obliged to spend a short period of time answering questions," *id.* at 437, and the "circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police," *id.* at 438—seem a bit strained. For criticism of *McCarty*, see George E. Dix, *Nonarrest Investigatory Detentions in Search and Seizure Law*, 85 DUKE L.J. 849, 931 (1985).

¹² See, e.g., *Mitchell v. Kemp*, 483 U.S. 1026, 1031 (1987) (Marshall, J., dissenting from denial of certiorari) ("Any reasonable standard of professionalism governing the conduct of a capital defense must impose upon the attorney, at a minimum, the obligation to explore the aspects of his client's character that might persuade the sentencer to spare his life."); *Strickland v. Washington*, 466 U.S. 668, 711 (1984) (Marshall, J., dissenting):

The majority contends that the Sixth Amendment is not violated when a manifestly guilty defendant is convicted after a trial in which he was represented by a manifestly ineffective attorney. I cannot agree. Every defendant is entitled to a trial in which his interests are vigorously and conscientiously advocated by an able lawyer.

¹³ The Fourth Amendment provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

¹⁴ Philip Caruso, head of New York City's 20,000 member Patrolmen's Benevolent Association, stated that Justice Marshall's resignation from the Supreme Court "is welcomed by police officers." Cameron Barr, *Supreme Court Shift Favors Police*, CHRISTIAN SCI. MONITOR, July 18, 1991, at 15. Caruso claimed that Justice Marshall "had more concern for criminals than for the rights of decent citizens and police officers." *Id.* Another police official, Ernest Curtsinger, chief of police in St. Petersburg, Florida, added that "Marshall's departure and almost anyone's replacement is going to be a benefit for the [police] profession as a whole." *Id.*

ical climate, anyone who expresses concern about constitutional safeguards is labelled as "soft" on criminals and "against" law enforcement.¹⁵

¹⁵ Professor Kamisar recently explained the origins of the "'public[s] perception' that many guilty criminals are being released on 'mere technicalities.'" Kamisar, *Remembering the 'Old World'*, *supra* note 4, at 551 (footnote omitted). According to Kamisar:

For decades police officials and prosecutors have been telling the public this. So have many politicians (who assume, probably correctly, that their chances of getting reelected are enhanced if they attack the courts for being "soft" on crime). So have many members of the press (who too often cannot resist oversimplifying or sensationalizing the crime problem).

Of course, a significant change of direction has occurred—at least at the level of the Supreme Court. The Court is now inclined to sacrifice constitutional rights in the name of law enforcement. *See Payne v. Tennessee*, 111 S. Ct. 2597, 2631 (1991) (Stevens, J., dissenting) (commenting that the "hydraulic pressure of public opinion . . . has played a role not only in the Court's decision to hear this case, . . . but even in its resolution of the constitutional issue involved") (citation and footnotes omitted).

State supreme courts and lower federal courts used to be considered "too close to the 'war on crime' and too susceptible to public influence to be counted on when the chips are down" to uphold constitutional claims of the criminally accused. Wayne R. LaFave, *Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment 'Seizures'?*, 1991 U. ILL. L. REV. 729, 763. The Supreme Court, on the other hand, was viewed as "the ultimate bulwark of the protections in the Bill of Rights." *Id.* Now, however, it appears that the Court has undertaken a role-reversal with the state and lower federal courts.

Over the past two terms, a majority of the Court has clearly supported Fourth Amendment claims in only two cases. *See James v. Illinois*, 493 U.S. 307 (1990) (holding that the exception to the Fourth Amendment exclusionary rule that permits use of illegally obtained evidence to impeach a defendant does not extend to impeachment of other witnesses); *Minnesota v. Olson*, 495 U.S. 91 (1990) (holding that an overnight guest has an expectation of privacy in the home of a third-party).

In a third case, *Florida v. Wells*, 495 U.S. 1 (1990), a unanimous Court affirmed the Florida Supreme Court's decision to suppress narcotics discovered in a closed container during an inventory search of an automobile because "the Florida Highway Patrol had no policy whatever with respect to the opening of closed containers encountered during an inventory search." *Id.* A five Justice majority, however, went on to declare that the state court erred in ruling that the Court's Fourth Amendment precedents require a policy either mandating or barring the inventory of closed containers. It noted that: "A police officer may be allowed sufficient latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself." *Id.*

Consequently, with the exception of *James* and *Olson*, the Court has spent the past two terms rejecting Fourth Amendment claims that were upheld by either a state or lower federal court. *See Maryland v. Buie*, 494 U.S. 325 (1990), *rev'g* Buie v. State, 314 Md. 151 (1988); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), *rev'g* 856 F.2d 1214 (9th Cir. 1988); *Michigan Dep't of State Police v. Sitz*, 110 S. Ct. 2481 (1990), *rev'g* Sitz v. State Police, 170 Mich. App. 433 (Mich. Ct. App. 1988); *Illinois v. Rodriguez*, 110 S. Ct. 2793 (1990), *rev'g* 177 Ill. App. 3d 1154 (Ill. App. Ct. 1989); *Alabama v. White*, 110 S. Ct. 2412 (1990), *rev'g* White v. State, 550 So. 2d 1074 (Ala. Crim. App. 1989); *New York v. Harris*, 110 S. Ct. 1640 (1990), *rev'g* People v. Harris, 72 N.Y.2d 614 (N.Y. 1988); *California v. Acevedo*, 111 S. Ct. 1982 (1991), *rev'g* 216 Cal. App. 3d 586; *Florida v. Jimeno*, 111 S. Ct. 1801 (1991), *rev'g* 564 So. 2d 1083; *California v. Hodari D.*, 111 S. Ct. 1574 (1991), *rev'g* 265 Cal. Rptr. 79 (Cal. Ct. App. 1989); *Florida v. Bostick*, 111 S. Ct. 2382 (1991), *rev'g* 554 So. 2d 1153 (Fla. 1989); *Riverside v. McLaughlin*, 111 S. Ct. 1661 (1991), *rev'g* 888 F.2d 1276 (9th Cir. 1989).

Justice Marshall, however, was not against the police; he was simply in favor of enforcing the Fourth Amendment. A review of his Fourth Amendment jurisprudence demonstrates his belief in a liberal application of the provision and his disapproval of a narrow interpretation that jeopardizes the liberty and privacy of all individuals, not just criminals. In deciding whether to apply the Fourth Amendment to challenged governmental intrusions, he urged his colleagues to be realistic about the power of government. Justice Marshall opposed uncontrolled police intrusions. He recognized that the reach of the Fourth Amendment defines the relationship between government and citizen, and shapes the society we live in.

Justice Marshall was also a strong proponent of the "warrant preference" rule. He believed that warrantless searches and seizures were unconstitutional unless the government could demonstrate the impracticality of obtaining a warrant. He vigorously opposed the view that the Fourth Amendment only requires police actions to be "reasonable." Justice Marshall argued, instead, that the Court had no commission to either "balance" the interests involved, or decide whether the government interests in effective law enforcement justify the abrogation of an individual's Fourth Amendment rights.

Finally, Justice Marshall had an acute awareness of the realities of police confrontations and a general distrust of police authority when directed at persons on the street. He recognized that police-citizen encounters are usually one-sided affairs where the police have the upper-hand. Ignoring this fact is troublesome—especially considering that the police often disregard or push constitutional safeguards to the limit.¹⁶

Disregarding this police advantage is counter-intuitive for another reason. The Fourth Amendment specifically, and the Bill of Rights generally, were designed to be anti-government provisions.¹⁷ As Professor Kamisar has observed, implicit in the Fourth Amendment is "a 'judicial veto' of the police."¹⁸ Like Justices of an earlier

¹⁶ See *Brinegar v. United States*, 338 U.S. 160, 182 (1949) (Jackson, J., dissenting) ("We must remember that the extent of any privilege of search and seizure without warrant which we sustain, the officers interpret and apply themselves and will push to the limit.").

¹⁷ See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 353 (1974).

¹⁸ Kamisar, *supra* note 7, at 593.

generation, including Louis Brandeis,¹⁹ Felix Frankfurter²⁰ and Robert Jackson,²¹ Justice Marshall viewed the protections of the Fourth Amendment as a recognition that the government could not cast aside indispensable human values for government needs, regardless of whether those needs are special, practical, or necessary to effectuate law enforcement concerns.

Despite his many years on the Court, Justice Marshall's Fourth Amendment views have had little impact on the current Court's position and are unlikely to significantly influence it in the foreseeable future. His views, however, have greatly influenced my perspective of the Fourth Amendment.

Should Americans applaud the retirement of another "liberal" Justice who had a progressive view of the Fourth Amendment? I think not. With Justice Marshall's resignation, the Fourth Amendment loses a powerful supporter. Justice Marshall labored to make his colleagues see that privacy is *not* an "all-or-nothing" concept. He tried to open the Court's eyes to the reality of street encounters with the police. He believed that it was unfair for the police not to inform citizens of their right to refuse a police request to search their luggage or automobiles. His opinions spoke for the Fourth Amendment rights of all Americans. His voice and understanding of Fourth Amendment values will be deeply missed.

¹⁹ See *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting) overruled by *Berger v. New York*, 388 U.S. 41 (1967).

²⁰ See *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) overruled by *Chimel v. California*, 395 U.S. 752 (1969); *Harris v. United States*, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting).

²¹ See *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) (the rights embodied in the Fourth Amendment "are not mere second-class rights but belong in the catalog of indispensable freedoms.").

Some might argue that Justices Frankfurter and Jackson were not strong proponents of the Fourth Amendment in light of their opposition to applying the exclusionary rule to the states. In *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court held—with Justice Frankfurter writing for a majority that included Justice Jackson—that, in a state prosecution, the due process of the Fourteenth Amendment did not forbid the admission of evidence obtained in violation of the Fourth Amendment. In essence, *Wolf* decided that states could determine for themselves how they would enforce the Fourth Amendment's prohibition against unreasonable searches and seizures.

Neither Justice Frankfurter nor Justice Jackson saw any "inconsistency" between *Wolf* and *Weeks v. United States*, 232 U.S. 383 (1914), which held that, in federal criminal cases, evidence obtained in violation of the Fourth Amendment was inadmissible. See *Wolf*, 338 U.S. at 28 (*Weeks* "has been frequently applied and we stoutly adhere to it."); *Brinegar*, 338 U.S. at 181 (Jackson, J., dissenting) (The "inconsistency" between *Weeks* and *Wolf* "does not disturb me, for local excesses or invasions of liberty are more amenable to political correction, the Amendment was directed only against the new and centralized government, and any really dangerous threat to the general liberties of the people can come only from this source."). See generally Kamisar, *Remembering the 'Old World'*, *supra* note 4, at 539, 540 n.14; Kamisar, *supra* note 7, at 610, 616 nn.269-70, 296.

My goal in this Article is to examine the legacy and merits of Justice Marshall's Fourth Amendment jurisprudence. Specifically, I will discuss why the current Court ignores or rejects Justice Marshall's conception of the Fourth Amendment jurisprudence. Finally, I will demonstrate that all citizens should mourn the loss of Justice Marshall's contributions in this area.

I

WHEN DOES THE FOURTH AMENDMENT PROTECT US FROM GOVERNMENT INTRUSION?

A. Justice Marshall's View on the Scope and Function of the Fourth Amendment

Defining the reach of the Fourth Amendment has always been an arduous and controversial task for the Court. Several years ago, Professor Amsterdam wrote that the Court had yet to articulate "a basic conception as to what the Fourth Amendment protects or protects against."²² Although this problem continues to plague the Court, the public often perceives this concern as one attributable to the "technical" and arcane nature of search and seizure law.²³ This is unfortunate because the Fourth Amendment serves as "the centerpiece of a free, democratic society."²⁴

The Fourth Amendment marks the boundaries of the government's power to search and seize. Where the Court sets those boundaries is important to a free society.²⁵ "Uncontrolled search and seizure is one of the first and most effective weapons in the arse-

²² Amsterdam, *supra* note 17, at 386.

²³ Professor Grano argues that the application of the Fourth Amendment's exclusionary rule to the states, announced in *Mapp v. Ohio*, 367 U.S. 643 (1961), is largely responsible for the public perception "that the criminal justice system releases defendants on 'technicalities,' . . . and converted search and seizure law into an arcane subject that consumes half of the standard criminal procedure course in many law schools." Grano, *supra* note 4, at 395-96 n.3. I agree with Professor Kamisar that the application of the exclusionary rule to the states had nothing to do with making the Fourth Amendment a troublesome area of constitutional law. "The exclusionary rule did not *make* the law complicated and difficult—it did not, to use Grano's language, 'convert search and seizure law into an arcane subject.' The rule only made a difficult and complex body of law *relevant*." Kamisar, *Remembering the 'Old World'*, *supra* note 4, at 557.

²⁴ Yale Kamisar, *The Fourth Amendment And Its Exclusionary Rule*, *THE CHAMPION*, Aug. 1991 at 2.

²⁵ One cannot . . . imagine a free society without some protection against unreasonable searches and seizures. By definition, a society that permits its police to search or arrest whenever or whomever they please is not a free society. . . .

The fourth amendment, therefore, should be viewed along with a few other safeguards, such as the first amendment's protection of political speech, as a bulwark of civil liberty and of freedom itself.

Joseph D. Grano, *Probable Cause and Common Sense: A Reply To The Critics of Illinois v. Gates*, 17 U. MICH. J.L. REF. 465, 519-20 (1984).

nal of every arbitrary government."²⁶ To say that "few issues [are] more important to a society than the amount of power that it permits its police to use without effective control by law is no exaggeration."²⁷ As Professor Kamisar asks: "What good is freedom of speech or freedom of religion or any other freedom if law enforcement officers have unfettered power to violate a person's privacy and liberty when he sits in his home or drives his car or walks the streets?"²⁸

Justice Marshall understood this point well. He urged his colleagues to consider the ramifications of uncontrolled police intrusions. Marshall consistently adopted a broad view of the Fourth Amendment's reach, believing that a narrow view, in effect, would mean police could act without restraint in a myriad of police-citizen encounters. Once the Court decides that a challenged police activity does not constitute a "search" or "seizure" within the meaning of the Fourth Amendment, then constitutional restraints are never triggered.²⁹ Police officials are free to conduct the challenged activity anytime, and against anyone they wish—by sending an undercover agent into our homes or offices, flying over our backyards, trespassing onto our farmlands, subpoenaing our bank records,

²⁶ *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting). As Justice Frankfurter warned. Society often forgets that

the Bill of Rights reflects experience with police excesses. It is not only under Nazi Rule that police excesses are inimical to freedom. It is easy to make light of insistence on scrupulous regard for the safeguards of civil liberties when invoked on behalf of the unworthy. It is too easy. History bears testimony that by such disregard are the rights of liberty extinguished, heedlessly at first, then stealthily, and brazenly in the end.

Davis v. United States, 328 U.S. 582, 597 (1946) (Frankfurter, J., dissenting).

²⁷ Amsterdam, *supra* note 17, at 377.

²⁸ Kamisar, *supra* note 24, at 2. See also *Harris v. United States*, 331 U.S. 145, 163 (1947) (Frankfurter, J., dissenting) ("How can there be freedom of thought or freedom of speech or freedom of religion, if the police can, without warrant, search your home and mine from garret to cellar merely because they are executing a warrant of arrest?"); Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, in POLICE POWER AND INDIVIDUAL FREEDOM 87, 97 (Claude R. Sowle ed., 1962):

The basic . . . problem of a free society is the problem of controlling the public monopoly of force. All the other freedoms, freedom of speech, of assembly, of religion, of political action, pre-suppose that arbitrary and capricious police action has been restrained. Security in one's home and person is the fundamental without which there can be no liberty.

²⁹ Of course, it is theoretically possible to raise a due process challenge to an investigative procedure that "shocks the conscience." *Rochin v. California*, 342 U.S. 165, 172 (1952). In *Rochin*, police forcibly entered a suspect's home without warrant. After the suspect placed capsules in his mouth, police "jumped upon" him in an attempt to remove the capsules. Unsuccessful in their attempt to retrieve the capsules, the police escorted the handcuffed suspect to hospital and ordered his stomach pumped, which induced vomiting and produced the two capsules that contained morphine. *Id.* at 166. *Rochin's* "shocks the conscience" standard, however, has been confined to cases of "coercion, violence or brutality to the person." *Irvine v. California*, 347 U.S. 128, 133 (1954) (plurality opinion).

searching our garbage, recording the phone numbers we dial, or accosting us on the streets to ask for identification.³⁰

In sum, in defining the reach of the Fourth Amendment, the Court goes a long way toward defining the type of society live in.³¹ The scope of the Amendment determines whether society "want[s] to govern our police instead of being governed by them,"³² and greatly affects the amount of privacy and personal security we enjoy in our everyday lives.³³ Justice Marshall consistently favored a broad reading of the protection against unreasonableness searches and seizures because he believed that an "ungrudging application of the Fourth Amendment is indispensable to preserving the liberties of a democratic society."³⁴

1. *Defining a "Search" Under the Fourth Amendment: The Problem with "Risk Analysis"*

One aspect of the debate over the Fourth Amendment's reach has generated substantial criticism both on and off the Court. The controversy involves the current method for defining a "search." For the past two decades, the Court has used its definition of "search" to narrow the Amendment's coverage in a way that eliminates constitutional restraint on many police intrusions.

The Court has posited that the Fourth Amendment:

"does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even

³⁰ As Professor Amsterdam has aptly noted, if challenged police activities are not subject to constitutional review, then these activities "may be as unreasonable as the police please to make them." Amsterdam, *supra* note 17, at 388.

³¹ See Amsterdam, *supra* note 17, at 403:

The ultimate question, plainly, is a value judgment. It is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society[:]

see also Brian J. Serr, *Great Expectations of Privacy: A New Model for Fourth Amendment Protection*, 73 MINN. L. REV. 583, 595, 624 (1989).

³² Amsterdam, *supra* note 17, at 380.

³³ Of course, one should always remember that no matter what the Court says—in the final analysis—police officers ultimately will decide whether the rules established by the judiciary and legislative branches of government will actually be applied to the person in the street.

If and when the police deny legal protection to individuals, abridge due process, or employ distinctions of race and class, it is patrolmen who do so. In short, patrolmen are profoundly involved with the most significant questions facing any political order, those pertaining to justice, order, and equity. They necessarily trade in the recurring moral antinomies that accompany political choice, and through the exercise of discretion patrolmen define and redefine the meaning of justice.

MICHAEL K. BROWN, *WORKING THE STREET* 6-7 (1988).

³⁴ *Rawlings v. Kentucky*, 448 U.S. 98, 121 (1980) (Marshall, J., dissenting).

if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed."³⁵

This view of the Fourth Amendment's protection, sometimes called risk analysis, reflects the Court's belief that individuals "assume the risk" when they place themselves in a position that permits third parties to glean incriminating information.³⁶ When the government subsequently obtains that information, the Fourth Amendment is not implicated because those individuals have assumed the risk. Under risk analysis, the Fourth Amendment does not protect these individuals because society, the Court tells us, does not consider their interests "objectively reasonable."³⁷

Justices favoring a broad reading of the Fourth Amendment have characterized risk analysis as a legal abstraction. Justice Marshall believed that risk analysis misses the point of the Fourth Amendment. If the point of the Amendment is "to prevent arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals,"³⁸ then attention should center on whether the challenged government conduct poses the potential for arbitrary and oppressive invasions.³⁹ An analysis

³⁵ United States v. Miller, 425 U.S. 435, 443 (1976).

³⁶ United States v. White, 401 U.S. 745, 752 (1971) (plurality opinion):
[O]ne contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubt he has, the risk is his.

³⁷ See, e.g., *California v. Greenwood*, 486 U.S. 35, 40-41 (1988) (while conceding that *Greenwood* held a subjective expectation that the contents of his garbage, which were wrapped in closed containers, would remain unexposed to the public, the Court stated that this expectation was not one which society was prepared to accept as reasonable).

³⁸ United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976).

³⁹ Arbitrary and unjustified government intrusions have been the focus of the Fourth Amendment because, as Professor Amsterdam has explained, they expose the citizenry to "indiscriminate" searches and seizures. Indiscriminate intrusions are condemned for two reasons:

The first is that they expose people and their possessions to interferences by government when there is no good reason to do so. The concern here is against *unjustified* searches and seizures: it rests upon the principle that every citizen is entitled to security of his person and property unless and until an adequate justification for disturbing that security is shown. The second is that indiscriminate searches and seizures are conducted at the discretion of executive officials, who may act despotically and capriciously in the exercise of the power to search and seize. This latter concern runs against *arbitrary* searches and seizures: it condemns the petty tyranny of unregulated rummagers.

Amsterdam, *supra* note 17, at 411; see also Kamisar, *supra* note 7, at 593 ("The 'central objectionable feature' of both the general warrant and the writs of assistance was that 'they provided no judicial check' on the discretion of executing officials.") (footnote omitted); Serr, *supra* note 31, at 594 n.60 (the proper underlying assumption of the

that focuses on the risks that a person has or has not assumed never reaches this central concern.

Moreover, risk analysis imposes an "all-or-nothing" approach to defining the reach of the Fourth Amendment. For Justice Marshall, "[p]rivacy is not a discrete commodity, possessed absolutely or not at all."⁴⁰ The partial disclosure of information to an isolated third party, whether intentionally or by necessity, is not the equivalent of giving police officials *carte blanche* access to that same information.⁴¹

Justice Marshall believed that investigatory activities which compromise individual privacy and security interests are subject to prior judicial review. Of course, simply stating that government intrusions require adherence to judicial processes only begs the question of what constitutes a government intrusion. Justice Marshall's response to this vexing question emphasized two elements. First, the pervasive nature of the challenged government conduct should be closely examined.⁴² The Court must carefully consider whether police officials should have absolute, unreviewable power to engage in a particular investigatory activity. Second, the Court should consider the impact this conduct would have on Fourth Amendment interests if left unregulated.

For example, should the Fourth Amendment restrict police efforts to infiltrate our homes with undercover agents on fishing expeditions? Should the police be free to send paid informants, equipped with electronic surveillance devices, into our homes for the purpose of determining who is or is not a criminal? If risk analysis is employed, a person has no Fourth Amendment protection against this type of secret police intrusion. After all, when we invite someone into our homes, even for innocent purposes, we run the risk of that person seeing evidence of criminality and then revealing it to the authorities. "[O]ne contemplating illegal activities must realize and risk that his companions may be reporting to the police."⁴³

Fourth Amendment is that government officials cannot be trusted to use power responsibly).

⁴⁰ *Smith v. Maryland*, 442 U.S. 735, 749 (1979) (Marshall, J., dissenting).

⁴¹ See Christopher Slobogin, *The World Without A Fourth Amendment*, 39 UCLA L. REV. 1, 103 (1991) (The Court's risk analysis "is based on a dangerous premise: that we should expect no privacy from the government when we do not expect it from others.") (footnote omitted).

⁴² *Smith*, 442 U.S. at 751 (The judiciary "must evaluate the 'intrinsic character' of in investigative practices with reference to the basic values underlying the Fourth Amendment" when defining its coverage).

⁴³ *United States v. White*, 401 U.S. 745, 752 (1971) (plurality opinion). Professor Serr has noted that "the Court's [risk] analysis has no stopping point. If the mere possibility of public observance or intrusion renders subjective privacy expectations illegitimate, the Fourth Amendment will not protect *even the home*, unless its occupants take

Justice Marshall believed that Fourth Amendment protection should not depend on this legal fiction.⁴⁴ When we hire a chauffeur, repairperson, housekeeper, or babysitter, or invite a neighbor or salesperson into our homes, we do not expect or assume that the person is a government agent sent on a secret spy mission. The risk analysis model of the Fourth Amendment is unconvincing. The Court's attempt to cast the issue as involving only risks assumed by "criminals" is intellectually dishonest. When the Court allows infiltration of our homes by undercover agents without prior judicial approval and without any individual suspicion, "then the government may unleash its spies on any of us, criminals or not; and talk about 'criminals' assuming the risks means that we all assume the risks."⁴⁵ Fortunately, most of us are not so distrustful of government that we think the way a majority of the Court claims we do.⁴⁶

Under Justice Marshall's view of the Fourth Amendment, this type of secret police undercover activity would be subject to Fourth Amendment scrutiny. If the Fourth Amendment is inapplicable in this context, then nothing restrains the government from sending disguised agents into any person's home, even where no basis exists to suspect criminality. In other words, the police can engage in covert investigations at any time, against any target, and for any reason, whether good or bad—the archetype of arbitrary and oppressive intrusion. If the point of the Fourth Amendment is to prohibit these government invasions, then Justice Marshall believed it should be interpreted to produce this result.⁴⁷

The impact of unregulated police conduct on Fourth Amendment interests should also be considered when deciding whether an intrusion has occurred. Fourth Amendment protection extends beyond the assumptions and expectations of the average person.⁴⁸ Even if one could argue that the average person assumes everyone she invites into her home is a government agent, the Fourth Amendment, as a textual and normative proposition, provides substantive

steps to ensure that no other member of the public ever enters." Serr, *supra* note 31, at 619 (emphasis added).

⁴⁴ See *Baldwin v. United States*, 450 U.S. 1045 (1981) (Marshall, J., dissenting from denial of certiorari). In *Baldwin*, an undercover police officer, as part of a general investigation, sought a position as Baldwin's repairperson and chauffeur. The agent was hired for a six month period and lived in Baldwin's home. During this time, unbeknownst to Baldwin, the officer discovered and retrieved evidence of cocaine.

⁴⁵ Amsterdam, *supra* note 17, at 470 n.492.

⁴⁶ Cf. Slobogin, *supra* note 41, at 104 (uncontrolled undercover activity by government agents jeopardizes state's interest in "maintaining allegiance of its citizenry and its objective of nurturing an open, democratic society.").

⁴⁷ See, e.g., *Baldwin*, 450 U.S. 1049 (Marshall, J., dissenting from denial of certiorari).

⁴⁸ See *United States v. White*, 401 U.S. 745, 786 (1971) (Harlan, J., dissenting); Amsterdam, *supra* note 17, at 384.

protection for her interests (including the home)⁴⁹ apart from the ordinary assumptions and expectations of the average person.

Warrantless entries into the home are supposed to be *per se* unreasonable in the absence of exigent circumstances.⁵⁰ Under risk analysis, however, this principle is ignored.⁵¹ Justice Marshall did not believe the Fourth Amendment's protection of the home should rest on such untenable grounds. Imagine a regime where, when the doorbell rings, a homeowner must guard against the young student soliciting funds for a public interest environmental group or the person requesting to read the water meter, because both may be government agents. Is this state of affairs really one which our society finds "objectively reasonable"? Do we really wish to live in such a regime? Justice Marshall thought not.⁵²

Skeptics might argue that neither society nor individuals are well-served by a reflexive response that subjects all police intrusions to the warrant and probable cause requirements. Not all government intrusions into a home advance traditional law enforcement activities.⁵³ Sometimes the government demands access to the home for benign reasons. In such cases, skeptics argue that the Fourth Amendment plays no role. In *Wyman v. James*,⁵⁴ the Court

⁴⁹ "The right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated." U.S. CONST. amend. IV.

⁵⁰ See *Payton v. New York*, 445 U.S. 573 (1980).

⁵¹ See *White*, 401 U.S. at 745 (plurality opinion); *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974).

⁵² See *Baldwin v. United States*, 450 U.S. 1045, 1049 (Marshall, J., dissenting from denial of certiorari):

If the decision of the Memphis police to place an undercover agent in petitioner's home for a 6-month period, during which the agent rifled through his belongings in the search for incriminating evidence, does not implicate the [Fourth Amendment], it is hard to imagine what sort of undercover activity would. Indeed, under the [lower court's reasoning], the Government need never satisfy the probable-cause and warrant requirements of the Fourth Amendment if, by disguising its officers as repairmen, babysitters, neighbors, maids, and the like, it is able to gain entry into an individual's home by ruse rather than force in order to conduct a search. (footnote omitted).

⁵³ See, e.g., *Camara v. Municipal Court*, 387 U.S. 523, 535 (1967) ("Unlike the search pursuant to a criminal investigation, the [administrative] inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property."); but cf. Phyliss T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 507 n.178 (1991):

[I]t seems rather apparent that administrative searches were the violations with which the Framers [of the Fourth Amendment] were intimately familiar and primarily concerned at the time of the drafting. Intrusions by King George's roving patrols, authorized by writs of assistance to look for administrative violations of the tax and customs rules, were the very searches against which the colonists were reacting. It is, thus, most ironic that modern interpretation reduces Fourth Amendment protections in just the situation that we most clearly can trace back to its origin.

⁵⁴ 400 U.S. 309 (1971).

appeared to agree, suggesting that the Fourth Amendment does not apply when welfare recipients refuse mandatory warrantless entries by social workers.⁵⁵

Justice Marshall, on the other hand, had no doubt that the Fourth Amendment should govern these "home visits." He stated that "[t]he Constitution protects the privacy of the home against all unreasonable intrusion of whatever character."⁵⁶ A home visit is a search within the meaning of the Fourth Amendment for two reasons. First, while it is true that caseworkers are interested in the physical and psychological well being of the recipients, they are "required to be sleuths" as well.⁵⁷ In other words, "the welfare visit is not some sort of purely benevolent inspection."⁵⁸

Second, the intrusion on the recipients' privacy and dignity is neither diminished by the purposes of the visit nor by the degree of sanction imposed for refusal to allow home visits. No logic exists "in the view that the ambit of the Fourth Amendment depends not on the character of the governmental intrusion but on the size of the club that the State wields against a resisting citizen."⁵⁹ A contrary view ignores the realities of welfare recipients and trivializes the value of the home.

Unlike the majority of the Court, Justice Marshall understood that constitutional protection of the home is just as important to the

⁵⁵ *Id.* According to the majority, *James* did not involve a Fourth Amendment "search" for two reasons. First, a home visit by a caseworker was not the typical investigative search normally "equated with a search in the traditional criminal law context." *Id.* at 317. Second, one could not characterize the home visit as forced or compelled, because no visit would occur if the recipient refused. Justice Blackmun explained that the visitation in itself is not forced or compelled, and that the beneficiary's denial of permission is not a criminal act. If consent to the visitation is withheld, no visitation takes place. The aid then never begins or merely ceases, as the case may be. There is no entry of the home and there is no search.

Id. at 317-18. See also Robert A. Burt, *The Burger Court and the Family*, in *THE BURGER COURT* 92, 94-95 (V. Blasi ed., 1983) (noting that the *James* Court construed the beneficiary's "supplicant posture as a general waiver of the [beneficiary's] ordinary claims to personal or family privacy"). Although the Court in *James* was unable (or unwilling) to see the coercion that a home visit forces upon a welfare recipient, in *Nollan v. California Coastal Comm.*, 483 U.S. 825 (1987), the Court had no trouble recognizing coercion of a property holder.

Nollan held that requiring a landowner to grant a public easement across a beachfront section of private property as a condition for building a home on the property was a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments. Writing for the majority, Justice Scalia noted even if the state agency's plan were a "good idea," coastal residents could not "be compelled to contribute to its realization" without payment. *Id.* at 841-42.

⁵⁶ *James*, 400 U.S. at 339, quoting *Poe v. Ullman*, 367 U.S. 497, 550-51 (1961) (Harlan, J., dissenting).

⁵⁷ *Id.* at 339 (Marshall, J., dissenting).

⁵⁸ *Id.*

⁵⁹ *Id.* at 340-41.

poor as it is to the wealthy. Focusing on whether the welfare recipient can exclude the caseworker, though partially correct, falls short of the analysis demanded by the Fourth Amendment. While our homes are important because we can exclude unwanted persons,⁶⁰ homes serve other equally important interests as well. In our homes, we are secure even when unwanted persons are not seeking entry. We can watch any television program, regardless of its intellectual value, and we can listen to any type of music, whether it be country and western or rap. In our homes, we can walk around naked, leave month-old newspapers lying around, or sit on ragged chairs.

A home not only furnishes security and privacy, it embodies our independence.⁶¹ Surely, this quality of independence is part of the "ancient concept that a man's home is his castle."⁶² An individual is sovereign in his or her home. The Court in *James* overlooks this aspect of the Fourth Amendment when it suggests that a home visit is not a search. Justice Marshall, however, understood that these interests in the home, while important to the wealthy, are no less important to recipients of government assistance.⁶³

*Smith v. Maryland*⁶⁴ exemplifies Justice Marshall's opposition to a narrow definition of the Fourth Amendment. In *Smith*, the Court concluded that people cannot claim any privacy interest in the numbers dialed on their telephones. Because the telephone company receives these numbers, the caller assumes the risk that the police might have access to this information. The Court ruled that the Government's installation and use of a mechanical device which

⁶⁰ Compare *Oliver v. United States*, 466 U.S. 170, 190 (1984) (a legitimate expectation of privacy is implicit in property owner's right to exclude) with *Minnesota v. Olson*, 495 U.S. 91, 96-97 (1990) (absence of an absolute right to exclude is not inconsistent with overnight guests' expectation of privacy in the home of their host).

⁶¹ Cf. *Oliver*, 466 U.S. at 192 n.15 (Marshall, J., dissenting); Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (stating that a home is personal, not fungible).

⁶² *James*, 400 U.S. at 339 (Marshall, J., dissenting). As Professor Lasson has noted, the maxim, "a man's house is his castle," was not an invention of English jurisprudence. Even in ancient times there were evidences of that same concept in custom and law, partly as a result of the natural desire for privacy, partly an outgrowth, in all probability, of the emphasis placed by the ancients upon the home as a place of hospitality, shelter, and protection.

NELSON B. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* 13 (1937).

⁶³ Mrs. James' constitutional claims were not minimized simply because, as the majority suggests, the home visit is for the recipient's benefit. As Justice Marshall noted, such a "paternalistic notion that a complaining citizen's constitutional rights can be violated so long as the State is somehow helping him is alien to our Nation's philosophy." *James*, 400 U.S. at 343.

⁶⁴ 442 U.S. 735 (1979).

records the numbers dialed on a particular phone does not constitute a search within the meaning of the Fourth Amendment.⁶⁵

From Justice Marshall's perspective, the Court's analysis reflected a truncated view of Fourth Amendment protections in modern society. The reach of the Amendment should not turn on an analysis that has no limiting principle to prevent the government from eliminating all subjective expectations of privacy.⁶⁶ The Fourth Amendment, Justice Marshall believed, required the judiciary to exercise "some prescriptive responsibility" in articulating protected interests.⁶⁷ Risk analysis does not fulfill this responsibility because it is out of touch with the circumstances under which most Americans live.

Does the Court really believe that we have no sense of privacy in the telephone numbers we dial from our homes or in the financial records we deposit in the bank?⁶⁸ Justice Marshall is correct in characterizing this view of privacy as insufficient.⁶⁹ How would you feel if, during your drive to work, the radio station began broadcasting the telephone numbers you had dialed over the last month? Or if, while reading the morning newspaper, you saw copies of all the checks you had written during the past year? Better yet, how would you feel if, while watching television, you saw your name and a list of the movies you had rented over the last six months from the local video store? The outrage and indignation most people would feel in such situations belies the Court's contrary findings that people have no "actual expectation of privacy in the numbers they dial,"⁷⁰

⁶⁵ The Court concluded that installation of a pen register, "a mechanical device that records the numbers dialed on a telephone by monitoring the electrical impulses caused when the dial on the telephone is released," *Smith*, 442 U.S. at 736 n.1 (quoting *United States v. New York Tel. Co.*, 434 U.S. 159, 161 n.1 (1977)), does not implicate Fourth Amendment scrutiny. Pen registers do not acquire the contents of telephone user's communications, and telephone users "realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed." *Id.* at 742. Therefore, according to the Court, *Smith* "assumed the risk" that the telephone company would reveal these numbers to the police. *Id.* at 744.

⁶⁶ [T]o make risk analysis dispositive in assessing the reasonableness of privacy expectations would allow the government to define the scope of Fourth Amendment protections. . . . Yet, although acknowledging this implication of [risk] analysis, the Court is willing to concede only that, in some circumstances, a further "normative inquiry would be proper." No meaningful effort is made to explain what those circumstances might be, or why this case is not among them.

Id. at 750 (Marshall, J., dissenting) (citation omitted).

⁶⁷ *Id.* at 750.

⁶⁸ See *United States v. Miller*, 425 U.S. 435 (1976) (no expectation of privacy in financial information turned over to bank; Fourth Amendment not implicated by subpoena to bank officials to disclose this information to the government).

⁶⁹ *Smith*, 442 U.S. at 750-51 (Marshall, J., dissenting).

⁷⁰ *Smith*, 442 U.S. at 742.

or "legitimate expectation of privacy concerning the information kept in bank records."⁷¹ Risk analysis is fundamentally flawed because "[i]mplicit in the concept of assumption of risk is some notion of choice."⁷² In cases like these, the individual has no realistic opportunity to prevent government surveillance of the telephone numbers he dials, or access to his banking records, unless he is "prepared to forgo use of what for many has become a personal or professional necessity."⁷³

Moreover, risk analysis is a thin reed on which to rest Fourth Amendment principles because privacy is not an "all-or-nothing" concept. When we rent movies from the corner video store, the partial disclosure to the store owner of our taste in movies is not an open invitation to the police or anyone else to learn this preference. The constitutional interests of privacy and personal security deserve better treatment than this.

B. How Does the Current Court Define the Scope of the Fourth Amendment?

Justice Marshall's way of defining the reach of the Fourth Amendment—focusing on the pervasive character of the government conduct and its impact on Fourth Amendment interests if left uncontrolled—stands in sharp contrast to the model employed by the Court today. Currently, the needs and interests of law enforcement are paramount despite the use of suspicionless and oppressive intrusions to further these interests. The Court acknowledges individual interests—only to dismiss them summarily. *Florida v. Riley*,⁷⁴ *California v. Greenwood*,⁷⁵ and *California v. Hodari D.*⁷⁶ are recent examples of the Court's handiwork.

1. *When is a Search Not a Search? When the Police Target the "Right" People*

In *Florida v. Riley*, the Court ruled that police may, at any time, conduct planned aerial surveillance in a helicopter four hundred feet above a targeted greenhouse adjacent to a home.⁷⁷ *California v. Greenwood* held that the police could seize and examine opaque, sealed garbage bags left for collection at the curb of a home without justification.⁷⁸

⁷¹ *Miller*, 425 U.S. at 442.

⁷² *Smith*, 442 U.S. at 749 (Marshall, J., dissenting).

⁷³ *Id.* at 750.

⁷⁴ 488 U.S. 445 (1989).

⁷⁵ 486 U.S. 35 (1988).

⁷⁶ 111 S. Ct. 1547 (1991).

⁷⁷ *Riley*, 488 U.S. at 449.

⁷⁸ *Greenwood*, 486 U.S. at 39-42.

Writing for the Court in both cases, Justice White conceded that Riley and Greenwood entertained subjective expectations that no one would invade their property.⁷⁹ Despite this concession, Justice White concluded that these subjective expectations of privacy were not sufficient to merit Fourth Amendment scrutiny of the challenged police procedures. Put simply, the Court concluded that Riley and Greenwood were "puddingheads." "Because the sides and roof of his greenhouse were left partially open," Riley should have known that the police—without probable cause or a warrant—would twice fly over his residence in an attempt to discover what was inside his greenhouse.⁸⁰ Riley had no cause to complain because he should have known that federal regulations permit helicopters to fly below the minimum limits of navigable airspace for fixed-wing aircraft.⁸¹

Similarly, Greenwood should have known better than to leave his garbage at the curb.⁸² "It 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."⁸³ Greenwood also should have known that by exposing his garbage in this manner, he invited the trash collector to reveal its contents to any member of the public, including the police.⁸⁴ Certainly Greenwood could not expect the police to divert their eyes from such a find.⁸⁵

In *Riley* and *Greenwood*, the Court does not consider the pervasive nature of the government intrusion nor does it assess the impact of this intrusion on the everyday lives of individuals.⁸⁶ If the Fourth Amendment bars *arbitrary* intrusions by government officials, then little logic supports a ruling that permits the police, at their whim, to fly over someone's residence and take pictures of the ground below or seize and sort through the "intimate activity asso-

⁷⁹ See *id.* at 39 ("It may well be that respondents did not expect that the contents of their garbage bags would become known to the police or other members of the public."); *Riley*, 488 U.S. at 450 ("Riley no doubt intended and expected that his greenhouse would not be open to public inspection, and the precautions he took protected against ground-level observation.").

⁸⁰ *Riley*, 488 U.S. at 450.

⁸¹ *Id.* at 450-51.

⁸² Despite Justice White's suggestion that Greenwood had only himself to blame for the police search and seizure of his garbage, Justice Brennan's dissent pointed out the lack of choice confronting Greenwood regarding the placement of his garbage. "Greenwood can hardly be faulted for leaving trash on his curb when a county ordinance commanded him to do so." *Greenwood*, 486 U.S. at 54-55 (citing ORANGE COUNTY CODE § 4-3-45(a) (1986)).

⁸³ *Greenwood*, 486 U.S. at 40 (citations omitted).

⁸⁴ *Id.* at 40.

⁸⁵ *Id.* at 41.

⁸⁶ See *United States v. White*, 401 U.S. 745, 787 (1971) (Harlan, J., dissenting).

ciated with the 'sanctity of a man's home and the privacies of life' ⁸⁷ often revealed by the content of one's garbage.⁸⁸

These rulings exemplify a risk analysis supported only by the Court's own value judgments about what the Fourth Amendment should protect. For example, what supports the conclusion that Riley "could not reasonably have expected the contents of his greenhouse to be immune from examination"⁸⁹ by a police officer flying in navigable airspace? Although private and commercial flight by airplanes and helicopters is commonplace, the average person would not consider a planned, focused police surveillance of their backyard "routine."⁹⁰

The only substantive or empirical support for the Court's conclusion that Riley's expectation of privacy is unreasonable is a reference to the fact that "[m]ore than 10,000 helicopters" are registered in the nation, and "an estimated 31,697 helicopter pilots" live here.⁹¹ But how do these figures advance the analysis? With several million automobiles registered in the United States, and even more licensed drivers, does this mean that the Fourth Amendment has nothing to say about around-the-clock police surveillance of one's home? Further, does this permit the police to follow me wherever I go without triggering constitutional concern?⁹² I should hope not.

⁸⁷ *Greenwood*, 486 U.S. at 50 (Brennan, J., dissenting) (quoting *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

⁸⁸ It is no response to the Fourth Amendment positions of Riley and Greenwood to argue that the challenged government activity in their cases disclosed "no intimate details connected with the use of the home. . . ." *Riley*, 488 U.S. at 452. Such an assertion is patently false regarding the seizure and search of one's household garbage. Indeed, though Justice White made such an argument in *Riley*, he did not attempt to make a similar claim in *Greenwood*. But as Justice Brennan's dissent aptly noted, one has to wonder why it is necessary for Riley to prove that the intrusive police conduct exposed intimate facts about his life. Certainly the Fourth Amendment does not impose any such threshold requirement before its protections are triggered. Only judicial activism and "language stretching," *Katz v. United States*, 389 U.S. 347, 366 (1967) (Black, J., dissenting), by judges bent on achieving certain political results would seem to justify this type of reasoning.

⁸⁹ *Riley*, 488 U.S. at 450.

⁹⁰ See Tracey Maclin, *Constructing Fourth Amendment Principles From The Government Perspective: Whose Amendment Is It, Anyway?*, 25 AM. CRIM. L. REV. 669, 698-700 (1988). Imagine, while reading this Article, you looked out the window of your home or office and saw a police helicopter taking pictures of you. Would you consider this a routine event?

⁹¹ *Riley*, 488 U.S. at 450 n.2.

⁹² I must admit that I am not particularly sanguine about my constitutional claims if the FBI were to start following me around in light of the treatment (and lack of public outrage) accorded Felix Bloc. See *The Felix Bloc Affair*, N.Y. TIMES MAG., May 13, 1990, at 28 (State Department official publicly called a suspected spy. FBI agents conducted round-the-clock surveillance of Bloc for six months). Cf. "Arguments Before The Court" 56 U.S.L.W. 3599, 3600 (Chief Justice Rehnquist remarking in the oral argument of *Michigan v. Chesternut*, 486 U.S. 567 (1988), "that our cases hold that a police [sic] can 'follow' a person on the public street all day long without implicating the Fourth Amendment.").

Similarly, what supports the Court's conclusion that society is unwilling to recognize as reasonable Greenwood's subjective expectation that the police would not target his garbage for seizure and search? Apparently, the prevalence of scavengers in our society—whether human or otherwise—is important to this conclusion. But why is this pertinent to whether a police seizure and search of someone's garbage constitutes a Fourth Amendment search? Comparing police activities with “animals, children, scavengers [and] snoops” does little to further discussion.⁹³ Not only is collecting and examining “another's trash . . . contrary to commonly accepted notions of civilized behavior,”⁹⁴ but most of us “do not, and should not, expect the Government to be the scavenger.”⁹⁵ As Professor Amsterdam has pointed out, no reason exists for ruling that the Fourth Amendment is not implicated if the police break into a car or pay drug junkies to break into it, merely because people generally run the risk that a junkie may take such action.⁹⁶

Further, the Court's arguments in *Riley* and *Greenwood* defy common sense. Both cases involved whether a “search” occurred within the meaning of the Fourth Amendment. When the police made arrangements to collect and separate Greenwood's garbage “without mixing [it] with garbage from other houses,” and then “searched through the rubbish and found items indicative of narcotics use,”⁹⁷ what were the police doing if not “searching” Greenwood's garbage? When an investigating officer twice circled over Riley's greenhouse and “was able to see through the openings in the roof . . . [and] to identify what he thought was marijuana growing in the structure,”⁹⁸ what was the officer doing if not “searching” the greenhouse? “To most lay people, looking for evidence of crime is a ‘search,’ regardless of what [the Court says] that term may mean under the Fourth Amendment.”⁹⁹

On the other hand, the Court pays scant attention to the Fourth Amendment interests of the individual. In *Greenwood*, the Court offers only the bald statement that Greenwood's placement of his trash at the curb subjected him to the risk that someone “might” sort through the trash and turn its contents over to the police.¹⁰⁰ The Court never considers the pervasive threat of police officers seizing and examining the trash of individuals without restraint.

⁹³ *California v. Greenwood*, 486 U.S. 35, 40 (1988).

⁹⁴ *Id.* at 45 (Brennan, J., dissenting).

⁹⁵ See *Trashing Privacy*, N.Y. TIMES, May 18, 1988, at A30.

⁹⁶ See Amsterdam, *supra* note 17, at 407.

⁹⁷ *Greenwood*, 486 U.S. at 37-38 (emphasis added).

⁹⁸ *Florida v. Riley*, 488 U.S. 445, 448 (1989) (emphasis added).

⁹⁹ Slobogin, *supra* note 41, at 22 n.65.

¹⁰⁰ *Greenwood*, 486 U.S. at 40.

Not one word addresses the impact of this intrusion on the privacy concerns of individuals. A model of the Fourth Amendment that is more sensitive to individual interests might have approached the question differently.

Realistically, the Court would probably acknowledge, if pushed, that police conduct in *Riley* and *Greenwood* does constitute government intrusion that threatens legitimate privacy interests. What explains the results in these cases? The Court assumes that these intrusions will happen only to individuals like *Riley* and *Greenwood*. Thus, a majority of the Court trusts the police to target the "right" people. The Court also assumes that the police will not take advantage of these rulings and begin conducting pervasive searches of everyone's backyards or sealed garbage bags. This confidence in the police, however, is misplaced. The police subject many innocent people to such intrusions. Yet the problem lies in the fact that the Court seldom, if ever, reviews such cases when deciding search and seizure issues.

2. *Non-Seizure on the Street: By Walking on the Streets, Do People "Assume the Risk" of Arbitrary Displays of Police Authority?*

*California v. Hodari D.*¹⁰¹ also exemplifies the Court's use of tenuous arguments in an effort to disguise its police-minded reasoning. *Hodari* ruled that a police show of authority directed at a particular individual does not constitute a seizure under the Fourth Amendment unless, and until, the individual yields to or is physically restrained by the police.¹⁰² To reach this result, the Court employs an amalgam of legal arguments, none of which addresses the matter at

¹⁰¹ 111 S. Ct. 1547 (1991).

¹⁰² *Id.* at 1551. *Hodari* involved the following facts. While standing next to a car, several black, male youths apparently saw an unmarked police patrol car approaching them. Inside the patrol car were Officers McColgin and Pertoso. Both officers wore jackets with the word "Police" written on both the front and back. When the youths, including *Hodari*, saw the police vehicle, they took flight. *Id.* at 1549.

After the youths left the scene, the police gave chase. Officer Pertoso left the police car and headed down the back of the street where several of the youths had run. As Pertoso "approached from the rear, he saw [*Hodari*] running toward him while looking back over his shoulder as he ran. When Officer Pertoso and [*Hodari*] were about 11 feet apart, [*Hodari*] turned forward, saw the officer, and looked startled." Brief for the United States as *Amicus Curiae* 2, *California v. Hodari D.*, 111 S. Ct. 1547 (1991). After seeing the officer, *Hodari* tossed away what appeared to be a small rock. "A moment later, Pertoso tackled *Hodari*, handcuffed him, and radioed for assistance. *Hodari* was found to be carrying \$130 in cash and a pager; and the rock he had discarded was found to be crack cocaine." *Hodari*, 111 S. Ct. 1549.

The Court "accept[ed] as true for purposes of this decision," *Hodari*'s contention that Pertoso's chase and confrontation "qualified as a 'show of authority' calling upon *Hodari* to halt." *Id.* at 1550. If Pertoso's actions were not a "show of authority" intended for *Hodari* to halt, one has to wonder how the Court would characterize Pertoso's conduct.

hand: Should the police be free, without any cause for suspicion, to direct a show of authority against an individual?

Speaking for the Court, Justice Scalia saw no reason to apply the Fourth Amendment in this context because its text "does not remotely apply . . . to the prospect of a policeman yelling 'Stop, in the name of the law!' at a fleeing form that continues to flee. That is no seizure."¹⁰³ Neither did Justice Scalia see any reason to conclude that a show of authority by the police, standing alone, constitutes an "arrest" within the meaning of the common law. An arrest requires application of physical force or "where that is absent, *submission* to the assertion of authority."¹⁰⁴ Public policy does not justify imposition of constitutional restraints in this context because "[s]treet pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged."¹⁰⁵

Finally, we discover that the traditional test for determining whether the police have seized a person—"Would a reasonable person believe that he was not free to leave the police presence?"—was not really the constitutional standard after all.¹⁰⁶ According to the Court, this reasonable person test is only a partial declaration of

¹⁰³ *Id.* at 1550 (footnote omitted).

¹⁰⁴ *Id.* at 1551.

¹⁰⁵ *Id.* Of course, Justice Scalia did not explain why—if policy arguments are to partially determine this constitutional question—he places the burden on the individual, rather than the police. After all, police officers have no constitutional right to accost and question persons. Individuals, however, do have the right (at least, as the Court stated in the past) to avoid and resist a police inquiry. See *Florida v. Royer*, 460 U.S. 491, 497-98 (1983) (plurality opinion) (citations omitted):

The person approached [by a police officer], however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

It is possible, of course, that the Court has never given any credence to its earlier pronouncements that persons on the street have a constitutional right to avoid an approaching officer when the officer has no objective justification for detaining the person. If it did, cases like *Hodari* and *Michigan v. Chesternut*, 486 U.S. 567 (1988) (no Fourth Amendment seizure when police patrol car chases a person down the street), would have been decided differently. See Rachel A. Vane Cleave, *Michigan v. Chesternut and Investigative Pursuits: Is There No End to the War Between the Constitution and Common Sense?*, 40 HASTINGS L.J. 203, 216 (1988). What really explains these decisions is the Court's unstated premise that the police *do* have the right to accost, stop, and question citizens, even in situations where they have no objective basis for doing so. See Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets*, 75 CORNELL L. REV. 1258, 1265-77 (1990).

¹⁰⁶ The traditional test for determining whether a person has been seized was established in *United States v. Mendenhall*, 446 U.S. 544 (1980) (plurality opinion). That test stated: "A person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Id.* at 554.

what triggers constitutional review.¹⁰⁷ In other words, just because a person gets the message that the police do not intend for him to leave their presence does not mean that the Constitution has been triggered.¹⁰⁸

One can say several things about *Hodari*.¹⁰⁹ The reasoning underlying the Court's assessment of the issue of seizure—considering, *inter alia*, the common law meaning of an arrest or determining whether public policy is served by encouraging persons always to submit to arbitrary demonstrations of police authority—is unconvincing.¹¹⁰ My focus here, however, is on whether the Fourth

¹⁰⁷ According to *Hodari*, this standard "says that a person has been seized 'only if,' not that he has been seized 'whenever'; it states a *necessary*, but not a *sufficient* condition for seizure—or more precisely, for seizure effected through a 'show of authority.'" *California v. Hodari*, 111 S. Ct. 1547, 1551 (1991).

¹⁰⁸ Professor Kamisar summarized the significance of *Hodari* this way: "A 'seizure' comprises two basic elements: (1) *actual restraint* (terminating an individual's freedom of movement or otherwise acquiring physical control over him) as well as (2) *police conduct* (whether physical force or a show of authority) *that brings about the restraint.*" Yale Kamisar, Arrest, Search and Seizure, Remarks of Yale Kamisar at the U.S. Law Week's 13th Annual Constitutional Law Conference, 31 (Sept. 6, 1991) (on file with the author).

Professor Kamisar further explains that, in his view, "under *Hodari* restraint or submission [in the presence of the police] *without more* does not constitute a 'seizure,' just as coercive police conduct [which conveys to the reasonable person a lack of freedom to leave] *without more* does not [constitute a seizure either]." *Id.* at 33.

¹⁰⁹ Professor LaFave provides an excellent critique of the case. He notes, for example, that many of the reasons given by the Court for its ruling are "flawed and sometimes largely irrelevant, while the others simply do not suffice alone to support the Court's result." LaFave, *supra* note 15, at 755. For other critical commentary on *Hodari*, see Bruce A. Green, "Power, Not Reason": Justice Marshall's Valedictory and the Fourth Amendment in the Supreme Court's 1990 Term, 70 N.C. L. REV. 373, 400-04 (1992); Thomas K. Clancy, *The Future of Fourth Amendment Seizure Analysis After Hodari D. and Bostick*, 28 AM. CRIM. L. REV. 799 (1991); L. Anita Richardson, *Seizure, Police Pursuits, and You: The Meaning and Implications of California v. Hodari D.*, 18 SEARCH & SEIZURE L. REP. 137 (July-Aug. 1991); cf. Thomas Y. Davies, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 65 n.263 (1991), under *Hodari*,

the Court's view is that an officer does not have to have cause when he leaps at a citizen, although the Court does not dispute that the officer is required to have cause the instant he lands on the citizen. It seems to me *Hodari* gives insufficient weight to the principle (of physics, not law) that whoever leaps must come down.

¹¹⁰ For example, Justice Scalia's opinion for the majority never explains why the Court should look to common law definitions for "arrest" to define the meaning of "seizure" in today's world. As Justice Stevens' dissent in *Hodari* aptly noted, *Katz v. United States*, 389 U.S. 347, 353-54 (1967) and *Terry v. Ohio*, 398 U.S. 1, 16 (1968), "unequivocally reject the notion that the common law of arrest defines the limits of the term 'seizure' in the Fourth Amendment." *Hodari*, 111 S. Ct. at 1556 (Stevens, J., dissenting).

Furthermore, Justice Scalia's assertion that "public policy" did not require constitutional restraints in this context because "[s]treet pursuits always place the public at some risk, and compliance with police orders to stop should therefore be encouraged," *id.* at 1551, is supported only by his own value judgments, not constitutional principles. See *supra* note 105. But even if Justice Scalia is correct to rely on "public policy" in this

Amendment principles articulated by Justice Marshall offer a better

context, his vision of the proper public policy may be considered skewed by some members of the public.

Consider, for example, Justice Scalia's gratuitous suggestion that the prosecution was mistaken in conceding that no reasonable suspicion existed to seize Hodari who ran when he saw a patrol car. Justice Scalia intimated that it is reasonable to detain young men who "scatter in panic upon the mere sighting of the police." *Hodari*, 111 S. Ct. at 1549 n.1. For Scalia, the prosecution's concession contradicted proverbial common sense, whereupon he noted that "The wicked flee when no man pursueth." *Id.* (quoting Proverbs 28:1).

From a police perspective, Justice Scalia's remarks may make sense. "Flight from an approaching patrol car implies guilt; an innocent person, patrolmen reason, would have nothing to fear from the police and would not [run] away." BROWN, *supra* note 33, at 175. Of course, this viewpoint never considers that Hodari, a black youth, may have had alternative reasons for wanting to avoid the police. Cf. Jerome M. Culp, Jr., *Toward a Black Legal Scholarship: Race and Original Understandings*, 1991 DUKE L.J. 39, 80-82. Professor Culp notes that some judges

believe that race is irrelevant—even when it is crucial to understanding the context that gives rise to a case. The law seems to take this color-blind approach most often when a color-conscious approach would lend perspective to the situation of a black participant in the legal process. . . . Judges do not always tell us when and for what purpose a fact is important, but the absence of race considerations in general is no accident; it reflects the view that race is irrelevant to understanding the circumstances surrounding an incident despite the fact that, in reality, race colors most situations in which whites and blacks interact.

Id. Justice Scalia never pauses to consider that many persons who have never committed a crime might have ambivalent or negative attitudes about the police. The Wall Street Journal recently reported on the fear and anger in the black community of Dayton, Ohio, caused by the tactics of an anti-drug police task force. See Kotlowitz, *supra* note 4, at A2 ("Black leaders complained that innocent people were picked up in the drug sweeps. . . . Some teenagers were so scared of the task force they ran even if they weren't selling drugs.").

Perhaps a youth like Hodari flees at the sight of police because he does not wish to drop his pants—as many black youths in Boston have been forced to do—simply because the police suspect he belongs to a gang or is selling drugs. See REPORT OF THE ATTORNEY GENERAL'S CIVIL RIGHTS DIVISION ON BOSTON POLICE DEPARTMENT PRACTICES 36-46, 60 (1990)

We do not credit all of the allegations of all of the complainants. However, these allegations are widespread, common in nature, in some cases supported by witnesses, and consistent with other information we have received. Although we cannot say with precision how widespread this illegal conduct was, we believe that it was sufficiently common to justify changes in certain Department practices.

Id. at 60.

Maybe a black youth has had an older sibling or parent roughed-up by the police, and does not wish to undergo a similar experience with the approaching officers. Maybe Hodari, like other blacks, was taught to avoid the police. See DAVID H. BAYLEY & HAROLD MENDELSON, *MINORITIES AND THE POLICE* 120 (1969) ("Our data have shown that minority people carry into contacts with the police more negative expectations than do [whites]. One important result of these attitudes is the generation of a strong disposition to avoid the police.").

Or, perhaps Hodari has seen the videotape of the Los Angeles police beating and kicking Rodney King, see Seth Mydans, *Tape of Beating by Police Revives Charges of Racism*, N.Y. TIMES, Mar. 7, 1991, at A18, or the NBC video of Don Jackson—a former police officer himself—being pushed through a store window by Long Beach, California, police officers for no reason. See Bill Girdner, *Charge of racism by Calif. police is latest in long line*,

method to resolve the issue in *Hodari*.¹¹¹ I believe Justice Marshall would resolve the issue of whether the Fourth Amendment should apply to a police officer's display of force directed at an individual by assessing the nature of the police conduct and the impact it would have on Fourth Amendment interests if left unregulated.

When one analyzes *Hodari* in this manner, the issue is easily resolved. *Hodari* allows a police officer to direct a show of force at a person without any suspicion of criminality. Until the individual receiving this arbitrary display of police power submits to the officer's authority, the Fourth Amendment is not implicated. Police officers, in effect, may roam the streets threatening and intimidating persons free of constitutional check. This curious state of affairs seems incompatible with a free society. It is an absolutely terrifying situation for those (I do not mean criminals) who have reason to fear police power.¹¹²

BOSTON GLOBE, Jan. 19, 1989; Don Jackson, *Police Embodiment Racism to My People*, N.Y. TIMES, Jan. 23, 1989, at A25. Justice Scalia may think that an approaching officer only wants to ask "What's going on here?" A black youth, however, may have had a different experience on the street and may believe that the approaching officer is out to administer a little "street justice" of the type recently documented in Boston and Los Angeles. As California Assemblyman Curtis Tucker said, "When black people in Los Angeles see a police car approaching, 'They don't know whether justice will be meted out or whether judge, jury and executioner is pulling up behind them.'" Richard W. Stevenson, *Los Angeles Chief Taunted at Hearing: U.S. Plans Wide Inquiry on Brutality*, N.Y. TIMES, Mar. 15, 1991, at A16. Regrettably, Justice Scalia's "public policy" analysis never considers these points.

On the other hand, some benefit might exist for individuals who heed Justice Scalia's warning not to flee from arbitrary displays of police authority. Indeed, if the attitudes of Los Angeles, California, police officers are representative of police officers across the country, then all of us would do well not to flee from approaching police officers. The "Christopher Commission," established in the wake of the Rodney King police brutality case in Los Angeles, found that some Los Angeles police officers "relish the excitement of a pursuit, and some view a pursuit as an opportunity for violence against the running suspect." REPORT OF THE INDEPENDENT COMMISSION ON THE LOS ANGELES POLICE DEPT 53 (1991) [hereinafter CHRISTOPHER COMMISSION]. I doubt that Justice Scalia had these concerns in mind when he authored the *Hodari* opinion, but his warnings about the dangers inherent in street pursuits by the police remind us that police officers on the street are not always there to "serve and protect."

¹¹¹ In another form, I have explored whether *Hodari*'s race should have been a factor in the Court's analysis of whether a seizure occurred under the Fourth Amendment. See Tracey Maclin, "Black and Blue Encounters" *Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter?*, 26 VAL. U. L. REV. 423 (1991).

¹¹² See, e.g., John Van Maanen, *Street Justice*, in POLICE BEHAVIOR 297-98 (Richard Lundman ed., 1980):

Certainly, a policeman's past experience with an individual or with a recognizable group will influence his street behavior. For example, a rookie soon discovers (as a direct consequence of his initiation into a department) that blacks, students, Mexicans, reporters, lawyers, welfare workers, researchers, prostitutes, and gang members are not to be trusted, are unpredictable, and are usually "out-to-get-the-police." He may even sort these "outsiders" into various categories indicative of the risk he believes they present to him or the implied contrast they have with his own life-

Any target of police power can attest to its unsettling nature.¹¹³ Indeed, such a frightening experience can permanently affect how one envisions government authority generally, and police power specifically. In a head-on chase similar to *Hodari's*, a reasonable person would not feel free to ignore the police officer.¹¹⁴ The whole point of such a confrontation is to restrain the freedom of the person being chased.¹¹⁵

The Court in *Hodari* fails to appreciate the fear engendered when police officers direct their power at individuals. Not a word is said about the likely effect upon an ordinary citizen of an arbitrary show of police authority. Nor does *Hodari* discuss the liberty interests of citizens. In fact, the Court never pauses to ask why police officers, in the absence of any evidence of criminal conduct, have unfettered discretion to direct their power and authority at citizens. Do people "assume the risk" of unregulated displays of official force simply by walking the streets?

The *Hodari* Court sent several very clear messages.¹¹⁶ To police officers the ruling means that they are free to direct their power and authority toward any person, regardless of cause, until it produces physical restraint or submission. Thus, officers may draw their weapons, activate the sirens on their patrol cars, or fire warning shots over a person's head without constitutional limitation as long as the person continues to flee.¹¹⁷ Though living in a society that

style and beliefs. Yet, without question, these categories will never be exhaustive—although the absolute size of what patrolmen call their "shit lists" may grow over the years.

113 "There is absolutely nothing flattering or reassuring about receiving the unsolicited attention of the police." JONATHAN RUBINSTEIN, *CITY POLICE* 260 (1973). "[E]ach individual [encounter] is personally unsettling and disrupting." *Id.* "[Persons approached by a police officer] have no choice but to remain until he has finished with them. They cannot say to him, 'Excuse me, Officer, but we really don't have the time for this right now,' and walk off. If they tried it, he would probably arrest them." *Id.* at 262.

114 Kathryn R. Urbonya, *The Constitutionality of High-Speed Pursuits Under the Fourth and Fourteenth Amendments*, 35 *ST. LOUIS U. L.J.* 205, 234 (1991) ("Pursuit experts agree that police officers, when deciding to pursue an individual, exert psychological force.").

115 See LaFave, *supra* note 15, at 758.

116 One of the messages signaled by *Hodari*, as noted by Professor LaFave, is that when police are acting merely on a hunch, a slow chase is better than a fast one, for if the cop in that case had caught up with the youth and grabbed him by the scruff of the neck *before* the cocaine was ditched, there would have been an illegal seizure requiring suppression of the subsequently discovered drugs.

LaFave, *supra* note 15, at 731 (footnote omitted).

117 See *California v. Hodari D.*, 111 S. Ct. at 1547, 1559 (1991) (Stevens, J., dissenting) (noting that under the Court's reasoning, "the timing of the seizure is governed by the citizen's reaction rather than by the officer's conduct"); see also Maclin, *supra* note 105, at 1312-14 (predicting that the Fourth Amendment analysis of Justices Scalia and Kennedy, see *Michigan v. Chesternut*, 486 U.S. 567, 577 (1988) (Kennedy, J., concurring,

gives the police such discretion may not disturb a majority of the Court, liberty will not flourish under such conditions. The message sent to citizens is clear: the Constitution offers no shield against arbitrary police force unless and until one submits to that force. Responsible persons should comply with a police show of authority; those who refuse to submit will surrender constitutional protection.

What is the significance of this result? For one, the police rather than the individual is now sovereign on the streets of America. Supreme Court precedent certainly did not preordain this result. In fact, *Hodari* did not even undertake a straightforward review of precedents. Instead, the Court manipulates earlier holdings¹¹⁸ and ignores other relevant decisions¹¹⁹ to reach a result that

joined by Scalia, J.), would lead to a rule that a seizure does not occur until the police presence has a restraining effect over the citizen).

¹¹⁸ Justice Scalia found that *Brower v. Inyo County*, 489 U.S. 593 (1989), and *Hester v. United States*, 265 U.S. 57 (1924), "were quite relevant" for deciding whether *Hodari* had been seized. *Hodari*, 111 S. Ct. at 1552. *Brower* ruled that a complaint of unreasonable seizure under 42 U.S.C. § 1983 is stated if the complainant alleges intentional government conduct that causes the termination of one's freedom of movement. *Brower*, 489 U.S. at 599 ("It was enough here, therefore, that, according to the allegations of the complaint, *Brower* was meant to be stopped by the physical obstacle of the roadblock—and that he was so stopped."). Unlike the case in *Hodari*, in *Brower* there was no doubt that the police had intentionally terminated *Brower's* flight once his vehicle ran into an 18 foot tractor trailer placed in the path of his flight. Other than in dicta that was not necessary for its result, *Brower* provides no support for *Hodari's* "no restraint, no seizure" rule. Professor LaFave has made a similar observation. See LaFave, *supra* note 15, at 757.

Nor does the reasoning of *Hester* support a "no restraint, no seizure" rule. In *Hester*, the Court merely ruled that securing "abandoned bottles was not itself a seizure, and there is no discussion in that very brief (two paragraphs) opinion of the then-nascent fruit-of-the-poisonous-tree doctrine by which the abandonment could have been claimed to be a fruit of a prior seizure-by-chase of the defendants." LaFave, *supra* note 15, at 757. For a critical review of the analysis employed by the Court before *Hodari*, see Ronald J. Bacigal, *In Pursuit of the Elusive Fourth Amendment: The Police Chase Cases*, 58 TENN. L. REV. 73 (1990).

¹¹⁹ Interestingly, Justice Scalia "never cite[s]" several decisions which would have aided the Court's discussion of what the Fourth Amendment protects in the context of police pursuits. *Urbonya*, *supra* note 114, at 278. Those cases—*Florida v. Royer*, 460 U.S. 491, 523 n.3 (1983) (Rehnquist, J., dissenting) (seizure occurs when "by means of physical force or show of authority," a person's freedom of movement is restrained); and *Brown v. Texas*, 443 U.S. 47, 52 (1979) (Fourth Amendment guarantees "freedom from police interference" with "personal security and privacy"); *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (show of authority conveys a message such that a reasonable person would believe that he was not free to leave)—"are instructive as to precisely what it is that the Fourth Amendment guarantee regarding 'seizures' protects: 'liberty'; 'freedom of movement'; 'personal security.'" LaFave, *supra* note 15, at 758.

fits its view of a correct social policy. This is, as Justice Marshall observed in a different context, not his vision of America.¹²⁰

II

WHEN ARE GOVERNMENT INTRUSIONS "REASONABLE" UNDER THE FOURTH AMENDMENT?

A. Justice Marshall as an Advocate for Fourth Amendment Safeguards

Another essential component of Justice Marshall's search and seizure jurisprudence was adherence to the safeguards of the Fourth Amendment—prior judicial review and the existence of probable cause to justify a police intrusion. Although many bemoan the technical and arcane quality of search and seizure law, Justice Marshall advocated a straightforward and traditional approach.¹²¹ Regarding searches, "[i]n the vast majority of cases, the determination of when the right of privacy must reasonably yield to the right of search is

¹²⁰ Florida v. Bostick, 111 S. Ct. 2382, 2391 (1991) (Marshall, J., dissenting) quoting United States v. Lewis, 728 F. Supp. 784, 789 (D.D.C.), *rev'd*, 921 F.2d 1294 (D.C. Cir. 1990).

While the result in *Hodari* is unsettling, the decision is not surprising. See Maclin, *supra* note 105, at 1312-14. Indeed, the result in *Hodari* was a forgone conclusion after Michigan v. Chesternut, 486 U.S. 567 (1988). In *Chesternut*, Justice Kennedy, joined by Justice Scalia, pressed the view that a seizure only occurs when a person remains in the control of police officials. Justice Kennedy argued that, regardless of whether a police presence conveys an intent to seize, no Fourth Amendment interests are at stake "until [the police action] achieves a restraining effect." *Id.* at 577.

Justice Kennedy's "no restraint, no seizure" rule resurfaced, albeit in dicta, in *Brower v. Inyo County*, 489 U.S. 593 (1989), authored by Justice Scalia. While the *Brower* Court unanimously held that placing a roadblock across both lanes of a two-lane highway on which the defendant was driving to stop his car constituted a seizure, Justice Scalia saw the occasion as a chance to outline his views on the meaning of a seizure. He argued that no seizure occurs under the Fourth Amendment unless the police undertake intentional conduct that physically restrains their target.

In light of Justices Scalia's and Kennedy's opinions in *Chesternut* and *Brower*, the result in *Hodari* comes as no surprise. *Hodari* proves just how easily "a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision." United States v. Rabinowitz, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting).

¹²¹ By "traditional" I mean that Justice Marshall's reading of the Fourth Amendment was consistent with the interpretation of the Amendment favored by the Framers. Justice Marshall, like the Framers, "focused on, and placed [his] trust in, the warrant procedure." Kamisar, *supra* note 7, at 578.

Some commentators have stated that "our constitutional fathers were not concerned about warrantless searches, but about overreaching warrants." TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 41 (1969); cf. William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 897-98 (1991) ("It is entirely possible that warrants do not make sense, and that search and seizure law would be better off without them. That would certainly fit with the Fourth Amendment's somewhat tortured history."); Gerald Bradley, *Present at the Creation? A Critical Guide to Weeks v. United States And Its Progeny*, 30 ST. LOUIS UNIV. L. J. 1031, 1041-46 (1986) (suggesting that warrantless searches did not trouble the Framers). Yet even accepting this view without challenge, Justice Marshall's focus on the requirements of the Warrant

required to be made by a neutral judicial officer before the search is conducted."¹²² Regarding routine arrests, Justice Marshall believed that, because an arrest in many ways is *more intrusive* than a search,¹²³ it is just as important to have a warrant for an arrest, as it is for a search.¹²⁴

1. *Theoretical Underpinnings*

Why were the safeguards of the Fourth Amendment so important to Justice Marshall? Like many of his colleagues, Marshall believed that the Warrant Clause should provide a neutral buffer between law enforcement officials and the public. He often quoted Justice Jackson's classic lines from *Johnson v. United States*,¹²⁵ which, until recently, have served as the guiding light for a half century of Fourth Amendment jurisprudence.¹²⁶ The crux of Justice Jackson's

Clause would remain consistent with the vision held by the Framers of the Fourth Amendment.

The Framers primarily directed their anger at the writs of assistance. "The obnoxious feature of writs of assistance was their character as permanent search warrants placed in the hands of customs officials: they might be used with unlimited discretion and were valid for the duration of the life of the sovereign." JACOB W. LANDYNSKI, *SEARCH AND SEIZURE AND THE SUPREME COURT* 31 (1966). If the Framers opposed searches authorized by writs of assistance and general warrants because they allowed customs officials to conduct arbitrary and unjustified intrusions, see *Amsterdam, supra* note 17, at 411, "[c]an there be any doubt that the [Framers] would have vigorously opposed *warrantless* searches exhibiting the same characteristics as general warrants and writs and thus impairing privacy and freedom to the same degree?" Kamisar, *supra* note 7, at 575.

In addition, it is helpful to note that when the Court upheld warrantless automobile searches with *Carroll v. United States*, 267 U.S. 132 (1925) (permissible to conduct warrantless search of automobile stopped on the open road where officers have probable cause to believe the vehicle contains contraband or evidence of crime), it acknowledged a preference for the warrant procedure. *Id.* at 156 ("In cases where securing of a warrant is reasonably practicable, it must be used."); see also *Rabinowitz*, 339 U.S. at 73 (Frankfurter, J., dissenting) ("Even as to moving vehicles, this Court did not lay down an absolute rule dispensing with a search warrant.").

¹²² *United States v. Robinson*, 414 U.S. 218, 242 (1973) (Marshall, J., dissenting).

¹²³ See *United States v. Watson*, 423 U.S. 411, 428 (1976) (Powell, J., concurring):

Since the Fourth Amendment speaks equally to both searches and seizures, and since an arrest, the taking hold of one's person, is quintessentially a seizure, it would seem that the constitutional provision should impose the same limitations upon arrests that it does upon searches. Indeed, as an abstract matter an argument can be made that the restrictions upon arrest perhaps should be greater[;]

cf. Dripps, supra note 5, at 612 (Some "methods of criminal investigation are punitive in effect. Consider an arrest: the person in custody is as effectively imprisoned as he would be in a penitentiary, and frequently under circumstances even less congenial.").

¹²⁴ *Watson*, 423 U.S. at 446 (Marshall, J., dissenting).

¹²⁵ 333 U.S. 10 (1948).

¹²⁶ In *Johnson*, Justice Jackson wrote:

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection

observation was that the requirements of the Amendment help to check police discretion and preserve our freedoms.

Justice Marshall believed that the requirements of prior judicial review and probable cause embodied substantive, as well as procedural, protections for the individual. Requiring police officials to seek a magistrate's review before intrusive activity occurs "limits the concentration of power held by executive officers over the individual, and prevents some overbroad or unjustified searches from occurring at all."¹²⁷ The Fourth Amendment reflects a substantive norm accepted by society that the police should not decide for themselves when to invade the privacy and dignity of individuals.¹²⁸ Prior judicial review also "prevent[s] 'hindsight from coloring the evaluation of the reasonableness of a search or seizure,' and reassures the public that the orderly process of law has been respected."¹²⁹ Illustrative of this last point is Justice Marshall's dissent in *New York v. Harris*.¹³⁰

In *Harris*, police officers, with probable cause for an arrest but without a warrant, forcibly entered the defendant's home. Although the arrest was illegal,¹³¹ the Court ruled that, "where the police

consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Id. at 13-14 (footnotes omitted).

¹²⁷ *United States v. Ross*, 456 U.S. 798, 829 (1982) (Marshall, J., dissenting).

¹²⁸ *United States v. United States Dist. Court*, 407 U.S. 297, 317 (1972) (Police officials

should not be the sole judges of when to utilize constitutionally sensitive means in pursuing their tasks. The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and protected speech.)

Justice Jackson has made the same point, although he stated it more bluntly: "Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government." *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting).

¹²⁹ *Ross*, 456 U.S. at 829 (Marshall, J., dissenting) (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 565 (1976)).

¹³⁰ 495 U.S. 14 (1990).

¹³¹ The arrest was illegal because it violated the Fourth Amendment's prohibition against a warrantless, nonconsensual entry to make a routine felony arrest, a rule announced in *Payton v. New York*, 445 U.S. 573 (1980). During and after this illegal

have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of [the Fourth Amendment.]¹³² The Court reasoned that the Fourth Amendment is "designed to protect the physical integrity of the home; it was not intended to grant criminal suspects, like Harris, protection for statements made outside their premises where the police have probable cause to arrest the suspect for committing a crime."¹³³

Believing that the Fourth Amendment was primarily meant to protect individuals, not just the bricks and mortar that form the home, Justice Marshall rejected this "cramped understanding" of Fourth Amendment values.¹³⁴ In his view,

[a] person who is forcibly separated from his family and home in the dark of night after uniformed officers have broken down his door, handcuffed him, and forced him at gunpoint to accompany them to a police station does not suddenly breathe a sigh of relief at the moment he is dragged across his doorstep. Rather, the suspect is likely to be so frightened and rattled that he will say something incriminating. These effects, of course, extend far beyond the moment the physical occupation of the home ends.¹³⁵

This position most faithfully reflects the substantive values embodied in the Fourth Amendment. The police conduct permitted in *Harris* conflicts with the norm that "the interposition of a magistrate's neutral judgment reassures the public that the orderly process of law has been respected."¹³⁶ In *Harris*, the police did not merely ignore legal process but deliberately subverted it.¹³⁷

arrest, Harris made incriminating statements after being informed of his *Miranda* rights. 495 U.S. at 16. The New York Court of Appeals ruled that one of Harris's statements, made at the police station, was the fruit of the illegal arrest, and thus inadmissible at his trial. A majority of the Supreme Court disagreed with this reasoning, and ruled that the confession was admissible. *Id.* at 21.

¹³² *Id.* at 21.

¹³³ *Id.* at 17.

¹³⁴ *Id.* at 27.

¹³⁵ *Id.* at 28.

¹³⁶ *United States v. Ross*, 456 U.S. 798, 829 (1982) (Marshall, J., dissenting).

¹³⁷ A de facto policy apparently exists in the New York Police Department not to follow the dictates announced in *Payton*. In *Harris*, the New York Court of Appeals found that

[the police] made no attempt to obtain a warrant although five days had elapsed between the killing and the arrest and they had developed evidence of probable cause early in their investigation. Indeed, one of the officers testified that it was department policy not to get warrants before making arrests in the home. From this statement a reasonable inference can be drawn . . . that the department's policy was a device used to avoid restrictions on questioning a suspect until after the police had strengthened their case with a confession.

Harris, moreover, discounts another substantive value: the right to privacy in the home. Our constitutional conscience includes this value because it has significance for many people. The safeguards of the Fourth Amendment add force to this basic view, not because we wish to subject police officers to infinite technical procedures, but because in our legal system we have firmly rejected the notion that police officers should decide for themselves when to invade a person's home.¹³⁸ When police carry out a warrantless arrest of an individual in his home, they not only jeopardize the security of the home, but also flaunt society's values and the rule of law.

It has been aptly stated that "the Fourth Amendment protects people, not places."¹³⁹ The values embodied in the Amendment, despite *Harris*, go beyond protecting "the physical integrity of the home."¹⁴⁰ These values also protect and symbolize the individuals who live in those homes.¹⁴¹ Though a majority of the Court in *Harris* obviously disagreed, Justice Marshall noted: "The Court's saying it may make it law, but it does not make it true."¹⁴²

Finally, Justice Marshall vigorously opposed the Court's steady and continuing drift toward a general rule of "reasonableness" for deciding Fourth Amendment cases. While Justice Marshall understood that the Court could not decide search and seizure issues by knee-jerk analysis,¹⁴³ he strongly opposed the Court's current systematic evisceration of the Fourth Amendment's traditional safeguards. For example, Justice Marshall never supported the view that the probable cause and warrant requirements could be ignored in the name of "special needs." In *Skinner v. Railway Labor Executives*

People v. Harris, 532 N.E.2d 1229, 1233-34 (N.Y. 1988). See also UVILLER, *supra* note 6, at 114-15 ("[P]rosecutors are reluctant to indict before arrest, since the accusation deprives the police of an opportunity to converse with the mirandized suspect in the absence of an attorney.").

¹³⁸ See *Johnson v. United States*, 333 U.S. 10, 14 (1948) ("The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance.").

¹³⁹ *Katz v. United States*, 389 U.S. 347, 351 (1967).

¹⁴⁰ *New York v. Harris*, 495 U.S. 14, 17 (1990).

¹⁴¹ *Cf. Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972):

[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth a "personal" right, whether the "property" in question be a welfare check, a home, or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

¹⁴² *Harris*, 495 U.S. at 29.

¹⁴³ See *United States v. Robinson*, 414 U.S. 218, 238-39 (1973) (Marshall, J., dissenting) (recognizing the need in some situations for a case-by-case analysis of Fourth Amendment issues).

Ass'n,¹⁴⁴ the Court invoked its emerging "special needs" doctrine to uphold the constitutionality of federal regulations requiring blood and urine tests of railroad employees involved in train accidents. *Skinner* permits warrantless and suspicionless searches "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" ¹⁴⁵

Justice Marshall questioned the judicial basis of the Court's "special needs" analysis: "The process by which a constitutional 'requirement' can be dispensed with as 'impracticable' is an elusive one to me."¹⁴⁶ In his view, by substituting a general reasonableness test for the traditional safeguards of the Warrant Clause, the Fourth Amendment "lies virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give to that supple term."¹⁴⁷ In a remark that should not have been lost on those who espoused strict construction of constitutional text, Justice Marshall noted: "Constitutional requirements like probable cause are not fair-weather friends, present when advantageous, conveniently absent when 'special needs' make them seem not."¹⁴⁸

More generally, Justice Marshall believed that a reasonableness model of the Fourth Amendment did not advance the institutional values of the Court. Under the "special needs" rule, for instance, "the clarity of Fourth Amendment doctrine has been badly distorted."¹⁴⁹ A judicial analysis that merely asks whether government intrusions satisfy an amorphous standard of reasonableness does more than disregard the literal requirements of the Constitution. It imposes the Court's vision of a correct social policy masquerading as constitutional analysis.¹⁵⁰

¹⁴⁴ 489 U.S. 602 (1989).

¹⁴⁵ *Id.* at 619 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)) (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment)).

¹⁴⁶ *Id.* at 637 (Marshall, J., dissenting).

¹⁴⁷ *Id.* See also *Davies*, *supra* note 109, at 52-53, stating that a generalized reasonableness interpretation rejects the warrant preference rule and the requirement of probable cause:

[a] generalized reasonableness reading allows for a flexible, colloquial interpretation of "reasonableness" under which any police conduct that is "understandable" in the circumstances according to common sense should be judged "reasonable" for purposes of assessing the constitutionality of police intrusions. In effect, this reading treats the Fourth Amendment more as a "regulatory canon" than as a statement of a citizen's enforceable right.

(footnotes omitted).

¹⁴⁸ *Skinner*, 489 U.S. at 637 (Marshall, J., dissenting).

¹⁴⁹ *Id.* at 639.

¹⁵⁰ See *id.* at 641:

The fact is that the malleable 'special needs' balancing approach can be justified only on the basis of the policy results it allows the majority to

Justice Marshall declared in *Skinner* that "no drug exception to the Constitution" exists.¹⁵¹ Despite the political clamor to wage a "War on Drugs," Justice Marshall believed that if the Court is to balance the interests of the government to undertake intrusive techniques against the interests of the individual to be free from unreasonable search and seizure, the Fourth Amendment itself provides the essential weights to place on the judicial scales.¹⁵²

B. Examples of Justice Marshall's Adherence to the Safeguards of the Fourth Amendment: The Liberty Interests of the Individual

While it is easy to endorse Justice Marshall's Fourth Amendment jurisprudence as straightforward and faithful to the traditional safeguards of the Amendment, this assertion only begs the question of the legal and political prudence of the positions articulated in many of Justice Marshall's opinions. Indeed, in today's climate of rising drug offenses and the general deterioration of many inter-city areas due to criminal behavior, some have questioned whether we can afford the type of constitutional jurisprudence espoused by Justice Marshall.¹⁵³

reach. The majority's concern with the railroad safety problems caused by drug and alcohol abuse is laudable; its cavalier disregard for the text of the Constitution is not.

¹⁵¹ *Id.* at 641. Many scholars and criminal defense lawyers might disagree. See Kamisar, *supra* note 24, at 20 (many scholars of the Court's constitutional criminal procedure cases might respond to Justice Marshall's declaration that "[t]here is now."); Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 *HASTINGS L.J.* 889 (1987). Jeffrey Weiner, who worked on the appeal in *Florida v. Bostick*, 111 S. Ct. 2382 (1991), discussed *infra* notes 368-402 and accompanying text, offered the following observations about the bus raids conducted by Broward County Sheriff Nick Navarro:

'I really worry about the "drug exception" to the Fourth Amendment. . . . If [a case] has anything to do with drugs, rest assured the court is going to find not "error" but "harmless error." I don't think "police state" is too strong a phrase to describe what happens then. In my opinion, what Nick Navarro has done up in Broward County is an insult to all freedom-loving Americans.'

Joseph P. Kahn, *The Right To Be Secure*, *THE BOSTON GLOBE MAG.*, Apr. 7, 1991, at 18, 36.

¹⁵² *Skinner*, 489 U.S. at 637 ("As this Court has long recognized, the Framers intended the provisions of [the Warrant] Clause—a warrant and probable cause—to 'provide the yardstick against which official searches and seizures are to be measured.'") (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 359-60 (1985) (Brennan, J., concurring in part and dissenting in part)).

¹⁵³ See, e.g., Jerry Thomas, *Police Sweep of Gangs Deemed a Success*, *THE BOSTON GLOBE*, May 21, 1989, at 40, a high-ranking Boston Police Department official was quoted as saying that

[The police] are not indiscriminately going to pat down people, only known drug dealers and gang members. I'm conscious of people's rights. But it's about time we start caring for the rights of good citizens, and not the criminals. They have harassed the community long enough. Now it's time for them to be harassed.

The best response to these charges requires a look at concrete examples and a comparison of the Fourth Amendment views articulated by Justice Marshall with the current Court's jurisprudence. Three categories of cases—individual liberty; Fourth Amendment protection for personal property; and the scope of “exceptions” to the warrant requirements—permit consideration of the contrasting views on the Fourth Amendment's role in today's society. Should the Fourth Amendment stand as the constitutional bulwark against discretionary police actions that invade the privacy, security, and dignity interests of the citizenry, as Justice Marshall believed? Or, should the Fourth Amendment merely require that police activity be reasonable, as the current Court often suggests?¹⁵⁴

1. *Individual Liberty*

American citizens have long enjoyed the right to come and go as we please, free of official interference. The right to be left alone while on the street is one of the “cherished liberties that distinguish this nation from so many others.”¹⁵⁵ Because Justice Marshall recognized the importance of liberty,¹⁵⁶ he believed that the safeguards of the Fourth Amendment—a warrant authorized by a neutral magistrate based upon probable cause—must precede any routine felony arrest. Similarly, Justice Marshall rejected the view that a subpoena requiring a person to provide voice or handwriting exemplars for a grand jury investigation was outside the purview of Fourth Amendment scrutiny. Each of these situations represented a threat to the liberty interests of the individual. A majority of the Court, however, disagreed.

See also Anthony Lewis, *Thornburgh Puzzle*, N.Y. TIMES, Aug. 12, 1991, at A15 (“The public, stressed by crime, is impatient with the idea of rights for the accused.”).

¹⁵⁴ See Nadine Strossen, *Michigan Department of State Police v. Sitz: A Roadblock to Meaningful Enforcement of Constitutional Rights*, 42 HASTINGS L.J. 285 (1991) Professor Strossen has elaborated on some of the analytical themes that run through the current Court's constitutional rulings regarding individual rights. She has noted that “the Court exercises more judicial restraint in reviewing decisions by government officials, largely deferring to such decisions.” *Id.* at 285. In Strossen's view, the Court has “imported into the personal rights realm the minimal level of judicial review that it heretofore reserved for regulations affecting property rights.” *Id.* at 288.

¹⁵⁵ *Gomez v. Turner*, 672 F.2d 134, 143-44 n.18 (D.C. Cir. 1982).

¹⁵⁶ See *United States v. Watson*, 423 U.S. 411, 446 (1976) (Marshall, J., dissenting) (“[A]n unjustified arrest that forces the individual temporarily to forfeit his right to control his person and movements and interrupts the course of his daily business may be more intrusive than an unjustified search.”).

In *United States v. Watson*¹⁵⁷ and *United States v. Dionisio*,¹⁵⁸ the Court found, *inter alia*, that history justified relaxed constitutional scrutiny of the police seizures at issue. In *Watson*, the Court noted that both the common law and the Second Congress had authorized warrantless arrests based on probable cause.¹⁵⁹ In *Dionisio*, the Court emphasized the "historically grounded obligation of every person to appear and give his evidence before the grand jury."¹⁶⁰

For Justice Marshall, neither history nor traditional common law practices justified disregarding constitutional requirements.¹⁶¹ Such an approach was dangerous to constitutional liberties,

for it is well settled that the mere existence of statutes or practice, even of long standing, is no defense to an unconstitutional practice. "[N]o one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."¹⁶²

Claims that governmental preference and convenience outweighed the individual's liberty interest did not impress Justice Marshall. In *Watson*, the Court found that deference to Congressional and state statutes justified overlooking the requirements of the Warrant Clause in the case of routine felony arrests. According to the Court, the Fourth Amendment provides only a right to be free from *unreasonable* searches and seizures; it does not require that a warrant authorize every search or seizure.¹⁶³ The relevant test, then, "is not

¹⁵⁷ 423 U.S. 411 (1976).

¹⁵⁸ 410 U.S. 1 (1973). In a companion case, *United States v. Mara*, 410 U.S. 19 (1973), the Court held that a grand jury subpoena to furnish handwriting exemplars did not implicate any Fourth Amendment interest.

¹⁵⁹ *Watson*, 423 U.S. at 418-20.

¹⁶⁰ *Dionisio*, 410 U.S. at 9-10.

¹⁶¹ See *Watson*, 423 U.S. at 438 (Marshall, J., dissenting) ("[T]he longstanding existence of a Government practice does not immunize the practice from scrutiny under the mandate of our Constitution.").

¹⁶² *Id.* at 443 (Marshall, J., dissenting) (quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 678 (1970)).

¹⁶³ Justice Scalia has recently endorsed this view: "The Fourth Amendment does not by its terms require a prior warrant for searches and seizures; it merely prohibits searches and seizures that are 'unreasonable.' What it explicitly states regarding warrants is by way of limitation upon their issuance rather than requirement of their use." *California v. Acevedo*, 111 S. Ct. 1982, 1992 (1991) (Scalia, J., concurring). Interestingly, Justice Scalia's support for this claim is neither Supreme Court precedent, nor a specific reference to the Framers' debate regarding the meaning of the Fourth Amendment, but is *Wakely v. Hart*, 6 Binn. 316, 318 (Pa. 1814).

Even more enlightening, however, is Justice Scalia's apparent conception of the intended role of the Warrant Clause. He states:

[T]he warrant was a means of insulating officials from personal liability assessed by colonial juries. An officer who searched or seized without a warrant did so at his own risk; he would be liable for trespass, including exemplary damages, unless the jury found that his action was "reason-

whether it is reasonable to procure a search [or arrest] warrant, but whether the search [or seizure] was reasonable."¹⁶⁴

Not only does this position "prove[] too much,"¹⁶⁵ but it is at odds with a bedrock principle of the Fourth Amendment. This view suggests that *searches* of persons, homes, and effects are equally valid absent judicial authorization. *Watson's* reasoning contradicts the principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment."¹⁶⁶ If we accept this "cardinal" rule of Fourth Amendment jurisprudence,¹⁶⁷ then both the language of this provision and logic require constitutional condemnation of warrantless *arrests* as well.¹⁶⁸ The Court, however, never addresses these difficult questions in *Watson*. The suggestion that the safeguards of the Warrant Clause have only marginal relevance in determining the reasonableness of a substantial intrusion flies in the face of the historical record,¹⁶⁹ and overlooks the protection af-

able. . . . By restricting the issuance of warrants, the Framers endeavored to preserve the jury's role in regulating searches and seizures.

Acevedo, 111 S. Ct. at 1992 (citations omitted).

Evidently, Justice Scalia believes that proponents of the Fourth Amendment and the Warrant Clause were primarily concerned with the law and economics of tort liability for customs officials. Not all scholars of the Fourth Amendment share Justice Scalia's crabbed view of the history and purpose behind the Warrant Clause. LASSON, *supra* note 62, at 75 (noting that the original petition of the colonists to King George II protested that "officers of customs are empowered to break open and enter houses, without the authority of a civil magistrate, founded on legal information"); Abraham S. Goldstein, *The Search Warrant, The Magistrate, and Judicial Review*, 62 N.Y.U. L. REV. 1173, 1178 (1987) ("The magistrate, and the concept of probable cause, are the first line of defense against the risk that the police will be unduly zealous in concluding that they have an adequate basis to conduct a search.").

Justice Scalia also conveniently ignores several United States Supreme Court declarations which take a sharply different view on the meaning and role of the Warrant Clause. His view flies in the face of a half century of Court declarations stating that the central purpose of the Warrant Clause was to interpose a neutral referee between government officials and the public so that "inferences [of probable cause could] be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

¹⁶⁴ *United States v. Rabinowitz*, 339 U.S. 56, 66 (1950).

¹⁶⁵ *Coolidge v. New Hampshire*, 403 U.S. 443, 480 (1971) (plurality opinion).

¹⁶⁶ *Katz v. United States*, 389 U.S. 347, 357 (1967).

¹⁶⁷ *See Mincey v. Arizona*, 437 U.S. 385, 390 (1978).

¹⁶⁸ Since the Fourth Amendment speaks equally to both searches and seizures, and since an arrest, the taking hold of one's person, is quintessentially a seizure, it would seem that the constitutional provision should impose the same limitations upon arrests that it does upon searches. Indeed, as an abstract matter an argument can be made that the restrictions upon arrest perhaps should be greater.

United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring).

¹⁶⁹ It comes as no surprise that Justice White, the author of *Watson*, saw little connection between the two clauses of the Fourth Amendment, as his dissents in *Chimel v. California*, 395 U.S. 752, 770 (1969), *Coolidge v. New Hampshire*, 403 U.S. 443, 510

fording personal security and privacy by a warrant requirement for felony arrests.¹⁷⁰

(1971), and *Payton v. New York*, 445 U.S. 573, 610 (1980), demonstrate. Justice White's position, however, has not gone unchallenged. See, e.g., LANDYNSKI, *supra* note 121, at 43-44:

It seems certain that the Fourth Amendment made no provision for the warrantless search any more than it did for the general search warrant. . . . It would be strange, to say the least, for the amendment to specify stringent warrant requirements, after having in effect negated these by authorizing judicially unsupervised 'reasonable' searches without warrant. To detach the first clause from the second is to run the risk of making the second virtually useless[.]

Martin Grayson, *The Warrant Clause in Historical Context*, 14 AM. J. CRIM. L. 107, 114 (1987) ("[I]t is unlikely that the drafters envisioned a search which could be both reasonable and without a warrant.").

Moreover, it makes little sense to interpret a provision—intended to prohibit unfettered executive and legislative power to search and seize—in a manner that turns a blind eye toward, and in some cases actually encourages, police discretion to search and seize. If Justice White's dissents in *Payton*, *Chimel*, and *Coolidge*, had been majority rulings, police officers would be free to effect a nonconsensual, warrantless entry into a person's home to make an arrest (*Payton*), search the entire house incident to that arrest (*Chimel*), and then go out and seize and search the arrestee's automobile (*Coolidge*). In theory, officers would utilize their discretion only when they decide probable cause exists to support their conduct, and a judge would agree, after the fact, with that determination.

The problem with this conception of search and seizure law is that no stopping point exists. Giving police officers substantial discretion only encourages them to expand warrantless searches and seizures in the hope that some day some court will agree that probable cause existed for their actions. In such a regime, why would an officer ever bother to secure a warrant? Eventually, "any search or seizure could be carried out without a warrant, and we would have simply read the Fourth Amendment out of the Constitution." *Coolidge*, 403 U.S. at 480.

Justice White's model of the Fourth Amendment is ultimately flawed because he forgets that the "Fourth Amendment contemplates a prior *judicial* judgment, not the risk that executive discretion may be reasonably exercised. This judicial role accords with our basic constitutional doctrine that individual freedoms will best be preserved through a separation of powers and division of functions among the different branches and levels of government." *United States v. United States District Court*, 407 U.S. 297, 317 (1972) (footnote omitted) (emphasis added). While Justice White is correct to note that "the Framers were concerned about warrants," *Payton*, 445 U.S. at 610, the "warrants" the framers hated were ones that authorized unfettered discretion to executive officials. Warrants that narrowly confined the authority of customs officers were not opposed by the opponents of the writs of assistance. See O.M. Dickerson, *Writs of Assistance as a Cause of the Revolution, in THE ERA OF THE AMERICAN REVOLUTION* 48 (R. Morris ed., 1939) (colonial judges and lawyers saw the writs of assistance as fundamentally different from the established practice of common law courts and in direct conflict with English law regarding the issuance of warrants).

Justice White does not acknowledge that the framers placed their trust in the judiciary to ensure that overbroad warrants would not be issued. "The courts, after all, are the specific addressees of the constitutional command that 'no Warrants shall issue, but upon certain prescribed conditions.'" Kamisar, *supra* note 24, at 592. See also *Wilson v. Schettler*, 365 U.S. 381, 396 (1961) (Douglas, J., dissenting) ("[T]he command of the Fourth Amendment implies continuous supervision by the judiciary over law enforcement officers, quite different from the passive role which courts play in some spheres.").

¹⁷⁰ Nor does Justice Powell, in my view, provide an adequate answer to his own logical conclusion "that arrests [should] be subject to the warrant requirement at least to the same extent as searches." *Watson*, 423 U.S. at 429 (Powell, J., concurring). Justice

Similarly, in *United States v. Dionisio*¹⁷¹ and *United States v. Mara*,¹⁷² the Court found no Fourth Amendment interests that require judicial review before the issuance of a subpoena for a voice exemplar or handwriting sample. Only by ignoring "common sense and practical experience" could one believe that a summons to appear before a grand jury is a minor inconvenience and poses no threat to liberty interests.¹⁷³ Imagine that you receive a hand-delivered document from a representative of the local federal prosecutor requesting that you appear at the federal courthouse to provide a voice exemplar or specimen of your handwriting. You might have several responses. "What does this mean?" "Will I be arrested?" "Why does a grand jury want to see my handwriting?" "Why am I being investigated?" "Should I consult with an attorney?" "What will happen if I don't appear?" "What rights do I have?" When confronted with a subpoena, you are unlikely to view the document as a minor formality. The order to appear before a grand jury is more than a mere inconvenience; rather, it will probably arouse considerable fear and anxiety. Yet, the majority in *Dionisio* and *Mara*

Powell contended that there was "no historical evidence that the Framers or proponents of the Fourth Amendment, outspokenly opposed to the infamous general warrants and writs of assistance, were at all concerned about warrantless arrests by local constables and other peace officers." *Id.* at 429. A similar lack of interest among the Founding Fathers might also have existed about eavesdropping, *see Katz v. United States*, 389 U.S. 347, 364-74 (1967) (Black, J., dissenting); the use of deadly force by the police to effectuate felony arrests, *see Tennessee v. Garner*, 471 U.S. 1, 26 (1985) (O'Connor, J., dissenting); and footlockers carried in public, *see United States v. Chadwick*, 433 U.S. 1 (1977), but the absence of interest in 1787 hardly provides a legitimate excuse for not confronting and resolving difficult constitutional questions posed in today's society.

Justice Powell also worried that requiring a warrant for routine felony arrests "could severely hamper law enforcement." *Watson*, 423 U.S. at 431. Besides the lack of any support for this naked assertion, Justice Powell did not bother to consider the fact that it was "the standard practice of the Federal Bureau of Investigation to present its evidence to the United States Attorney, and to obtain a warrant, before making an arrest." *Id.* at 448 (Marshall, J., dissenting) (quoting Brief for United States 26 n.15). Justice Powell's additional concerns about the need for warrantless arrests in exigent conditions and stale warrants, *id.* at 431-32, were easily answered by Justice Marshall, *see id.* at 449-53 (If "exigent circumstances develop that demand an immediate arrest, the arrest may be made without fear of unconstitutionality, so long as the exigency was unanticipated and not used to avoid the arrest warrant requirement." *Id.* at 450. "[I]t is virtually impossible for probable cause to become stale between procurement [of a warrant] and arrest." (citations omitted). *Id.* at 451.).

¹⁷¹ 410 U.S. 1 (1973).

¹⁷² 410 U.S. 19 (1973).

¹⁷³ *Dionisio*, 410 U.S. at 43 (Marshall, J., dissenting). The *Dionisio* majority suggested that the average person would not be troubled by the compulsion associated with a subpoena to appear before a grand jury. 410 U.S. at 10 (citing *United States v. Doe* (Schwartz), 457 F.2d 895, 898 (1972) (contrasting physical seizure of a person with a grand jury subpoena; the latter does not involve stigma, it is, at most, a minor inconvenience)).

were unable (or unwilling) to contemplate these natural human responses.

The Court saw no reason to impose any Fourth Amendment scrutiny on this process. Subpoenas can be issued without prior judicial review or without any showing of cause justifying this assertion of governmental power over the individual. Justice Marshall, however, saw the Court's decision as a severe blow to individual liberty. If the Fourth Amendment is supposed to protect us from unfettered and potentially unwarranted impositions of government power over the individual, then it is indeed "a strange hierarchy of constitutional values" that personal property¹⁷⁴ and private papers¹⁷⁵ are afforded "more protection from arbitrary governmental intrusion than people."¹⁷⁶

2. *How Are Liberty Interests Perceived by the Current Court?*

Justice Marshall's conception of the liberty interests protected by the Fourth Amendment contrasts sharply with the approach taken in two recent Supreme Court decisions, *Riverside v. McLaughlin*¹⁷⁷ and *Michigan Dep't of State Police v. Sitz*.¹⁷⁸ *McLaughlin* considered the question of how promptly a probable cause hearing must occur after a warrantless arrest. *Sitz* resolved the constitutionality of warrantless, suspicionless sobriety roadblocks. In both cases, the Court curtailed the liberty interests of all persons.

McLaughlin concerned how quickly authorities must bring an individual arrested without a warrant before a neutral judge to determine whether the police have good grounds for detaining the person. An earlier ruling, *Gerstein v. Pugh*,¹⁷⁹ had rejected the claim that the Fourth Amendment did not grant a right to a judicial determination of probable cause prior to an extended restraint of liberty

¹⁷⁴ See *Connecticut v. Doehr*, 111 S. Ct. 2105 (1991) (statute authorizing prejudgment *ex parte* attachment of realty, without prior notice and hearing and absent exigent circumstances, held violative of due process as applied in cases involving an assault claim).

¹⁷⁵ See, e.g., *Stanford v. Texas*, 379 U.S. 476, 485, *reh'g denied* 380 U.S. 926 (1965) ("[T]he constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain." (citation omitted)). For a discussion of the Court's treatment of personal papers under the Fourth Amendment, see Craig Bradley, *Constitutional Protection for Private Papers*, 16 HARV. C.R.-C.L. L. REV. 461 (1981); James A. McKenna, *The Constitutional Protection of Private Papers: The Role of a Hierarchical Fourth Amendment*, 53 IND. L.J. 55 (1977); Eric Schnapper, *Unreasonable Searches And Seizures Of Papers*, 71 VA. L. REV. 869 (1985).

¹⁷⁶ *United States v. Mara*, 410 U.S. 19, 40 (1973) (Marshall, J., dissenting).

¹⁷⁷ 111 S. Ct. 1661 (1991).

¹⁷⁸ 496 U.S. 444 (1990).

¹⁷⁹ 420 U.S. 103 (1975).

following arrest.¹⁸⁰ *Gerstein* explained that states "must provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest."¹⁸¹

In resolving what *Gerstein* meant by a "prompt" probable cause hearing, the focus of *McLaughlin* was clear. Speaking for the Court, Justice O'Connor emphasized the administrative problems faced by state officials who seek to combine certain pretrial hearings. In essence, the majority treated this as a case about federalism. The intent of *Gerstein*, according to the *McLaughlin* Court, "was to make clear that the Fourth Amendment requires every State to provide prompt determinations of probable cause, but that the Constitution does not impose on the States a rigid procedural framework."¹⁸² Individual states are free to decide how they will comply. The Fourth Amendment does not require that a probable cause hearing occur immediately after state officials complete the administrative steps incident to arrest.¹⁸³

What justifies the result in *McLaughlin*? Justice O'Connor wants us to believe that the reasoning of *Gerstein* had already decided the question presented to the Court. She asserts that *Gerstein* "stopped short of holding that jurisdictions were constitutionally compelled to provide a probable cause hearing immediately upon taking a suspect into custody and completing booking procedures."¹⁸⁴ This assertion is misleading at best, and, as a matter of law, it would be wrong to say that *Gerstein* held that states need not provide an immediate hearing. In fact, *Gerstein*, held "that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest."¹⁸⁵ *Gerstein* had no reason to reach the timing issue presented in *McLaughlin* because the state had argued that no probable cause hearing was constitutionally necessary.¹⁸⁶ Therefore, Justice O'Connor had no justifi-

¹⁸⁰ In *Gerstein*, the Court considered whether persons arrested without a warrant could be held for 30 days or more without a judicial determination of probable cause. The Court held "that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Gerstein*, 420 U.S. at 114.

¹⁸¹ *Id.* at 125 (footnotes omitted). *Gerstein* held, however, that because a probable cause hearing was not a "critical stage" in the prosecution, the Fourth Amendment does not require a formal adversary hearing at this point. *Id.* at 119-26.

¹⁸² *Riverside v. McLaughlin*, 111 S. Ct. 1661, 1668 (1991).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Gerstein*, 420 U.S. at 114.

¹⁸⁶ See Brief for Petitioner at 10, *Gerstein v. Pugh*, 420 U.S. 103 (1975) (No. 73-477) ("Preliminary probable cause hearings for defendants in state custody whether charged with felonies or misdemeanors are not required by the United States Constitution.").

able basis for her assertion that *Gerstein* either considered or resolved the issue raised in *McLaughlin*.¹⁸⁷ Although the majority in *McLaughlin* suggests that *Gerstein* compels its decision, the real foundation underlying the Court's decision is its own "value laden[] 'balancing' of the competing demands of the individual and the State."¹⁸⁸ Judicial balancing and deference to state interests, of course, are essential parts of constitutional doctrine when the Court confronts equally compelling claims. However, a balancing analysis with deference to state concerns seems less appropriate when a state's asserted interests amount to nothing more than administrative convenience.

At issue in *McLaughlin* was whether state officials, after completing the administrative process incident to an arrest and arranging for a magistrate's appearance, must provide an immediate judicial hearing to determine whether good cause exists for holding an individual. Imagine the indignities associated with any arrest. The police forcibly seize you. They have thoroughly searched your body and personal effects. They remove you from family, friends, and job. They place you in an environment where no one represents your legal interests. And, they may interrogate you.¹⁸⁹ If arrested

¹⁸⁷ In fact, to the extent that *Gerstein* offers any clues as to its resolution of the issue, the evidence suggests that the Court would reject Justice O'Connor's position in *McLaughlin*. As Justice Powell explained in *Gerstein*,

[o]nce the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. . . . And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be more serious than the interference occasioned by arrest. . . . When the stakes are this high, the detached judgment of a neutral magistrate is essential if the Fourth Amendment is to furnish meaningful protection from unfounded interference with liberty.

Gerstein, 420 U.S. at 114.

¹⁸⁸ *McLaughlin*, 111 S. Ct. at 1674 (Scalia, J., dissenting).

¹⁸⁹ This, of course, is what the Supreme Court has permitted state officials to do in the abstract. Many times, however, the legal theory announced by the Court and the reality of what occurs on the street and in police stations are worlds apart. We know, for example, that the police have arrested innocent people. See William Glaberson, *Trapped in the Terror of New York's Holding Pens*, N.Y. TIMES, Mar. 23, 1990, at A1. We also know that the police arrest people for illegal reasons. See, e.g., Richard Emery, *The Even Sadder New York Police Saga*, N.Y. TIMES, Dec. 14, 1987, at A31 (police officers illegally arrested Black, Hispanic and homeless persons in New York's subways in an effort to meet arrest quotas). Further, the police severely heat and kill some of the people they arrest. See, e.g., Andy Court, *Unreasonable Doubt*, THE AM. LAW., Apr. 1991, at 76 (jury acquits six narcotics officers of civil rights charges in death of drug suspect). Citizens are often not informed of the reasons for their arrest and sometimes state officials ignore the constitutional rights of citizens to remain silent and have a lawyer present during custodial interrogation. See, e.g., *Cooper v. Dupnik*, 924 F.2d 1520 (9th Cir. 1991) (police continued interrogation of arrested suspect despite his request for silence or an attorney; suspect was interrogated for nearly 24 hours before he was allowed to see family or attorney).

without a warrant, you obviously have compelling reasons to demand that a neutral official examine the grounds for your continued detention. The nature of your seizure and detention demands no less.

On the other hand, the state, according to *McLaughlin*, desires the flexibility to combine certain pretrial hearings into a single proceeding. For example, the Court worries that requiring a probable cause hearing immediately after completion of the administrative procedure incident to arrest might mean that “[w]aiting even a few hours so that a bail hearing or arraignment could take place at the same time as the probable cause determination” is unconstitutional.¹⁹⁰ This interest in administrative convenience competes with the individual’s Fourth Amendment interests of liberty, privacy, and personal security.

Is this really a matter of equally compelling claims that merit judicial balancing? I think not. Consider the concerns raised by Justice Marshall for those who are routinely arrested without judicial approval: the loss of liberty, the possibility that force might be employed by police officials, the indignities of a police body and effects search, the isolation of a police environment where no one is available to represent your interests, and the important consequences that accompany custodial interrogation. When these interests are placed next to the state’s interest in administrative convenience, the latter interest pales in significance.

The *McLaughlin* Court, however, failed to make a fair assessment of the Fourth Amendment interests at stake. The Court does not devote a single sentence to detailing the liberty, privacy, and dignity interests involved in a routine arrest. The best that the Court can do is remind the reader that *Gerstein* leaves it no choice.¹⁹¹ The individuals involved in warrantless arrests and the Fourth Amendment values that should protect them deserve better treatment than this, yet the *McLaughlin* opinion indicates no awareness of the individual interests at stake. By this, I do not suggest, like some Justices, that the Court accords the Fourth Amendment “second-

¹⁹⁰ *McLaughlin*, 111 S. Ct. at 1668.

¹⁹¹ Justice O’Connor noted that *Gerstein* stated that “prolonged detention based on incorrect or unfounded suspicion may unjustly ‘imperil [a] suspect’s job, interrupt his source of income, and impair his family relationships.’” *Id.* at 1668 (quoting *Gerstein*, 420 U.S. at 114). She then argued that *Gerstein* “established a ‘practical compromise’ between the rights of individuals and the realities of law enforcement.” *Id.* Later, she explained that “*Gerstein* struck a balance between competing interests; a proper understanding of the decision is possible only if one takes into account both sides of the equation.” *Id.* at 1669.

These references indicate that Justice O’Connor is aware that the interests of an individual compete with the state’s need for procedural convenience. Unfortunately, nothing indicates that she understands the significance and scope of those interests.

class" status.¹⁹² Rather, as Justice Marshall often reminded his colleagues, the Court's Fourth Amendment analysis should be realistic about the impact of governmental power on individuals. *McLaughlin* evidences no understanding that an arrest "is a serious personal intrusion regardless of whether the person seized is guilty or innocent."¹⁹³

Moreover, *McLaughlin's* balancing analysis is particularly inept in light of the Court's earlier ruling in *Watson*, which permitted warrantless arrests even in cases where state officials had time to obtain a warrant. Once *Watson* excused state officials from complying with the Warrant Clause before arrest, delaying judicial scrutiny after the arrest is inconsistent with Fourth Amendment values.¹⁹⁴ Why? Imagine that the police suspect a certain person—call him Uncle Sam—has committed a crime. The police have no reason to believe that Uncle Sam is about to flee, and Uncle Sam is not even aware that he is suspected of wrongdoing. Even though the police have plenty of time to present their suspicions to a neutral magistrate,

¹⁹² See, e.g., *Brinegar v. United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting) ("We cannot give some constitutional rights a preferred position without relegating others to a deferred position; we can establish no firsts without thereby establishing seconds. Indications are not wanting that Fourth Amendment freedoms are tactily marked as secondary rights, to be relegated to a deferred position."); *Harris v. United States*, 331 U.S. 145, 157 (1947) (Frankfurter, J., dissenting) (noting that a Fourth Amendment question "may turn on whether one gives that Amendment a place second to none in the Bill of Rights, or considers it on the whole a kind of nuisance, a serious impediment in the war against crime").

¹⁹³ *United States v. Watson*, 423 U.S. 411, 428 (1976) (Powell, J., concurring); Mireya Navarro, *As Suspects Wait, the Fear of Tuberculosis Rises*, N.Y. TIMES, Jan. 30, 1992, at B1 (noting concern of health officials that persons arrested and held for arraignment over one or two days in New York City jails could become infected with tuberculosis); Glaberson, *supra* note 189, at A1, describing the detention cells where persons arrested in New York City are held:

"There are no mattresses, no bedding, no clean clothing and no showers. The toilets, where there are toilets at all, are open bowls along the walls and often encrusted and overflowing. Meals usually consist of a single slice of baloney and a single slice of American cheese on white bread.

....

"People who have been through the system say it is not easy to forget. Some were threatened by other prisoners. Others were chained to people who were vomiting and stinking of the streets. With few phone privileges, many felt as if they were lost in a hellish labyrinth far from the lives they had been plucked from."

¹⁹⁴ See *Gerstein*, 420 U.S. at 114:

Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate. There no longer is any danger that the suspect will escape or commit further crimes while the police submit their evidence to a magistrate. And, while the State's reasons for taking summary action subside, the suspect's need for a neutral determination of probable cause increases significantly. The consequences of prolonged detention may be *more serious* than the interference occasioned by arrest. (emphasis added).

they arrest Uncle Sam at his place of employment in front of his coworkers and supervisors.

Watson permits this scenario, clearly indicating that police officials have substantial authority and discretion to restrain the liberty and invade the privacy of any person they suspect. If Justice Marshall's view of the Fourth Amendment had commanded a majority of the Court in 1976, police officials could not arrest Uncle Sam without a warrant unless some exigency justified his immediate seizure. In 1991, however, the Court—worried that state officials would lack the flexibility and convenience to combine pretrial proceedings—concludes that the Fourth Amendment allows the police to keep Uncle Sam in jail for an *additional* 48 hours; two full days after the police have completed the administrative steps surrounding the arrest. And the Court reaches this result in the name of federalism.

Watson not only gave the state the power of warrantless arrests, but also sanctioned a regime where administrative convenience denies individuals the immediate opportunity to have a neutral magistrate scrutinize police claims of probable cause. The *McLaughlin* Court, which purported to balance the competing claims of official convenience against individual freedom, never considered the advantages already given the state under *Watson*.

Instead, the *McLaughlin* Court found that administrative convenience, by itself, is sufficient to override Fourth Amendment values. When the Court is oblivious to this power and permits meager state interests to trump weighty and obvious Fourth Amendment interests,¹⁹⁵ it is questionable whether *McLaughlin* involved a fair and sensitive balancing analysis as Justice O'Connor claimed¹⁹⁶ or simply further eroded Fourth Amendment principles.

Although *McLaughlin* is a disturbing decision,¹⁹⁷ it is not a surprising one, given the Court's fondness for balancing and its hostility towards applying the Fourth Amendment's substantive safeguards to limit law enforcement activities. What, some might

¹⁹⁵ See *Riverside v. McLaughlin*, 111 S. Ct. 1661, 1677 (1991) (Scalia, J., dissenting):

While in recent years we have invented novel applications of the Fourth Amendment to release the unquestionably guilty, we today repudiate one of its core applications so that the presumptively innocent may be left in jail. Hereafter a law-abiding citizen wrongfully arrested may be compelled to await the grace of a Dickensian bureaucratic machine, as it churns its cycle for up to two days—never once given the opportunity to show a judge that there is absolutely no reason to hold him, that a mistake has been made.

¹⁹⁶ *Id.* at 1670.

¹⁹⁷ Unlike many of the Court's Fourth Amendment rulings over the last few years, *McLaughlin* received substantial attention in the popular media. See Tom Wicker, *Dee Brown and You*, N.Y. TIMES, May 15, 1991, at A27.

ask, is wrong with balancing? What is so bad about using a rule of reasonableness to assess police efforts to combat violent crime or judge government programs aimed at reducing the use of alcohol by railroad and airline employees?¹⁹⁸ After all, when law enforcement activities cross the line of reasonableness, the citizenry will rise up and politicians will act to rein in the police.

Several reasons exist for concern about the Court's balancing model. First, judges who profess allegiance to the written text of the Constitution should be concerned about a rule of reasonableness for resolving Fourth Amendment issues. Certainly, the first clause of the Amendment grants only a right against "unreasonable" search and seizure. The addition of the Warrant Clause, however, indicates that the right embodied in the first clause went beyond merely outlawing the evil associated with the writs of assistance. "The general right of security from unreasonable search and seizure was given a sanction of its own and the amendment thus intentionally given a broader scope."¹⁹⁹

Put another way, "[u]nreasonable searches or seizures conducted without any warrant at all are condemned by the plain language of the first clause of the Amendment."²⁰⁰ Even if one disagrees with this construction of the Fourth Amendment's text,²⁰¹ a logical place to determine what the Framers meant by "unreasonable" searches and seizures is the Fourth Amendment itself. The provision, intended to limit the power and excesses of government officials, incorporates a preference for the requirements of probable cause and neutral review by a magistrate as the best means to check

¹⁹⁸ See Eric Weiner, *Northwest Pilots Are Found Guilty of Drunken Flying*, N.Y. TIMES, Aug. 21, 1990, at A1.

¹⁹⁹ LASSON, *supra* note 62, at 103; see also Amsterdam, *supra* note 17, at 399 n.465; Clark D. Cunningham, *A Linguistic Analysis of the Meanings of "Search" in the Fourth Amendment: A Search for Common Sense*, 73 IOWA L. REV. 541, 551-52 (1988); Kamisar, *supra* note 7, at 574; cf. Bookspan, *supra* note 53, at 477:

Although the fourth amendment conveys to "the People [the right] to be secure in their persons, houses, papers, and effects," the reasonableness approach focuses on the acts of the police instead of the rights of the people. The question, then, becomes whether the police acted reasonably rather than whether a person's rights were violated. This approach endorses retrospective evaluations of police behavior rather than prospective protections.

(footnote omitted).

²⁰⁰ *Payton v. New York*, 445 U.S. 573, 585 (1980); *United States v. Rabinowitz*, 339 U.S. 56, 70 (1950) (Frankfurter, J., dissenting) ("[T]he framers said with all the clarity of the gloss of history that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity.").

²⁰¹ See *Payton*, 445 U.S. at 610-11 (White, J., dissenting).

the discretion of government officers.²⁰² Judges concerned about vague standards and countless exceptions to constitutional rules should appreciate an analytical model that defers to the constitutional text, rather than to their own personal values, for evaluating governmental search and seizure activities.²⁰³

Second, when balancing occurs, the government generally wins—at least in search and seizure cases. Few cases exist in which the government's interest in effective law enforcement is insubstantial. This fact raises the question of whether the Court ought to engage in "balancing" in the first place.²⁰⁴ Balancing analysis is a very subjective process. The subjective nature of the process is exacer-

²⁰² *United States v. United States Dist. Court*, 407 U.S. 297, 315 (1972) ("[T]he definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause.").

²⁰³ Of course, it could also be argued that a general rule of reasonableness flies in the face of precedents established by both the Warren and Burger Courts, which look to the safeguards of the Warrant Clause for assessing the constitutional validity of government search and seizure actions. *See, e.g., Mincey v. Arizona*, 437 U.S. 385, 390 (1978):

The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside of the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."

(quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

However, *stare decisis* no longer carries the same weight it has in the recent past, particularly when individual rights are at stake. *See Payne v. Tennessee*, 111 S. Ct. 2597, 2610 (1991) (Chief Justice Rehnquist explaining that *stare decisis* considerations are heightened in cases involving "property and contract rights," but *stare decisis* is less important in cases concerning "procedural and evidentiary rules.") What the Chief Justice euphemistically calls "procedural and evidentiary rules" used to be known as "constitutional rights," "fundamental freedoms," and "civil liberties." It is evident that the Court has more concern for the reliance expectations associated with private property and business contracts than for the constitutional expectations the individual holds in the Bill of Rights. *See California v. Acevedo*, 111 S. Ct. 1982 (1991), *overruling Arkansas v. Sanders*, 442 U.S. 753 (1979); *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991), *overruling Rogers v. Richmond*, 365 U.S. 534 (1961) (admission into evidence of an involuntary confession, regardless of its truth or falsity, constitutes *per se* due process violation for a criminal defendant); *Coleman v. Thompson*, 111 S. Ct. 2546 (1991), *overruling Fay v. Noia*, 372 U.S. 391 (1963); *Payne v. Tennessee*, 111 S. Ct. 2597 (1991), *overruling Booth v. Maryland*, 482 U.S. 496 (1987) & *South Carolina v. Gathers*, 490 U.S. 805 (1989). *See generally* Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68 (1991).

²⁰⁴ "How does one balance 'privacy' (or 'individual liberty' or 'personal dignity,' or call it what you will) against the interest in suppressing crime (or 'law and order' or the 'general welfare,' or call it what you will)?" Kamisar, *supra* note 7, at 646.

bated when the topic concerns law enforcement,²⁰⁵ leaving us to question what criteria the Court uses in such an analysis.²⁰⁶

Third, the Court's balancing process is distorted because it generally sees only a guilty defendant on the other side of the scale. Rarely does a Fourth Amendment case reach the Court where the party urging a ruling in favor of Fourth Amendment rights is not charged with a crime or some other civil misconduct.²⁰⁷ When the Court proffers its reasoning and conclusions for a particular result, it rarely considers the effect on innocent persons subjected to the police intrusion permitted by the Court. Foremost in the minds of the Justices is the need for effective law enforcement. Thus, Fourth Amendment rights are seldom considered positive rights. Rather, the Court generally views them as restraints on law enforcement to be acknowledged, but not taken seriously.

It is not surprising, then, that a balancing formula inevitably favors the government. Is this a bad thing? No, not if the original purpose of the Fourth Amendment was to favor or facilitate law enforcement investigatory techniques. However, the Framers designed the Amendment to bar certain law enforcement activities and to slow down others. Regrettably, the current Court not only ignores this fact, but also disguises its disregard of Fourth Amendment values by intentionally fostering the view that those who favor strict adherence to the Fourth Amendment's safeguards have an expansive concern for the rights of criminals and no interest in the "rights" of the police and public. A balancing model, which looks primarily to the general reasonableness of government conduct, is a convenient tool for the Court's handiwork.

Consider, for example, the problem of drunk driving. Admittedly, drunk driving is a problem. But who will say that society should not give police officials and policymakers the primary responsibility for devising the methods to detect those who drink and drive? And how many politicians will campaign on a platform that opposes sobriety roadblocks because of the threat they pose to Fourth Amendment principles?

²⁰⁵ Cf. *id.* at 649 (In Fourth Amendment cases "because the crime may be so heinous and the relevance of the evidence so overwhelming, interest-balancing 'almost requires the judge to intrude his individual values into the case.'") (footnote omitted) (quoting Harry Kalven, Jr. & Roscoe T. Steffen, *The Bar Admission Cases: An Unfinished Debate between Justice Harlan and Justice Black*, 21 *LAW IN TRANSITION* 155, 178-79 (1961)).

²⁰⁶ "If the standard is not to be the fourth amendment—which embodies the judgment that securing all citizens 'in their persons, houses, papers, and effects, against unreasonable searches and seizures' 'outweighs' society's interest in apprehending and convicting criminals—then what is it to be?" Kamisar, *supra* note 7, at 646-47 (footnote omitted).

²⁰⁷ *But cf.* *INS v. Delgado*, 466 U.S. 210 (1984) (civil action challenging the constitutionality of government's "factory surveys").

These questions, and their obvious answers, provide the support for Chief Justice Rehnquist's majority opinion in *Michigan Dep't of State Police v. Sitz*,²⁰⁸ which considered the constitutionality of sobriety checkpoints. Not surprisingly, the Chief Justice concluded that states have a substantial interest in eradicating drunk driving.²⁰⁹ State officials, not judges, are in the best position to choose among reasonable alternative methods for apprehending drunk drivers;²¹⁰ therefore, judges should not question the effectiveness of sobriety checkpoints in cases not involving "a complete absence of empirical data."²¹¹

Someone accustomed to living in a society that highly values individual liberty and generally deplors official seizures lacking any evidentiary basis might wonder how one can reconcile sobriety checkpoints—which involve suspicionless and warrantless seizures of motorists and their companions—with our constitutional framework. In effect, *Sitz* held that the Fourth Amendment has no relevance for a police decision²¹² to establish a roadblock that seizes every vehicle that passes through it.²¹³ No warrant is required. No probable cause or suspicion is needed. No prior approval by a neu-

208 496 U.S. 444 (1990).

209 *Id.* at 2485-86.

210 *Id.* at 2487.

211 *Id.*

212 Professor Strossen has cogently explained that the Michigan legislature had not approved the roadblock program at issue in *Sitz*. Rather, the legislature considered and rejected a proposal for such a program. Despite this rejection, the Director of the Michigan Department of State Police, an unelected official, implemented the challenged program. Thus, according to Professor Strossen, there was no "justification for deferring to search and seizure decisions [made] by the appointed head of a state police agency. Such decisions are made by a single, unelected official, not by a broadly representative elected body." Strossen, *supra* note 154, at 294.

213 The Chief Justice did note that *Sitz* only considered "the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers. Detention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard." *Sitz*, 110 S. Ct. at 2485.

Those who care about Fourth Amendment freedoms should not take too much comfort in the way the Chief Justice appears to frame narrowly the issue. The Chief Justice wants motorists to believe that they have nothing to worry about at sobriety roadblocks. Motorists need not fear the initial seizure because all vehicles are seized and the seizure itself "is slight," *id.* at 2486 (approximately 25 seconds). In addition, officers supposedly follow "guidelines" with instructions on examining motorists for signs of intoxication. *Id.* at 2488.

Although the Chief Justice notes the length of the seizure, he fails to mention the *intensity* of that seizure, or to acknowledge that officers have considerable discretion when deciding which motorists will be subjected to further official detention and scrutiny. However, Professor Strossen noted that the scope of the initial seizure is far from slight when one considers that it includes "looking at the driver's face and eyes to see whether they were . . . flushed or bloodshot; smelling the driver's breath to [detect the] odor of alcohol; engaging the driver in conversation [to detect slurred speech]; and in-

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tral magistrate is necessary. In other words, the Constitution turns a blind eye towards a police tactic one might expect to see "in Russia or Hitler-occupied Germany."²¹⁴

Someone who values liberty might also worry about the subjective intrusion that occurs when the police detain and question a person at a night-time roadblock. A police seizure is seldom a pleasant experience. The experience may be "distressing even when it should not be terrifying, and what begins mildly may by happenstance turn severe."²¹⁵

In *Sitz*, the Court's response to these legitimate concerns was, in essence, that "only the guilty need worry." This response is an increasingly familiar tactic employed by the Court to constrain the reach of Fourth Amendment protections. According to the Court, only the fear and surprise engendered in "law abiding" motorists are pertinent when assessing the subjective intrusion posed by sobriety checkpoint seizures.²¹⁶

The strategic advantages in this approach are obvious. Most of the public already associates the Fourth Amendment with criminals

specting the driver's shirt to see whether it was unbuttoned." *Strossen, supra* note 154, at 295.

Moreover, the so-called "guidelines" that allegedly limit the officers' discretion, provide no real protection against arbitrary and discriminatory police decisions to detain motorists for further questioning. "The 'guidelines' in fact provided no meaningful guidance as to the circumstances under which a driver should be detained for more prolonged investigation. That determination was consigned to the discretion of individual officers conducting the initial stops." *Id.* at 295-96 (footnote omitted).

Finally, it is interesting that the Chief Justice's reference to the "[d]etention of particular motorists for more extensive field sobriety testing" only states that this intensified seizure "may" require satisfaction of an individualized suspicion standard. *Sitz*, 110 S. Ct. at 2485. Apparently, the question whether secondary seizures at sobriety roadblocks must be justified by particularized suspicion of intoxication or other criminality remains unanswered. Presumably, the Chief Justice and the rest of the *Sitz* majority is willing to consider an argument that such particularized suspicion is unnecessary to justify such seizures. *Cf. United States v. Martinez-Fuerte*, 428 U.S. 543, 563-64 (1976) (no reasonable suspicion needed to refer to motorist to secondary area at checkpoint near border to detect illegal immigration); *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 624 (1988) (upholding suspicionless blood, urine, and breath searches of railroad employees involved in train accidents and stating that "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable.").

²¹⁴ *Strossen, supra* note 154, at 291 n.21 (statement by state legislator that drunk driving roadblocks are a police tactic he might expect to see "in Russia, or Hitler-occupied Germany.").

²¹⁵ *Sitz*, 110 S. Ct. at 2493 (Stevens, J., dissenting).

²¹⁶ "The 'fear and surprise' to be considered are not the natural fear of one who has been drinking over the prospect of being stopped at a sobriety checkpoint, but, rather, the fear and surprise engendered in law abiding motorists by the nature of the stop." *Id.* at 2486.

and their advocates.²¹⁷ The Fourth Amendment is only a technicality, used by shifty lawyers to help their clients avoid just punishment. Others, fueled by the rhetoric of politicians, believe that the Amendment “handcuffs” legitimate law enforcement methods for detecting and capturing criminals. When the Court characterizes the competing choices as involving the rights of the “law abiding” versus the interests of the “guilty,”²¹⁸ the public easily identifies with the former at the expense of the latter.

What is wrong with this sort of reasoning? First, the accuracy of the Court’s premise in *Sitz* is questionable. The fear and anxiety that motorists experience regarding police checkpoints are not “solely the lot of the guilty.”²¹⁹ More importantly, however, this approach diverts attention from the main task at hand: deciding whether sobriety roadblocks are consistent with the central principles of the Fourth Amendment. Rather than ask straightforward questions, the Court engages in a formless balancing analysis. *Sitz*, for instance, never considers whether the safeguards of the Fourth Amendment—probable cause and neutral review by a magistrate *ante-factum*—have any relevance to the constitutional debate. The Court simply assumes their irrelevance. This sleight-of-hand is possible when the Court diverts its attention from the requirements of the Warrant Clause. When analysis begins with the assumption that government intrusions need only be reasonable, the end result is a conclusory and unsurprising holding that sobriety checkpoints satisfy the Court’s standard of reasonableness.

C. The Danger of the Reasonableness Rule: The Evolving Government Convenience and Efficiency Rationale

The Fourth Amendment’s protection extends not only to people, homes, and papers, but also protects “effects.” Similarly, the Warrant Clause “does not in terms distinguish between searches conducted in private homes and other searches.”²²⁰ All searches must adhere, at least presumptively, to its restrictions. Thus, allegiance to the text of the Fourth Amendment suggests that personal effects should receive the same degree of protection against warrantless searches as that received by “persons, houses, [and] papers.”²²¹ But, as Justice Marshall noted in another context,

²¹⁷ “One hears the complaint, nowadays, that the Fourth Amendment has become constitutional law for the guilty; that it benefits the career criminal (through the exclusionary rule) often and directly, but the ordinary citizen remotely if at all.” *Riverside v. McLaughlin*, 111 S. Ct. 1661, 1677 (1991) (Scalia, J., dissenting).

²¹⁸ *Maclin*, *supra* note 105, at 1311 n.255.

²¹⁹ *See Sitz*, 110 S. Ct. at 2493 (Stevens, J., dissenting).

²²⁰ *United States v. Chadwick*, 433 U.S. 1, 8 (1977).

²²¹ U.S. CONST. amend. IV.

"[c]onsistency . . . hardly has been a hallmark of the current Court's Fourth Amendment campaigns."²²² The Court's cases concerning closed containers found inside automobiles demonstrate why Justice Marshall was correct when he warned that adopting a rule of reasonableness would inevitably lead to the evisceration of Fourth Amendment rights.

1. *Private Containers Found Inside Automobiles: Why Aren't They Protected?*

In *United States v. Ross*,²²³ the Court tried to clarify an area of search and seizure law—searches of automobiles and containers found therein—that has confronted and confused courts since Prohibition. *Ross* considered "the extent to which police officers—who have legitimately stopped an automobile and who have probable cause to believe that contraband is concealed somewhere within it—may conduct a probing search of compartments and containers within the vehicle whose contents are not in plain view."²²⁴ The Court, speaking through Justice Stevens, held that police "may conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant 'particularly describing the place to be searched.'"²²⁵

The reasoning of *Ross* can be summarized as follows: The so-called "automobile" exception²²⁶ to the warrant requirement permits a warrantless search of a vehicle when probable cause supports the search. The exception, however, does not allow a warrantless search of a closed container found inside a car if the focus of probable cause is the container itself and not the vehicle generally.²²⁷ When police have probable cause to search the entire vehicle, the

²²² *United States v. Sharpe*, 470 U.S. 675, 700 (1985) (Marshall, J., dissenting).

²²³ 456 U.S. 798 (1982).

²²⁴ *Id.* at 800.

²²⁵ *Id.*

²²⁶ In a series of cases, the Court has allowed law enforcement officials to search automobiles where they had probable cause to believe that the vehicle contained evidence of crime. This rule is popularly known as the "automobile" exception to the warrant requirements. The origins of the exception stem from *Carroll v. United States*, 267 U.S. 132 (1925). Professor Kamisar, however, has explained why this label is a misnomer and can be misleading. See Yale Kamisar, *United States v. Ross: The Court Takes Another Look at the Container-in-the-Car Situation*, in *THE SUPREME COURT: TRENDS AND DEVELOPMENTS 1981-1982*, at 74-75 (Jesse Choper et al. eds., 1983).

²²⁷ *Arkansas v. Sanders*, 442 U.S. 753 (1979) (police had probable cause to believe that particular item of luggage placed in the trunk of a taxi contained contraband; while police may seize that luggage, they must obtain a warrant before searching it). In a concurring opinion, Chief Justice Burger noted that "it was the *luggage* being transported by respondent at the time of the arrest, not the automobile in which it was being carried, that was the suspected locus of the contraband. The relationship between the automobile and the contraband was purely coincidental. . . ." *Id.* at 767 (Burger, C.J., concurring in judgment).

scope of a warrantless search is "no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause."²²⁸

What is the significance of *Ross*? For Justice Marshall, it was a disaster. The reasoning of the Court "repeals the Fourth Amendment warrant requirement itself."²²⁹ Why would the Court equate the authority of the police to conduct a warrantless search with an authorization provided by a magistrate's warrant? In Justice Marshall's view, the only convincing explanation for *Ross* is "expediency: it assists police in conducting automobile searches, ensuring that the private containers into which criminal suspects often place goods will no longer be a Fourth Amendment shield."²³⁰ What is the impact of *Ross* for Fourth Amendment protection of closed containers and other luggage? Justice Marshall predicted that *Ross* marked "a first step toward an unprecedented 'probable cause' exception to the warrant requirement."²³¹ Hyperbole? I think not.

At first blush, the result in *Ross* seems logical.²³² If the Fourth Amendment permits police officers to tear open the upholstery of cars,²³³ open concealed compartments,²³⁴ or otherwise search the interior of automobiles stopped on the highway, why would it require police to obtain a warrant before opening a closed container—like a suitcase or knapsack—found during the course of a general search of a car? Justice Marshall's response to this question was straightforward: exigency justifies a warrantless search of a automobile stopped on the highway. The police cannot easily secure automobiles found on the open road because of their size and inherent mobility. No such exigency, however, applies to closed containers that come under the control of the police.²³⁵

Moreover, the reasoning of *Ross* cannot rest on a lack of privacy associated with closed containers. The Fourth Amendment provides explicit protection of personal "effects," and no one argues that individuals have no privacy expectations in their purses, attaché bags, and zippered pouches. In fact, the *Ross* majority acknowl-

²²⁸ *Ross*, 456 U.S. at 823.

²²⁹ *Id.* at 827 (Marshall, J., dissenting).

²³⁰ *Id.* at 841-42.

²³¹ *Id.* at 828.

²³² *Cf.* 3 WAYNE R. LAFAYE, SEARCH AND SEIZURE § 7.2(d), at 54-56 (2d ed. 1987) (noting that the *Ross* majority "can be applauded for refusing to accept . . . a distinction between cars and containers therein").

²³³ *See Carroll v. United States*, 267 U.S. 132 (1925) (search of automobile and seizure of liquor found therein do not violate Constitution if based upon probable cause).

²³⁴ *See Chambers v. Maroney*, 399 U.S. 42 (1970) (given probable cause police may conduct a warrantless search of entire car).

²³⁵ *Ross*, 456 U.S. at 830-32 (Marshall, J., dissenting).

edged the legitimate privacy expectations that surround such containers.²³⁶ Furthermore, it is nonsensical to say that the Fourth Amendment *bars* a warrantless search of a closed container found inside a car when the focus of probable cause is on the container itself, but permits a warrantless search of a similar container when the focus is on the entire car. Justice Marshall wondered, “[W]hy is . . . a container [in the former case] more private, less difficult for police to seize and store, or in any other relevant respect more properly subject to the warrant requirement, than a container [in the latter case] that police discover in a probable-cause search of an entire automobile?”²³⁷

But why not allow police to open closed containers discovered during the course of an extensive search of a car? Why not say that the scope of a police search based on probable cause is no broader than the scope of a search authorized by a warrant supported by probable cause? According to Justice Marshall, the critical function of a magistrate is lost under that approach. *Ross* contains “the startling assumption that a policeman’s determination of probable cause is the functional equivalent of the determination of a neutral and detached magistrate.”²³⁸ Not only does *Ross* assume “what has never been the law,”²³⁹ but it reaches a result that is at odds with the primary purpose of the Fourth Amendment, namely to prevent this assumption—the equation of an officer’s finding of probable cause with a magistrate’s determination—from ever becoming the law of the land.²⁴⁰

What, then, justifies *Ross*? The *Ross* Court simply balances the competing interests of the police and the individual. The Court thought that the police action in *Ross* was reasonable under the circumstances, notwithstanding the commands of the Warrant Clause. “When a legitimate search is under way, . . . nice distinctions between . . . glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the

²³⁶ *Id.* at 822 (Stevens, J.) (rejecting distinction between “worthy” and “unworthy” containers; “a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [may] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case.”) (footnote omitted).

²³⁷ *Id.* at 839-40 (Marshall, J., dissenting).

²³⁸ *Id.* at 833.

²³⁹ *Id.*

²⁴⁰ The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

interest in the prompt and efficient completion of the task at hand.”²⁴¹ Justice Marshall opposed this sort of value judgment by the Court.

2. *Why Doesn't the Warrant Clause Apply to the Search of Personal Possessions?*

When the Court decided *Ross*, Justice Marshall believed that “any movable container found within an automobile deserves precisely the same degree of Fourth Amendment warrant protection that it would deserve if found at a location outside the automobile.”²⁴² The *Ross* Court, of course, did not adopt this view. In his dissent, however, Justice Marshall predicted that the reasoning of *Ross* was a sign of future threats to Fourth Amendment rights.²⁴³ *California v. Acevedo*²⁴⁴ shows the prescience of Justice Marshall’s remarks and indicates how far the present Court is willing to, and might yet further, undermine Fourth Amendment rights.

As framed by the Court, the central issue in *Acevedo* was whether the Fourth Amendment requires the police to obtain a warrant to open a closed container found inside a car simply because they lack probable cause to search the entire car. Justice Blackmun, writing for the majority, would have us believe that the focus of the Court should be on the vehicle itself. Interestingly, the Court begins with two concessions. First, it acknowledges the wisdom of Justice Marshall’s dissent in *Ross*. Closed containers seized by the police, whether “found after a general search of the automobile . . . [or] found in a car after a limited search for the container are equally easy for the police to store and for the suspect to hide or destroy.”²⁴⁵ Second, no reason exists to distinguish the privacy expectations of closed containers based on whether the police had probable cause to search the entire vehicle, or only to seek a specific

²⁴¹ *Ross*, 456 U.S. at 821 (footnote omitted).

²⁴² *Ross*, 456 U.S. at 834 (Marshall, J., dissenting). In fact, Justice Marshall believed any warrantless search of an automobile or containers found therein was constitutionally suspect if performed without either the consent of the owner or some reason to believe that contraband or relevant evidence would be found inside. See *Colorado v. Bertine*, 479 U.S. 367, 377 (1987) (Marshall, J., dissenting) (respondent’s privacy interest in closed containers discovered during inventory of vehicle outweighed government’s interest in searching those containers); *South Dakota v. Opperman*, 428 U.S. 364, 384 (1976) (Marshall, J., dissenting) (government’s interest in preserving property should not override individual’s privacy interest in closed compartment of his vehicle).

²⁴³ Recall Justice Marshall’s declaration that *Ross* “repeals the Fourth Amendment warrant requirement itself,” and constitutes “a first step toward an unprecedented ‘probable cause’ exception to the warrant requirement.” 456 U.S. at 827-28 (Marshall, J., dissenting).

²⁴⁴ 111 S. Ct. 1982 (1991).

²⁴⁵ *Id.* at 1988.

container.²⁴⁶ Thus, the dichotomy created in *Ross*, which allows a warrantless search of a closed container discovered during the course of a general search of a vehicle but disallows the exact same search when probable cause exists only to search the container itself, is logically unsound. At this point, however, all agreement between the Court's and Justice Marshall's conception of the warrant requirements ends.

Without any support, *Acevedo* states that the Court's prior cases have provided "only minimal protection for privacy" and have "impeded effective law enforcement."²⁴⁷ The Court intimates that separate rules for closed containers actually "disserve privacy interests."²⁴⁸ According to the Court, "[i]f the police know that they may open a bag only if they are actually searching the entire car, they may search more extensively than they otherwise would in order to establish the general probable cause required by *Ross*."²⁴⁹ Further, the dichotomy created in *Ross* provided only minimal protection of privacy interests because once police officers obtain probable cause to seize property, "'a warrant will be routinely forthcoming in the overwhelming majority of cases.'"²⁵⁰

The *Acevedo* Court also insisted, again without proof, that separate treatment of containers confused courts and police officers. Reiterating views first voiced in his dissenting opinions in *United States v. Chadwick*²⁵¹ and *Arkansas v. Sanders*,²⁵² Justice Blackmun claims that separate treatment of containers found in automobiles causes "'the perverse result of allowing fortuitous circumstances to control the outcome' of various searches [and produces] 'inherent opaqueness'" in judicial doctrine.²⁵³

To remedy this situation, *Acevedo* announces "one clear-cut rule"²⁵⁴ to govern automobile searches and eliminates the warrant requirement for closed containers previously set forth by the Court in *Sanders*.²⁵⁵ From now on, police "may search without a warrant if

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 1989 (quoting *Arkansas v. Sanders*, 442 U.S. 753, 770 (1979) (Blackmun, J., dissenting)).

²⁵¹ 433 U.S. 1, 22 (1977) (Blackmun, J., dissenting).

²⁵² 442 U.S. at 771 (Blackmun, J., dissenting).

²⁵³ *Acevedo*, 111 S. Ct. at 1990.

²⁵⁴ *Id.* at 1991.

²⁵⁵ In what most thought was "clear-cut" language, *Sanders* had held that the warrant requirement of the Fourth Amendment applies to personal luggage taken from an automobile to the same degree it applies to such luggage in other locations. Thus, insofar as the police are entitled to search such luggage without a warrant, their actions must be justified

their search is supported by probable cause.”²⁵⁶ When police have probable cause to believe a container holds contraband, as they did in *Acevedo*, “[t]hat probable cause now allows a warrantless search of the [container].”²⁵⁷ If the focus of probable cause is exclusively on the container, a search of the rest of the automobile is unreasonable under the Fourth Amendment. This “clear-cut” rule, according to the Court, is consistent with *Carroll v. United States*²⁵⁸ and its progeny, and faithful to the “cardinal principle” that warrantless searches are *per se* unreasonable under the Fourth Amendment, subject to a few jealously guarded exceptions.²⁵⁹

Acevedo is another example of the current Court’s disregard for the plain requirements of the Warrant Clause. The search in *Acevedo* appears reasonable because the Court chose to focus on the *location* of the search rather than on the *item* being searched. The Court offers several arguments to justify its ruling, none of which withstand scrutiny. The best explanation for the result in *Acevedo*, although the Court does not state it explicitly, is that it simply does not believe the Warrant Clause should apply to searches of personal property.²⁶⁰

Justice Frankfurter once wrote that on a journey of law, “the place you reach depends on the direction you are taking. And so, where one comes out on a case depends on where one goes in.”²⁶¹ The result in *Acevedo* is predictable if one’s analysis begins with the automobile. Justice Blackmun correctly draws attention to a “curious” dichotomy between “the search of an automobile that coincidentally turns up a container and the search of a container that

under some exception to the warrant requirement other than that applicable to automobiles stopped on the highway.

Sanders, 442 U.S. at 766; see also *Robbins v. California*, 453 U.S. 420, 425 (1981) (plurality opinion) (opening of packages in a car by police without a search warrant violated Fourth and Fourteenth Amendments even though police had probable cause: “[*Chadwick* and *Sanders*] made clear, if it was not clear before, that a closed piece of luggage found in a lawfully searched car is constitutionally protected to the same extent as are closed pieces of luggage found anywhere else.” *Id.*).

²⁵⁶ *Acevedo*, 111 S. Ct. at 1991.

²⁵⁷ *Id.*

²⁵⁸ 267 U.S. 132 (1925).

²⁵⁹ *Id.*

²⁶⁰ Justice Blackmun gave us a preview of the *Acevedo* holding in his earlier dissents in *Chadwick*, 433 U.S. at 19 (“I would . . . hold generally that a warrant is not required to seize and search any movable property in the possession of a person properly arrested in a public place.”), and in *Sanders*, 442 U.S. at 772 (“[I]t would be better to adopt a clear-cut rule to the effect that a warrant should not be required to seize and search any personal property found in an automobile that may in turn be seized and searched without a warrant pursuant to *Carroll* and *Chambers [v. Maroney]*.”). It was only a matter of time until the Court’s composition changed so that a majority would view the Fourth Amendment in a similar manner.

²⁶¹ *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting).

coincidentally turns up in an automobile."²⁶² However, this dichotomy is curious and opaque only if you focus on the location of the containers. If, instead, one focuses on the container itself, the dichotomy disappears.

The Court never considers the real question in *Acevedo*: whether the Warrant Clause should apply to personal property? To me, the answer seems obvious. Because the Fourth Amendment protects effects as well as persons, homes, and papers, and because the Warrant Clause does not distinguish "between searches conducted in private homes and other searches,"²⁶³ warrantless searches of closed containers²⁶⁴ should be *per se* unreasonable, subject to a few carefully drawn exceptions.

As discussed above, *Acevedo* suggests that the Court's previous rulings have provided only minimal protection for the privacy of personal property placed inside automobiles. Justice Blackmun is surely correct if he meant that the Court has offered a bankrupt analysis to support "its claim that expectations of privacy are lower in automobiles than in most other places."²⁶⁵ However, the *Acevedo* Court claims that separate treatment of closed containers under *Ross* and *Sanders* might actually encourage more extensive searches by the police. This argument is hard to take seriously. Police need probable cause *before* they begin a search. An otherwise illegal search cannot be justified in order to validate a lesser intrusion. Just as "a search [cannot] be made legal by what it turns up,"²⁶⁶ so too legal grounds for a lesser intrusion cannot be demonstrated by a more extensive search.²⁶⁷

²⁶² *Acevedo*, 111 S. Ct. at 1991.

²⁶³ *United States v. Chadwick*, 433 U.S. 1, 8 (1977).

²⁶⁴ In the past, the Court rejected any distinction between "worthy" and "unworthy" containers in allocating Fourth Amendment protections for "effects." The Fourth Amendment allowed no such distinction, according to *Ross*, because

just as the most frail cottage in the kingdom is absolutely entitled to the same guarantees of privacy as the most majestic mansion, so also may a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case.

Ross, 456 U.S. at 822 (footnote omitted).

²⁶⁵ Joseph Grano, *Perplexing Questions About Three Basic Fourth Amendment Issues: Fourth Amendment Activity, Probable Cause, And The Warrant Requirement*, 69 J. CRIM. L. & CRIMINOLOGY 425, 459 (1978).

²⁶⁶ *United States v. Di Re*, 332 U.S. 581, 595 (1948).

²⁶⁷ See *Acevedo*, 111 S. Ct. at 1999 n.9 (Stevens, J., dissenting) (noting prior cases "unequivocally rejected this bootstrap justification for a search which was not lawful when it commenced."). Moreover, the Court's decision in *United States v. Johns*, 469 U.S. 478 (1985) made clear that officers do not have to conduct an extensive search of a car "in order to establish the general probable cause required by *Ross*." *Acevedo*, 111 S. Ct. at 1988 (Stevens, J., dissenting). See *Johns*, 469 U.S. at 483 ("The possibility that the officers did not search the vehicles more extensively does not affect our conclusion that

Several of the Justices, however, apparently believed that that pre-*Acevedo* doctrine placed a premium on police ignorance.²⁶⁸ Justice Scalia, for example, thought it strange to permit an officer to search a container found in the car when he has probable cause to believe that the car contained contraband "somewhere" but to preclude him from searching if his knowledge is more specific.²⁶⁹ These concerns are misplaced. Nothing is strange about a rule that a warrantless police intrusion must be "strictly circumscribed by the exigencies which justify its initiation."²⁷⁰ The potential mobility of a closed container justifies a warrantless *seizure*. A warrantless *search*, however, is not necessary because the container is "easy for the police to store" and retains sufficient expectations of privacy to warrant a magistrate's finding of probable cause before a search is permitted.²⁷¹ Justice Scalia certainly knows there is nothing strange about requiring police officers to obey the requirements of the Warrant Clause before undertaking a *search* of an object, even though *seizure* of that same object is permissible without a warrant.²⁷²

Moreover, condemning pre-*Acevedo* doctrine for its supposed premium on police ignorance misses the point. The point of the Fourth Amendment and the warrant requirements, as Justice Marshall pointed out, is not to assess the constitutionality of police searches by asking what is permissible given a different set of circumstances, but rather to ask what police actions are permissible without the authorization of a neutral magistrate. Justice Scalia correctly questions the wisdom of a rule that seems to reward limited knowledge of the facts. However, his criticism of pre-*Acevedo* law

the packages were removed [and properly searched at a later time] pursuant to a vehicle search.").

²⁶⁸ See *Acevedo*, 111 S. Ct. at 1990 ("The *Chadwick* rule, as applied in *Sanders*, has devolved into an anomaly such that the more likely the police are to discover drugs in a container, the less authority they have to search it.").

²⁶⁹ *Acevedo*, 111 S. Ct. at 1992-94 (Scalia, J., concurring in the judgment).

²⁷⁰ *Arizona v. Hicks*, 480 U.S. 321, 324 (1987) (quoting *Mincey v. Arizona*, 437 U.S. 385, 393 (1978)).

²⁷¹ *Acevedo*, 111 S. Ct. at 1996 (Stevens, J., dissenting). This, of course, is the precise point Justice Marshall made in his dissent in *Ross*. *United States v. Ross*, 456 U.S. 798, 832 (1982).

²⁷² *Cf. Hicks*, 480 U.S. at 326 (rejecting a claim that police should be free to search an object in plain view on lesser grounds than would be permitted for a similar seizure).

Moreover, it is also hard to take seriously the Court's claim in *Acevedo* that "one clear-cut" rule for automobile searches will eliminate the alleged confusion caused by the dichotomy created in *Ross*.

If the police only have probable cause to search a specified container in a vehicle, they no longer need a warrant to open that container, but they still cannot search the entire vehicle. Thus the police still have to ascertain which kind of probable cause they have. For resolution of that issue determines the scope of the warrantless search they may make.

only begs the larger question of whether police, as an initial matter in the absence of exigency, should be free to conduct warrantless searches of personal property.²⁷³

An honest and straightforward reading of the Fourth Amendment and a distrust of *post-hoc* judicial evaluations of police decisions suggest that the best way to protect personal property is to erect strong barriers against warrantless searches instead of deferring to such intrusions as permitted by *Acevedo* and *Ross*.²⁷⁴ This would place a premium on compliance with the warrant requirements, rather than on police ignorance, which comports with the true intent of the Framers.

Similarly, arguing that *Carroll* and its progeny permit very extensive searches of automobiles does not bolster the reasoning of *Acevedo*. Certainly, the search of the bag in *Acevedo* "intrude[d] far less on individual privacy than [did] the incursion sanctioned long ago in *Carroll*."²⁷⁵ But how does this point help resolve the underlying issue in *Acevedo*—should the Warrant Clause apply to personal property?

The *Carroll* Court actually endorsed the warrant preference rule, although based on the facts it found that the exigencies of the moment justified an exception.²⁷⁶ *Carroll*, of course, never reached the question of whether the police could search closed containers without a warrant. The Court simply assumed that once it was proper to *begin* a search of a vehicle, a very broad search would be permissible.

This sort of reliance on precedent can only create mischief for the Court. The issue in *Acevedo* was not whether the police could tear up the seats or open the trunk of *Acevedo*'s car, but whether they could search a private container without a warrant even though the container could easily be brought under their control unlike a bulky car. Close adherence to the facts would have resulted in less temptation to emphasize the ease and convenience for officers in conducting warrantless searches. As Justice Blackmun has previously warned, members of the Court tread on thin judicial ice when

²⁷³ See *Acevedo*, 111 S. Ct. at 1992-93 (Scalia, J., concurring in the judgment) (agreeing with the dissent in *Acevedo* that "it is anomalous for a briefcase to be protected by the 'general requirement' of a prior warrant when it is being carried along the street, but for that same briefcase to become unprotected as soon as it is carried into an automobile.").

²⁷⁴ See Lewis Katz, *The Automobile Exception Transformed: The Rise of a Public Exemption to the Warrant Requirement*, 36 CASE W. RES. L. REV. 375, 405 (1986) ("There is absolutely no greater reason to conduct a warrantless search of a container seized from an automobile than there is a container seized from any [other] location.").

²⁷⁵ *Acevedo*, 111 S. Ct. at 1989.

²⁷⁶ See *Carroll v. United States*, 267 U.S. 132, 155 (1925).

their personal predilections control their constitutional reasoning and divert them from the cold, hard facts of a particular case.²⁷⁷

More attention to the facts and the specific issue at hand would have served Fourth Amendment interests better. Those interests include the right of all persons to expect some modicum of security in their personal items while traveling the nation's roads. After *Acevedo*, however,

[a] closed paper bag, a tool box, a knapsack, a suitcase, and an attache case can alike be searched without the protection of the judgment of a neutral magistrate, based only on the rarely disturbed decision of a police officer that he has probable cause to search for contraband in the vehicle.²⁷⁸

Why should the public worry about warrantless searches of containers found inside of automobiles? Because the regime sanctioned in *Acevedo* stands at odds with a fundamental premise of the Fourth Amendment: society should not trust police officers to decide for themselves when to invade personal property unless it is impractical to obtain a warrant. Allowing officers to bypass this judicial process is dangerous because "the right to be secure against searches and seizures is one of the most difficult to protect. Since the officers are themselves the chief invaders, there is no enforcement outside of court."²⁷⁹

When reasonableness is the center of attention and someone else's bags are the subject of the police examination, the analysis loses sight of this fundamental premise. The Court's facile reasoning, however, should not mislead the public. While it is hard to sympathize with a drug-runner like *Acevedo*, remember that the police stop and suspect many individuals. Ignoring or discounting a warrantless search against *Acevedo* is perilous. The search against *Acevedo* today may be used against others—even ourselves—tomorrow.²⁸⁰

Nor does it suffice to say that because "the police, by hypothesis, have probable cause to seize the property, [it is acceptable to] assume that a warrant will be routinely forthcoming in the over-

²⁷⁷ It seems to me that whenever, as here, courts fail to concentrate on the facts of a case, these predilections inevitably surface, no longer held in check by the "discipline" of the facts, and shape, more than they ever should and even to an extent unknown to the judges themselves, any legal standard that is then articulated.

O'Connor v. Ortega, 480 U.S. 709, 734 n.3 (1987) (Blackmun, J., dissenting).

²⁷⁸ *United States v. Ross*, 456 U.S. 798, 842 (Marshall, J., dissenting) (footnote omitted).

²⁷⁹ *Brinegar v. United States*, 338 U.S. 160, 181 (1949) (Jackson, J., dissenting).

²⁸⁰ "So a search against *Brinegar's* car must be regarded as a search of the car of Everyman." *Id.*

whelming majority of cases.'"²⁸¹ Searches conducted without warrant have been universally condemned "'notwithstanding facts unquestionably showing probable cause. . . .'"²⁸² Judicial authorization prior to a search of personal property upholds the values of individual freedom and personal security over police authority to search and seize without a warrant.

Justice Marshall believed in these values. Regrettably, the current Court's jurisprudence is out of step with his conception of the Fourth Amendment. This new brand of constitutional theory, in its unending march of "reasonableness," is likely to continue eroding Fourth Amendment freedoms.²⁸³

D. Exceptions to the Warrant Requirements: Are They Really "Jealously"²⁸⁴ Guarded by the Court?

Not too long ago the Court declared that "it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'"²⁸⁵ Today, such pronouncements from the Court are meaningless. Indeed, "the 'warrant requirement' ha[s] become so riddled with exceptions that it [i]s basically unrecognizable."²⁸⁶ How did this happen? Can anything prevent further erosion of Fourth Amendment principles?

²⁸¹ *Acevedo*, 111 S. Ct. at 1989 (quoting *Arkansas v. Sanders*, 442 U.S. 753, 770 (1979) (Blackmun, J., dissenting):

[A] warrant would be routinely forthcoming in the vast majority of situations where the property has been seized in conjunction with the valid arrest of a person in a public place. I therefore doubt that requiring the authorities to go through the formality of obtaining a warrant in this situation would have much practical effect in protecting Fourth Amendment values. (footnote omitted);]

United States v. Chadwick, 433 U.S. 1, 20 (1977).

²⁸² *Katz v. United States*, 389 U.S. 347, 357 (1967) (quoting *Agnello v. United States*, 269 U.S. 20, 33 (1925)).

²⁸³ See *Acevedo*, 111 S. Ct. at 1994 (Scalia, J., concurring in judgment) (urging reversal:

not because a closed container carried inside a car becomes subject to the 'automobile' exception to the general warrant requirement, but because the search of a closed container, *outside a privately owned building*, with probable cause to believe that the container contains contraband, . . . is not one of those searches whose Fourth Amendment reasonableness depends upon a warrant. (emphasis added)).

²⁸⁴ *Jones v. United States*, 357 U.S. 493, 499 (1958).

²⁸⁵ *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (quoting *Katz*, 389 U.S. at 357 (footnotes omitted)).

²⁸⁶ *Acevedo*, 111 S. Ct. at 1992 (Scalia, J., concurring in judgment). For a list of exceptions, see Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985).

And why does it matter that the Court no longer takes the warrant requirements seriously?

Under the Court's reasonableness model, exceptions to the Warrant Clause have swallowed the general rule. Justice Marshall responded to this trend by reminding his colleagues that it "is the role of the judiciary, not of police officers, to delimit the scope of exceptions to the warrant requirement."²⁸⁷ But why should the judiciary, and not the police, guarantee a narrow application of the exceptions to the warrant requirements? Why should the average person worry if the exceptions to the warrant requirement are further expanded? The best way to answer these questions, as Justice Marshall remarked in a different context, is to examine "some cases."²⁸⁸

1, *Justice Marshall and Terry v. Ohio: Did Justice Marshall Fail to Protect the Fourth Amendment?*

Justice Marshall has been correctly portrayed as a champion of the Bill of Rights and civil rights law.²⁸⁹ Although he disfavored exceptions to the warrant requirements,²⁹⁰ Justice Marshall's approval of the "stop and frisk" exception has always been intriguing. The "stop and frisk" rule, inaugurated in *Terry v. Ohio*,²⁹¹ created a narrow exception to the requirement that the police have probable cause before seizing and searching an individual. *Terry* ruled that when a police officer confronts a person who he believes is armed and dangerous, the officer is permitted to conduct a limited frisk of that person in order to discover weapons that might be used against him.²⁹²

²⁸⁷ *United States v. Robinson*, 414 U.S. 218, 243 (1973) (Marshall, J., dissenting).

²⁸⁸ *Hearings Before The Comm. on the Judiciary United States Senate, Ninetieth Congress, First Session on Nomination of Thurgood Marshall, of New York, to be an Associate Justice of the Supreme Court of the United States*, 90th CONG., 1st Sess. 52 (1967).

²⁸⁹ See, e.g., *A Tribute to Justice Thurgood Marshall*, 6 HARV. BLACKLETTER J. 1 (1989); *Dedicated to Mr. Justice Thurgood Marshall of the United States Supreme Court*, 6 BLACK L.J. 1 (1978).

²⁹⁰ See Charles J. Ogletree, *Justice Marshall's Criminal Justice Jurisprudence: 'The Right Thing To Do, The Right Time To Do It, The Right Man and The Right Place'*, 6 HARV. BLACKLETTER J. 111, 113 (1989) (Marshall's fourth amendment opinions "focus upon the risk of using . . . formal categories to create exceptions to the warrant requirement since he believes that the exceptions chip away at the warrant requirement's fabric thus making it ineffective in protecting individuals." (footnote omitted)).

²⁹¹ 392 U.S. 1 (1968).

²⁹² *Terry*, 392 U.S. at 30. Despite its narrow holding, the *Terry* doctrine was subsequently applied in cases which had no connection with the reasoning that originally prompted the Court to create the exception in the first place—namely, protecting police officers who confront potentially dangerous persons. Indeed, the so-called *Terry* exception has been converted into a doctrinal tool to assess searches and seizures of people, homes, and effects by "a balancing process in which the judicial thumb [is] planted firmly on the law enforcement side of the scales." *United States v. Sharpe*, 470 U.S. 675,

When *Terry* was decided in 1968, Justice Marshall joined the Court's opinion because he believed the Court was "not watering down rights, but [was] hesitantly and cautiously striking a necessary balance between the rights of American citizens to be free from government intrusion into their privacy and their government's urgent need for a narrow exception to the warrant requirement[s]."293 It soon became clear, however, that the Court could not withstand the pressure to widen the loophole created in *Terry*. Eventually, the Court sanctioned searches and seizures of people,294 cars,295 luggage,296 and homes297 in contexts that had no nexus with the original rationale of *Terry*: Justice Marshall generally opposed extension of the *Terry* exception. In two cases, however, he joined the Court's ruling upholding police intrusions that relied upon the reasoning first articulated in *Terry*.298 Justice Marshall's acceptance of the Court's rationale in these cases is intriguing, given his otherwise broad interpretation of Fourth Amendment freedoms.

In the first case, *Florida v. Royer*,299 a plurality of the Court (including Justice Marshall) accepted the view that a person was not seized under the Fourth Amendment when law enforcement agents accosted him in an airport concourse and asked to see his identification and airline ticket.300 This conclusion was accepted even in cases where agents identify themselves as police officials301 and do not expressly inform a person of their right to decline coopera-

720 (1985) (Brennan, J., dissenting). Although Justice Marshall did oppose extending the *Terry* doctrine in subsequent cases, arguably he and the other Justices who joined the Court's ruling should have foreseen the great harm to Fourth Amendment freedom caused by *Terry* and never yielded to the "hydraulic pressures" that caused the Court to "give the police the upper hand." *Terry*, 392 U.S. at 39 (Douglas, J., dissenting).

293 *Adams v. Williams*, 407 U.S. 143, 161-62 (1972) (Marshall, J., dissenting).

294 *See, e.g., Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Hensley*, 469 U.S. 221 (1985); *United States v. Sharpe*, 470 U.S. 675 (1985); *United States v. Sokolow*, 490 U.S. 1 (1989).

295 *See, e.g., Michigan v. Long*, 463 U.S. 1032 (1983); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975).

296 *See United States v. Place*, 462 U.S. 696 (1983).

297 *Maryland v. Buie*, 494 U.S. 325 (1990).

298 *Michigan v. Chesternut*, 486 U.S. 567 (1988); *Florida v. Royer*, 460 U.S. 491 (1983).

299 460 U.S. 491 (1983).

300 460 U.S. at 497 (plurality opinion). It might be more accurate to say that a majority of the Justices accepted the notion that no seizure occurs when police officials approach a person and ask to see identification. In addition to the four Justices who joined Justice White's statement noted above, dissenting Justices Blackmun, Rehnquist, O'Connor, and Chief Justice Burger, expressed agreement with the plurality's "seizure" standard. *See Royer*, 460 U.S. at 514 (Blackmun, J., dissenting); *id.* at 523 n.3 (Rehnquist, J., dissenting). Only Justice Brennan opposed the plurality's seizure standard. *See* 460 U.S. at 511-512 (Brennan, J., concurring in result).

301 *Royer*, 460 U.S. at 497.

tion.³⁰² *Royer* also ruled that a person could be seized for investigation in situations that do not pose an immediate threat of danger, provided there is a reasonable suspicion of criminal activity.³⁰³ One wonders why Justice Marshall would agree with either of these positions.

On the first point, Justice Marshall was an unlikely believer in the fictional quality of the Court's conclusion that a reasonable person would feel free to ignore or walk away from law enforcement officials who approach and ask for identification.³⁰⁴ As Justice Marshall noted in a different context, Fourth Amendment questions are best resolved when there is "a realistic assessment of the nature of the interchange between citizens and the police."³⁰⁵ If the Court had undertaken a "realistic assessment" of the dynamics surrounding the scene when an officer accosts and questions a person about possible criminal behavior, it seems self-evident that no reasonable person would feel free to disregard the police.³⁰⁶

On the second issue in *Royer*—extending the *Terry* exception to investigative detentions of individuals where the only government

³⁰² *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (plurality opinion) ("Our conclusion that no seizure occurred is not affected by the fact that the respondent was not expressly told by the agents that she was free to decline to cooperate with their inquiry, for the voluntariness of her response does not depend upon her having been so informed.").

³⁰³ 460 U.S. at 498-99 (plurality opinion); *id.* at 513-19 (Blackmun, J., dissenting) (police had reasonable suspicion to detain *Royer*; given the minimally intrusive nature of the detention, probable cause was not needed to support the seizure); *id.* at 523-25 (Rehnquist, J., dissenting) (agents had at least reasonable suspicion to detain *Royer*).

³⁰⁴ See Kathleen M. Sullivan, *Marshall, the Great Dissenter*, N.Y. TIMES, June 29, 1991, at L23 ("What marked [his opinions] was a candor that cut through legal abstractions to the social reality and human suffering underneath."); Glen M. Darbyshire, *Clerking for Justice Marshall*, 77 A.B.A. J., Sept. 1991, at 48, 50. ("Marshall judged from an instinct honed by his experience as a lawyer and not from an encyclopedic knowledge of legal technicalities. . . . He never allowed academic theories to restrict his consideration of bare facts, and his questions from the bench were often brutally blunt."); Kathleen M. Sullivan, *The Candor of Justice Marshall*, 6 HARV. BLACKLETTER J. 83, 89 (1989):

Justice Marshall's candor about the 'world out there' has been one of the many great features of his tenure on the Court. He has dared both to say what 'everyone knows' but would rather forget, and to say what *not* everyone knows because of the partiality of their experience of the world.

(footnotes omitted, quotations omitted); Irving R. Kaufman, *Thurgood Marshall: A Tribute From A Former Colleague*, 6 BLACK L.J. 23, 25 (1978):

As a judge he wrote for the people. . . . He possessed an instinct for the critical fact, the gut issue, born of his exquisite sense of the practical. This gift was often cloaked in a witty aside: "There's a very practical way to find out whether a confession has been coerced: ask how big was the cop?"

³⁰⁵ *Schneckloth v. Bustamonte*, 412 U.S. 218, 289 (1973) (Marshall, J., dissenting).

³⁰⁶ "[I]f the ultimate issue is perceived as being whether the suspect 'would feel free to walk away,' then virtually all police-citizen encounters must in fact be deemed to involve a Fourth Amendment seizure." LAFAVE, *supra* note 232, at 411 (footnotes omitted).

interest at stake is a generalized interest in law enforcement—one would have thought that Justice Marshall would have opposed this enlargement of the *Terry* exception. After all, the interest at stake in *Royer*—the government's ordinary interest in investigating and detecting would-be criminals—was a far cry from the compelling concerns that moved the Court in *Terry*.³⁰⁷ While this interest is obviously important, the Fourth Amendment was written and designed to override this precise government interest unless certain safeguards were satisfied. As Justice Marshall observed: The Justices have no commission "to restrike that balance because of their own views of the needs of law enforcement."³⁰⁸ It is possible, however, that Justice Marshall's well-known distaste for drug pushers caused him to back away in this particular case from his otherwise staunch support of Fourth Amendment freedoms.

In the second case, *Michigan v. Chesternut*,³⁰⁹ Justice Marshall's acceptance of the Court's opinion is even more baffling. *Chesternut* held that an "investigatory pursuit" of a person who runs at the sight of a police car did not amount to a seizure.³¹⁰ No seizure occurred, according to the Court, because no reasonable person would have believed that the police chase was "an attempt to capture or otherwise intrude upon [their] freedom of movement."³¹¹

The Court's result in *Chesternut* is deeply disturbing.³¹² That a majority of the Court would rule against *Chesternut* is not surpris-

³⁰⁷ See *United States v. Brignoni-Ponce*, 422 U.S. 873, 881 (1975) (investigative detention near border permissible in light of unique government need to stem flow of illegal immigration and lack of practical enforcement alternatives); *Adams v. Williams*, 407 U.S. 143, 148 (1972) (officer search of suspect for possible gun was intended to protect officer's safety); *Terry v. Ohio*, 392 U.S. 1 (1968) (protective frisk permissible to protect safety of investigating officer). In *Michigan v. Summers*, 452 U.S. 692 (1981), the Court ruled that a warrant to search a home for contraband authorized the detention of occupants of that home while a proper search is conducted. Unlike *Terry*, *Williams*, and *Brignoni-Ponce*, there was no special government interest justifying this detention. Justice Marshall joined Justice Stewart's dissent in *Summers* because the detention endorsed in *Summers* was "justified by no . . . special governmental interest or law enforcement need." 452 U.S. at 708 (Stewart, J., dissenting).

³⁰⁸ *Bustamonte*, 412 U.S. at 290 (Marshall, J., dissenting).

³⁰⁹ 486 U.S. 567 (1988).

³¹⁰ In *Chesternut*, four police officers in a marked patrol car observed Chesternut talking with another individual. When Chesternut saw the patrol car approaching, he ran. The officers followed and after the "cruiser quickly caught up with [Chesternut] and drove alongside him for a short distance," Chesternut discarded items that turned out to be illegal narcotics. 486 U.S. at 569.

³¹¹ *Id.* at 575. The Court did concede that the police chase could be "somewhat intimidating," but it "was not 'so intimidating' that [Chesternut] could reasonably have believed that he was not so free to disregard the police presence and go about his business." *Chesternut*, 486 U.S. at 576 (quoting *INS v. Delgado*, 466 U.S. 210, 216 (1984)).

³¹² See Maclin, *supra* note 105, at 1307 ("*Chesternut* reflects the current Court's unwillingness or inability to empathize with those citizens who are subjected to police scru-

ing.³¹³ But why would Justice Marshall join this opinion? His acceptance of the result in *Chesternut* seems inconsistent with his general views on the reach of the Fourth Amendment. One can only speculate that Justice Marshall believed a favorable ruling for *Chesternut* would call into question whether police officers are free to "follow" or monitor individuals on the street without triggering Fourth Amendment scrutiny.

2. *United States v. Robinson: Is Reasonableness a Valid Exception to the Warrant Requirements?*

The Court's reasonableness model has always been adverse to close scrutiny of searches that appear to be consistent with regular police procedures. For example, in *United States v. Robinson*,³¹⁴ the Court refused to scrutinize the justifications for a full search of a person arrested for a minor traffic violation. The police searched a cigarette packet found during a search of Robinson's person.³¹⁵ The Court stated that the secondary search of the cigarette packet was normal procedure, a mere variation of the traditional exception allowing warrantless searches incident to arrest. The decision to search was "a quick *ad hoc* judgment."³¹⁶ Because a custodial arrest is a reasonable intrusion under the Fourth Amendment, "a search incident to the arrest requires no additional justification."³¹⁷

Justice Marshall argued that the majority's aversion in scrutinizing police decisions to search was "inconsistent with the very function of the Amendment—to ensure that the quick *ad hoc* judgments of police officers are subject to review and control by the judiciary."³¹⁸ Even assuming the reasonableness of removing the cigarette package from Robinson's coat to search for a weapon, no objective justification existed for a warrantless search of the package

tiny. . . . Perhaps the result in *Chesternut* is due to the fact that none of the Justices has been recently chased down public streets by a police car.").

³¹³ Cf. "Arguments Before The Court," 56 U.S.L.W. 3599, 3600 (Mar. 8, 1988):

Is "pursue" any different from "follow," Chief Justice Rehnquist inquired. The reason I ask, he said, is that our cases hold that a police [sic] can "follow" a person on the public street all day long without implicating the Fourth Amendment.

³¹⁴ 414 U.S. 218 (1973). In *Robinson*, an officer pulled Robinson's car over and arrested him for a motor vehicle offense. After the arrest and in accordance with police procedure, the officer conducted a full search of Robinson's person. During this search, the officer felt an object in Robinson's pocket. The officer reached inside and removed a "crumpled up cigarette package." The officer opened the package and found illegal narcotics inside. *Id.* at 223.

³¹⁵ *Id.*

³¹⁶ *Id.* at 235.

³¹⁷ *Id.*

³¹⁸ *Id.* at 242 (Marshall, J., dissenting).

itself.³¹⁹ In fact, the only explanation for searching the package was police curiosity about its contents.

Justice Marshall also disagreed with the Court's inference that because the arrest was reasonable, a full search incident to that arrest "requires no additional justification."³²⁰ The attractiveness of *Robinson's* reasonableness formula fades after considering its potential application in the real world. How would a business traveler, lawfully arrested for driving without a license, react if police opened a wallet or purse, removed its contents, and examined them closely? Better yet,

suppose a lawyer lawfully arrested for a traffic offense is found to have a sealed envelope on his person. Would it be permissible for the arresting officer to tear open the envelope in order to make sure that it did not contain a clandestine weapon—perhaps a pin or a razor blade?³²¹

The *Robinson* majority never addresses these concerns. It simply asserts that a full search of an arrestee "is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."³²² The Court's reasoning may satisfy those who have full confidence that police officers will not undertake the type of searches that troubled Justice Marshall. *Robinson's* naked assertion that authority to arrest justifies a search of a private container that poses no danger to the officer, or to the integrity of the arrest, is hard to square with traditional Fourth Amendment principles.³²³ For those who thought the Fourth Amendment provided a check against this sort of unfettered police discretion, they can only hope that Justice Marshall's hypotheticals never come true for them.

3. *The Consent Exception: Has Constitutional Principle Been Sacrificed for Police Convenience?*

Another traditional exception to the warrant requirements is a search conducted pursuant to a person's consent. In *Schneekloth v. Bustamonte*,³²⁴ the Court addressed the definition of consent under the Fourth Amendment. It held that a warrantless search is valid

³¹⁹ *Id.* at 255-56.

³²⁰ *Id.* at 235.

³²¹ *Id.* at 257-58 (Marshall, J., dissenting).

³²² *Id.* at 235.

³²³ See Davies, *supra* note 109, at 43 n.169 ("Justice Rehnquist's rationale for *Robinson* is strange. Authority alone does not constitute reasonableness. If authority alone can make a search constitutional, regardless of an evaluation of cause for the search, then what is really being asserted is that the arrested person has lost any reasonable expectation of privacy under the *Katz* formulation.").

³²⁴ 412 U.S. 218 (1973).

where the state shows "consent was in fact voluntarily given, and not the result of duress or coercion."³²⁵ The voluntariness of the consent is "determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent."³²⁶

Justice Marshall could never square the reasoning in *Bustamonte* with constitutional principle nor common sense. In his view, *Bustamonte* was not a case about coercion, as the majority claimed, but about consent, "a mechanism by which substantive requirements, otherwise applicable, are avoided."³²⁷ The substantive requirement at stake was the rule that "searches be conducted only after evidence justifying them has been submitted to an impartial magistrate for a determination of probable cause."³²⁸

Justice Marshall reminded the majority that consent searches are not allowed because of exigent police interests.³²⁹ In fact, no such compelling needs exist because consent searches usually involve an absence of probable cause. Instead, consent is a recognized exception allowing citizens "to choose whether or not they wish to exercise their constitutional rights."³³⁰

Bustamonte also defies common sense. Because a consent search obviously constitutes relinquishment of a constitutional right, why would an individual make a valid decision without knowledge of the other available choices? "If consent to search means that a person has chosen to forgo his right to exclude the police from the place they seek to search, it follows that his consent cannot be considered a meaningful choice unless he knew that he could in fact exclude the police."³³¹

Why did the majority reject Justice Marshall's straightforward approach? First, the Court claimed that the requirement of a "knowing" and "intelligent" waiver is only applicable to constitutional liberties that implicate the fairness of a criminal trial itself.³³² The freedoms protected by the Fourth Amendment "have nothing

³²⁵ *Id.* at 248.

³²⁶ *Id.* at 249 (footnote omitted).

³²⁷ *Id.* at 282 (Marshall, J., dissenting). In fact, *Bustamonte* is another example of the Court framing the issue to reach the result desired. As Professor LaFave has noted, *Bustamonte's* assertion that the "precise question in this case . . . is what must the state prove to demonstrate that a consent was 'voluntarily' given," *id.* at 223, is "grossly misleading, and inevitably leads to only one conclusion." 3 LAFAVE, *supra* note 232, § 8.1(a), at 152.

³²⁸ *Bustamonte*, 412 U.S. at 282 (Marshall, J., dissenting).

³²⁹ *Id.* at 282-83.

³³⁰ *Id.* at 283.

³³¹ *Id.* at 284-85.

³³² *Id.* at 241-42.

whatever to do with promoting the fair ascertainment of truth at a criminal trial."³³³ In addition, the Court asserted—without proof—that it was “thoroughly impractical”³³⁴ to warn a person of his right to refuse a police search.³³⁵ Apparently, such a warning undermines what the Court described as the “legitimate need for [consent] searches.”³³⁶

When the Court speaks about the “impracticality” of restricting police intrusions or the “legitimate need” for police intrusions, it inevitably subordinates Fourth Amendment freedoms to the reasonableness of the government’s actions. In the context of consent searches, the Court’s concern amounts to no more than “the continued ability of the police to capitalize on the ignorance of citizens so as to accomplish by subterfuge what they could not achieve by relying only on the knowing relinquishment of constitutional rights.”³³⁷

The majority’s analysis is unfair to the average citizen. The Court’s crabbed definition of consent denies a person the knowledge that he or she has a right to refuse a police officer’s request.³³⁸ The Court’s analysis ignores the reality of a typical police confrontation. A police confrontation is unlike a “friendly chat” between two neighbors. In most cases, “consent is ordinarily given as acquiescence in an implicit claim of authority to search.”³³⁹ Those who have observed interactions between the police and the citizenry

³³³ *Id.* at 242.

³³⁴ *Id.* at 231. Justice Stewart argued that consent searches are “part of the standard investigatory techniques of law enforcement.” *Id.* at 232. The need for such searches “may develop quickly.” *Id.* Accordingly, consent searches “are a far cry from the structured atmosphere of a trial where, assisted by counsel if he chooses, a defendant is informed of his trial rights.” *Id.* at 232.

³³⁵ *Id.* at 227-28 (explaining the benefits of consent searches: first, tangible evidence may be revealed that could serve as the basis for a prosecution, thus providing assurance that others, innocent of criminal conduct, will not be prosecuted; second, if a search is undertaken and proves fruitless, it will save the need for an arrest).

³³⁶ *Id.* at 227.

³³⁷ *Id.* at 288 (Marshall, J., dissenting).

³³⁸ The Court presumably draws a distinction between a police “request” for permission to search and a “demand” that such a search be allowed. *Cf.* Marjorie E. Murphy, *Encounters of a Brief Kind: On Arbitrariness and Police Demands for Identification*, 1986 ARIZ. ST. L.J. 207, 217 n.86. To the person in the street, however, the distinction between a police “request” and “demand” is likely to be illusory. *See* Albert Reiss, Jr., “Police Brutality”, in POLICE BEHAVIOR 292-93 (Richard Lundman ed., 1980):

Open defiance of police authority, however, is what the policeman defines as *his* authority, not necessarily “official” authority. . . . [I]t is still of interest to know what a policeman *sees* as defiance. Often he seems threatened by a simple refusal to acquiesce to his own authority. A policeman beat a handcuffed offender because, when told to sit, the offender did not sit down. One Negro woman was soundly slapped for her refusal to approach the police car and identify herself.

³³⁹ *Bustamonte*, 412 U.S. at 289 (Marshall, J., dissenting).

share Justice Marshall's assessment of the atmosphere surrounding police-citizen encounters.³⁴⁰

Bustamonte is also an unprincipled decision. It sacrifices Fourth Amendment rights for an alleged, but unproven, need for law enforcement practicality and police convenience. If this result is the product of a balancing analysis,³⁴¹ the balance certainly seems distorted. As Justice Marshall retorted, "[t]he Framers of the Fourth Amendment struck the balance against this sort of convenience and in favor of certain basic civil rights. It is not for this Court to restrike that balance because of its own views of the needs of law enforcement officers."³⁴²

Today Justice Marshall's conception of the consent exception stands even further removed from the Court's current applica-

³⁴⁰ See generally BROWN, *supra* note 33, at 176 (noting that in most field interrogations the police were "easily convinced that nothing was wrong. The exception to this is when the person challenges their authority, their right to stop and ask them questions. The question, 'what right do you have to question me' is not construed as rightful indignation but as implicit guilt."); RUBINSTEIN, *supra* note 113, at 269; *id* at 80-81 ("Commonly, however, police invoke the myth of consent—the idea that a suspect waives his rights if he doesn't actively assert them—to justify their exercise of authority over the liberty of some person who is not independently motivated to cooperate."); JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL 232-33 (1975):

[T]he policeman not only perceives possible criminality according to the symbolic status of the suspect; he also develops a stake in organized patterns of enforcement. To the extent that a suspect is seen as interfering with such arrangements, the policeman will respond negatively to him. On the other hand, the 'cooperative' suspect, that is, one who contributes to the smooth operation of the enforcement pattern, will be rewarded[.]

UVILLER, *supra* note 6, at 16 ("Police officers relish respect and, in many small ways, insist on a show of deference from the ordinary folk among whom they work. . . . In virtually every encounter I have witnessed, the response of the person approached was docile, compliant, and respectful."):

When [an officer is] on patrol, people feel free to approach him for advice or help, but if he approaches them, there are inevitably tensions and unease that cannot be masked, even if the encounter is not marked by displays of incivility. The person approached cannot know what the policeman wants of him, and the policeman, if he is suspicious of someone, does not know whether his feelings are accurate. Every encounter the policeman has in public, except when he is called to aid someone, must begin with an abridgment of personal freedom.

³⁴¹ "'Necessity,' real or apparent, seems to be the mother of interest-balancing." Kamisar, *supra* note 7, at 651.

³⁴² *Bustamonte*, 412 U.S. at 290 (Marshall, J., dissenting).

tion.³⁴³ For example, in *Illinois v. Rodriguez*,³⁴⁴ the state argued that the Fourth Amendment does not bar a warrantless entry into a home when the police mistakenly believe that a third party has authority to permit their entry. The Court found this argument consistent with the consent exception. It held that a warrantless entry is valid when police reasonably believe a third party possesses common authority over the premises, even though that party in fact has no such authority.³⁴⁵

In explaining the Court's holding, Justice Scalia rejected Rodriguez' claim that allowing a reasonable belief of common authority to permit a warrantless entry into a home would amount to a vicarious waiver of Fourth Amendment rights. Taking a cue from *Bustamonte*, Justice Scalia distinguished between the "trial rights that *derive*" from a Fourth Amendment violation and the "nature of" the constitutional guarantee itself.³⁴⁶ Under this dichotomy, Rodriguez' trial rights are straightforward: "[N]o evidence seized in violation of the Fourth Amendment will be introduced at his trial unless he consents."³⁴⁷

Justice Scalia defined the substantive nature of what the Fourth Amendment guarantees Rodriguez more subtly. The Fourth Amendment does not guarantee Rodriguez that "no government search of his house will occur unless he consents."³⁴⁸ It only ensures that if a search occurs, it will not be "unreasonable."³⁴⁹ Mistaken reliance by police on a third party's authority to consent, if reasonable, will pass constitutional muster. Assessing a person's authority to consent to a search of another's residence, "is the sort of

³⁴³ See, e.g., *Florida v. Jimeno*, 111 S. Ct. 1801, 1805 (1991) (Marshall, J., dissenting): Because an individual's expectation of privacy in a container is distinct from, and far greater than, his expectation of privacy in the interior of his car, it follows that an individual's consent to a search of the interior of his car cannot necessarily be understood as extending to containers in the car[;]

Zeigler v. Florida, 455 U.S. 1035 (1982) (Marshall, J., dissenting from denial of certiorari) (request for police assistance immediately after a shooting on premises does not constitute consent to unlimited 12 day search of the premises); *United States v. Watson*, 423 U.S. 411, 456-58 (1976) (Marshall, J., dissenting) (where suspect is in police custody, government "must show that the suspect knew he was not obligated to consent to the search"); cf. *David Levell W. v. California*, 449 U.S. 1043, 1047 (1980) (Marshall, J., dissenting from denial of certiorari) (Court would be "hard pressed" to find that parent has the authority to waive her teenage child's right under the Fourth Amendment to be free from unreasonable seizures by the police). For an excellent critique of the Court's recent decision in *Jimeno*, see Green, *supra* note 109, at 378-86.

³⁴⁴ 110 S. Ct. 2793 (1990).

³⁴⁵ *Id.* at 2798-2800.

³⁴⁶ *Id.* at 2798.

³⁴⁷ *Id.* at 2799.

³⁴⁸ *Id.*

³⁴⁹ *Id.*

recurring factual question to which law enforcement officials must be expected to apply their judgment; and all the Fourth Amendment requires is that they answer it reasonably.”³⁵⁰

The Court’s analysis in *Rodriguez* has many flaws.³⁵¹ First, if traditional reasonableness is the touchstone for assessing the Fourth Amendment, the Court’s past pronouncements that warrantless searches of a home are *per se* unreasonable absent exigent circumstances should have some relevance when deciding the constitutionality of the search of Rodriguez’ home. As Justice Marshall said: “The baseline for the reasonableness of a search or seizure in the home is the presence of a warrant.”³⁵² In *Rodriguez*, the police had no warrant, and exigent circumstances did not exist. Yet, the Court still concluded that the intrusion in Rodriguez’ home was constitutional.

Moreover, the Court’s construction of the consent exception—whatever search does occur must be reasonable—typifies what happens to Fourth Amendment analysis when a reasonableness theory replaces the traditional requirements of the Warrant Clause. The exceptions swallow the rule. Justice Scalia’s opinion provides no criteria for determining why the intrusion into Rodriguez’ home was constitutional. He simply states that the police action was “reasonable,” “responsible,” and “understandable” under the circumstances.³⁵³ Thus, *Rodriguez* authorizes a warrantless police invasion of a person’s home without any requirement of probable cause or emergency, based solely on the “seeming consent” of a third party. When the Supreme Court takes such a meager view of Fourth Amendment protection of the home, should we be surprised when other members of the judiciary express open disenchantment with the message that is coming from the High Court?³⁵⁴

Prior to the Court’s return to the rule of reasonableness, the established Fourth Amendment principle was that “no amount of

³⁵⁰ *Id.* at 2800.

³⁵¹ Professor Davies has provided a powerful critique of *Rodriguez*. See Davies, *supra* note 109.

³⁵² *Rodriguez*, 110 S. Ct. at 2802 (Marshall, J., dissenting).

³⁵³ See Davies, *supra* note 109, at 64, (quoting *Rodriguez*, 110 S. Ct. at 2800).

³⁵⁴ See *Sanders v. Parker Drilling Co.*, 911 F.2d 191, 196 n.1 (9th Cir. 1990) (Reinhardt, J., concurring) *cert. denied*, 110 S. Ct. 2014 (1991):

I am not as sanguine as Judge Trott about the recent curtailments of fourth amendment rights. “Fine Tuning” is not in my view what has been occurring. “Weakening,” “eroding” or even “gutting” would be a more accurate description. Nor do I agree that we need more debate concerning the fourth amendment. What we need is a greater sense of commitment to the fundamental constitutional principles it represents—and a resolve not to sacrifice those principles in our eagerness to combat illicit drugs, whether that eagerness stems from legitimate concerns or merely from political expediency.

probable cause can justify a warrantless search or seizure [within a home] absent 'exigent circumstances.'"³⁵⁵ Even in cases where an officer had incontrovertible evidence that contraband was inside, "plain view" of that evidence could not justify a warrantless entry.³⁵⁶ Why would the Court enforce such a rule? Because when officers have time to seek a magistrate's approval for a search, the Fourth Amendment cannot tolerate a planned intrusion into a home.³⁵⁷

Should similar reasoning apply where the police claim consent from a third party for a search? Certainly Rodriguez' home is entitled to the same high degree of protection under the Constitution. If "no amount of probable cause can justify a warrantless"³⁵⁸ police intrusion into a home under the plain view exception, why should the police be free to conduct a warrantless search under the consent exception where there is neither probable cause nor exigency justifying the search? Even assuming that the third party in *Rodriguez* had the authority to consent to a search,³⁵⁹ police reliance upon her decision is "a sorry and wholly inadequate substitute for the protections which inhere in a judicially granted warrant. It is inconceivable that a search conducted without a warrant can give more authority than a search conducted with a warrant."³⁶⁰

By ignoring the warrant requirements and emphasizing the reasonableness of police conduct, the Court distorts the Fourth Amendment claims presented in *Rodriguez*. No one credibly argues that the police must always be "factually correct"³⁶¹ for their actions to be upheld under the Fourth Amendment. Yet the Court focuses on this nonissue, drawing our attention away from the central purpose of the warrant requirements—to assure that a neutral magistrate determines *before* the entry that an adequate legal basis exists for making a search, unless compelling reasons exist that prevent obtaining such prior approval.

When the focus shifts from the aims of the Warrant Clause to a general requirement of reasonableness, a malleable standard appears attractive.³⁶² By following this model in *Rodriguez*, however, the Court forgets that no magistrate authorized the entry and

³⁵⁵ *Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971) (plurality opinion).

³⁵⁶ *Id.* "Plain view" is another traditional exception to the warrant requirement. *Id.*

³⁵⁷ *Id.* (citations omitted).

³⁵⁸ *Id.*

³⁵⁹ Of course, the third party who lead the police to Rodriguez' home had no such authority. *Illinois v. Rodriguez*, 110 S. Ct. 2793, 2798 (1990).

³⁶⁰ *United States v. Matlock*, 415 U.S. 164, 187 (1974) (Douglas, J., dissenting).

³⁶¹ *Rodriguez*, 110 S. Ct. at 2799.

³⁶² As with other factual determinations bearing upon search and seizure, determination of consent to enter must 'be judged against an objective standard: would the facts available to the officer at the moment . . . war-

search, no probable cause justified the intrusion, and no exigency existed which required prompt police action. The only support for the entry and search was the mistaken belief of the officers that a third party had the authority to permit their entry. The Court's approach gives the consent exception more constitutional weight than it can bear, and, once again, the theory of reasonableness has allowed another exception to the warrant requirements to be "enthroned into the rule."³⁶³

III

DISTRUST OF POLICE POWER

Many of Justice Marshall's Fourth Amendment opinions show a healthy distrust of police power and a realistic sense of the dynamics involved in police-citizen confrontations. However, I doubt that Justice Marshall has any inherent distrust or dislike for law enforcement officials. After all, he was once the chief litigator for the United States before the Supreme Court, where he argued for the government in a number of criminal procedure cases.³⁶⁴ Instead, I suspect the source of Justice Marshall's distrust of police power has more subtle origins. In several of his opinions, Justice Marshall has urged the Court to undertake "a realistic assessment of the nature of the interchange between citizens and the police."³⁶⁵ What separated Justice Marshall from other members of the Court was his "citizen perspective." His Fourth Amendment opinions display a "candor that cut through legal abstractions to the social reality"³⁶⁶ that exists on the street. He scrutinizes police claims of necessity and practicality, instead of assuming that the police are always a "friend."

Police officials and their proponents have traditionally resisted oversight and review of their discretionary actions. Because of this resistance, politicians and citizens generally fail to closely examine many police tactics, and many blindly trust the police. They claim

rant a man of reasonable caution in the belief' that the consenting party had authority over the premises?

Rodriguez, 110 S. Ct. at 2801 (quotations omitted).

³⁶³ *United States v. Rabinowitz*, 339 U.S. 56, 80 (1950) (Frankfurter, J., dissenting).

³⁶⁴ *Williams*, *supra* note 2, at 138. Justice Marshall also has two sons involved in law enforcement, one a former prosecutor and the other a state trooper.

One commentator has said that Justice Marshall's "criminal law opinions cannot be properly described as either consistently liberal or conservative. Justice Marshall has written opinions that can be characterized as both pro-government and pro-defendant. Such titles, however, fail to describe adequately the broad and often conflicting principles Justice Marshall seeks to address in his criminal law opinions." Ogletree, *supra* note 290, at 111-12 (footnotes omitted).

³⁶⁵ *Schneekloth v. Bustamonte*, 412 U.S. 218, 289 (1973) (Marshall, J., dissenting).

³⁶⁶ *Sullivan*, *supra* note 304, at L23.

that the demands of law enforcement require that the police not be "handcuffed" by overly intrusive and technical rules.³⁶⁷

The Fourth Amendment, however, stands for the principle that official power that threatens liberty and personal security cannot be left to the control of the police. When certain interests are implicated, the discretion of the police cannot be trusted. This is the view espoused by Justice Marshall. It is not an "anti-police" position; it is a vision enshrined in the Constitution.

*Florida v. Bostick*³⁶⁸ illustrates the diverse judicial perspectives on police power and what role, if any, the Fourth Amendment plays in checking that power. *Bostick* involved a police practice that some state and federal judges have compared to the tactics employed by fascist and totalitarian regimes of a bygone era—police randomly, and without any suspicion, approaching passengers seated on a bus, requesting to see their identification and tickets, and asking for consent to search their luggage.³⁶⁹ The *Bostick* Court considered whether this police practice—"working the buses"—constituted a *per se* seizure within the meaning of the Fourth Amendment. The Court held that it did not.³⁷⁰

Bostick raised many troublesome questions,³⁷¹ especially the issue of judicial trust of police authority. The result and reasoning in *Bostick* illustrate the Court's excessive trust of police authority and its indifference toward the dynamics of police-citizen encounters. The Court's blind acceptance of police power produces distorted standards, ignores the real world, and destroys Fourth Amendment freedoms under the guise of law enforcement interests.

Justice O'Connor, writing for the *Bostick* majority, begins by confidently asserting that the Fourth Amendment would not have been implicated if the police confrontation had occurred "before

³⁶⁷ See Barr, *supra* note 14 (statement of Phil Caruso that decisions of the Warren Court had the effect of "handcuffing the police instead of turning them loose in the war against drugs and against crime.").

³⁶⁸ 111 S. Ct. 2382 (1991).

³⁶⁹ While the actual facts remain in dispute, the Court decided *Bostick* under the following facts: Two police officers with badges and police insignia (one holding a recognizable gun pouch) boarded a bus bound from Miami to Atlanta during a stopover in Fort Lauderdale. The officers, without any legitimate basis for doing so, approached Bostick. They asked and received Bostick's ticket and identification. After these were returned to him, the officers continued the confrontation and informed Bostick that they were narcotics officers. They then requested consent to search his bags for drugs. Although Bostick claimed that he was not informed of his right to refuse consent, and stated that he did not consent to any search, the officers claimed otherwise. A search of Bostick's luggage disclosed illegal narcotics. *Id.* at 2384-85.

³⁷⁰ *Id.* at 2389.

³⁷¹ Professor LaFave has raised and discussed many of the problems in the Court's reasoning. LaFave, *supra* note 15, at 743-53.

Bostick boarded the bus or in the lobby of the bus terminal.”³⁷² Her certainty derives from the Court’s previous declarations that “th[is] sort of consensual” police confrontation in a public place implicates no Fourth Amendment interest.³⁷³ Justice O’Connor then argues that the Court’s earlier pronouncements are just as applicable even when the police confrontation takes place on a bus.³⁷⁴

According to the *Bostick* Court, “the mere fact that Bostick did not feel free to leave the bus” at the moment of the confrontation did not mean that the police had seized him.³⁷⁵ Why not? Because one cannot measure the substance of the Fourth Amendment right in this context by asking whether Bostick was “free to leave.” The “free to leave” standard makes sense “[w]hen police attempt to question a person who is walking down the street or through an airport lobby.”³⁷⁶ But for someone who is already seated on a bus and “has no desire to leave, the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter.”³⁷⁷

Although Bostick did not feel free to leave, the Court emphasized that his sensation was not due to the officers towering over him. Rather, his feeling of confinement “was the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive.”³⁷⁸

The appropriate test for determining whether the police violated Bostick’s Fourth Amendment rights is “whether a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter.”³⁷⁹ In other words, considering all the facts surrounding the encounter, have the police communicated to a reasonable person that he was “‘not at liberty to ignore the police presence and go about his business?’”³⁸⁰ This test, according to the Court, is consistent with prior precedent and captures the essence of what the Fourth Amendment prohibits. The locus of the confrontation is not determinative. Even persons seated on a bus may “decline an officer’s request without fearing prosecution.”³⁸¹ The fact that no reasonable person in Bostick’s shoes would have allowed the police to search his luggage containing illegal drugs is

³⁷² *Bostick*, 111 S. Ct. at 2386.

³⁷³ *Id.*

³⁷⁴ *Id.* at 2389.

³⁷⁵ *Id.* at 2387.

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ *Id.*

³⁷⁹ *Id.*

³⁸⁰ *Id.* (quoting *Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)).

³⁸¹ *Id.*

irrelevant. The so-called "reasonable person" the Court has in mind "presupposes an *innocent* person."³⁸²

Bostick shows how willing the Court is to subordinate Fourth Amendment freedoms to the needs of police authority. Legal abstractions minimize coercive police tactics under the reasonableness analysis. For example, the Court found it "particularly worth noting" that the officers "advised Bostick that he had the right to refuse consent," and "at no time did the officers threaten Bostick with a gun."³⁸³ The Court suggested that an officer carrying a zippered pouch, recognizably containing a pistol, was the "equivalent of carrying a gun in a holster," and noted that no evidence indicated that the gun was "ever removed from its pouch, pointed at Bostick, or otherwise used in a threatening manner."³⁸⁴

On the latter point—the issue of the officer carrying the gun—the Court's casual response is disturbing. As Justice Marshall notes in his dissent, this sort of "display" by an officer "exerts significant coercive pressure on the confronted citizen."³⁸⁵ The Court intimates that carrying a gun in this manner is no different from seeing a holstered gun.³⁸⁶ But according to whom? Justice O'Connor? Bostick? The average "reasonable person"?

Most persons are unaccustomed to seeing police officers handle guns in this manner. Certainly a police officer gripping a loaded weapon seldom confronts the average person in settings similar to the cramped space inside a bus aisle. The Court's suggestion that this sort of police confrontation is "a sufficiently routine part of modern life"³⁸⁷ and that a targeted person will feel free to go about his business as if nothing unusual is happening strains credibility. Only a Court ready and willing to yield to the power of the police could make such a claim.

³⁸² *Id.* at 2388.

³⁸³ *Id.* at 2385.

³⁸⁴ *Id.*

³⁸⁵ *Id.* at 2393.

³⁸⁶ Of course, the record is unclear about the manner in which the officer, Detective Joseph Nutt, was handling the gun pouch. The officers stated that Nutt's gun was carried in a pouch in his hand. Bostick stated that

during part of the encounter Nutt had his hand on the gun, inside the unzipped pouch. Nutt testified that he usually kept the pouch zipped, acknowledging though that there 'have been many times I had a hand on the firearm.' He could not recall whether he had had his hand directly on the weapon in this instance.

Brief of Respondent at 3, n.2, *Florida v. Bostick*, 111 S. Ct. 2382 (1991).

³⁸⁷ *Florida v. Riley*, 488 U.S. 445, 453 (1989) (O'Connor, J., concurring). In *Riley*, Justice O'Connor argued that a person cannot assert an expectation of privacy against a police intrusion that "is a sufficiently routine part of modern life." Apparently, she believes that police drug agents gripping loaded weapons are also a sufficiently routine part of modern life for bus passengers that their appearance in the back of a bus is no cause for alarm.

Similarly, the Court's notation that the police "advised Bostick that he had the right to refuse consent"³⁸⁸ adds little to the analysis and only diverts attention from the main issue. If the question of seizure ultimately turns on whether Bostick felt free to decline the police requests or to terminate the encounter, why should it matter whether the police advised Bostick of his right to refuse consent for a search of his luggage? The Court has confused itself; the issue of whether a seizure occurred is distinct and separate from the issue of whether Bostick consented to the search. As Justice Marshall noted, "[I]f [Bostick] was unlawfully seized when the officers approached him and initiated questioning, the resulting search was likewise unlawful no matter how well advised [Bostick] was of his right to refuse it."³⁸⁹

Moreover, if the Court was serious about discussing the relevance of a police warning for someone in Bostick's situation, it should have paid attention to the dynamics involved in this type of encounter. The type of police warning pertinent to this issue is not one that comes *after* the police have affected the target with their powerful presence, but a warning that informs a person of his right to pre-empt the police strike *before* he becomes a target.

If police officers were truly interested in reducing the coercive atmosphere of bus raids, they would warn all passengers of their right to terminate the encounter *before* the officers approach and begin to question individual travellers. If a traveller knows that the police have informed his fellow passengers of their right to resist interrogation and a search, he might feel more secure in exercising his own right, despite the possible delay in the bus departure. Unfortunately, the police are not likely to provide such a warning. Indeed, it is unrealistic to think members of a profession that generally operate free of meaningful oversight³⁹⁰ and whose very role within society depends upon the use of coercion³⁹¹ will convey

³⁸⁸ *Bostick*, 111 S. Ct. at 2385.

³⁸⁹ See *id.* at 2393 (Marshall, J., dissenting); see also LaFave, *supra* note 15, at 752.

³⁹⁰ See SKOLNICK, *supra* note 340, at 14 ("Police work constitutes the most secluded part of an already secluded system and therefore offers the greatest opportunity for arbitrary behavior.")

³⁹¹ See BROWN, *supra* note 33, at 4:

[C]oercion both defines the role of the police and lies behind or is instrumental in the accomplishment of most police functions. It is the use of coercion that unites the otherwise disparate activities of the police; it is present in both the act of enforcing the law and in that of peacekeeping. This is not to say that the police always rely upon coercion; only that their role is defined by the necessity of mediating or controlling situations which require, as Egon Bittner has put it, "remedies that are non-negotiably coercible."

See generally Egon Bittner, *The Police Charge*, in POLICE BEHAVIOR, *supra* note 112, at 34.

a message that significantly undermines the mission society expects them to perform.

That Bostick was advised he could refuse a search comes too late in the encounter to make a difference. But why does the Court accept a police tactic that the Florida Supreme Court, which is by no means a court "soft" on criminals, compares with "'Hitler's Berlin, . . . Stalin's Moscow, [and] white supremacist South Africa' "?³⁹² The Court's attitude reflects inherent trust in police procedures that the Court itself deems reasonable and necessary. Therefore, the source of the Court's conclusions is not the Fourth Amendment, but its own values about law enforcement.³⁹³

An example better illustrates this point. It was probably no accident that the police chose to accost Bostick after he was seated and the bus was about to depart. The Court, however, casually asserts that if the police confrontation "had taken place before Bostick boarded the bus or in the lobby of the bus terminal, it would not rise to the level of a seizure."³⁹⁴ Though the Court does not view this fact as important, it does seem significant that the police did *not* confront Bostick before he boarded the bus or in the bus lobby. One plausible reason for their delay is that Bostick might have felt less inhibited to leave in a relatively open space.

At the same time, the police decision to initiate their confrontation with Bostick in the back of the bus, rather than in the bus lobby, enhances the coerciveness of the encounter. If police had accosted Bostick in the lobby, they would have reduced the chances that the encounter would disturb or inconvenience other travellers. However, by approaching Bostick inside the bus, the other passengers would undoubtedly have noticed any refusal to cooperate with the police, which could delay the departure of the bus. Surely the police are aware of these nuances. The Court, however, chose to ignore them and overlook the exploitation of Bostick's vulnerability once inside the bus. This result stems from the Court's police-oriented perspective.

Is this criticism too harsh? Have I substantiated the charge that the Court gives too much weight to police interests and sharply cur-

³⁹² *Bostick v. State*, 554 So. 2d 1153, 1158 (Fla. 1989) (quoting *State v. Kerwick*, 512 So. 2d 347, 348-49 (Fla. 1987)).

³⁹³ The idea that people feel free to ignore a police officer who has approached them and requested identification is not empirically grounded. Rather, it is a "policy decision that the police should be allowed to rely on the moral and instinctive pressure to cooperate inherent in [police-citizen] encounters by *not treating them* as 'seizures' for Fourth Amendment purposes." Yale Kamisar, *Arrest, Search and Seizure, Prepared Remarks (Part 1)* at the U.S. Law Week's Tenth Annual Constitutional Law Conference, 16 (Sept. 10, 1988). See generally 3 LAFAYE, *supra* note 232, § 9.2(h), at 410-11.

³⁹⁴ *Florida v. Bostick*, 111 S. Ct. 2382, 2386 (1991).

tails Fourth Amendment rights to accommodate those interests? Consider the Court's construction of the constitutional standard employed in *Bostick*. It ruled that the "free to leave" test, which had been the controlling test for more than a decade, was not applicable because it was fortuitous that Bostick was found in the cramped confines of a bus. Although, in my view, such confines would inevitably lead one to feel that their freedom was restricted, particularly when confronted by gun-toting drug agents, the Court instead stated that any sense of confinement was "the natural result of [Bostick's] decision to take the bus."³⁹⁵ Thus, in the Court's view, Bostick had only himself to blame for the police encounter that made him feel confined.

This type of analysis, which I have previously called a "blame the victim" approach to Fourth Amendment questions,³⁹⁶ focuses attention on a strawman. If the question of seizure ultimately turns on whether the police displayed a show of authority that leads one to believe that their freedom of action is restrained, why should it matter that Bostick had voluntarily placed himself in confining quarters? Suppose an individual enters an express elevator in the lobby of a 100-floor building, and three police officers, hands inside pouches containing loaded weapons, also enter the elevator just as the doors close. Imagine also that as the elevator ascends uninterrupted to the 100th floor, the officers ask the individual to provide identification and to account for his presence in the building. The individual's feelings of restraint are not only reasonable, but also justified. Nor is it likely that the individual would feel free to ignore the officers or to terminate the encounter, at least not until the elevator stopped and the doors opened. If a court were to employ *Bostick*'s "blame the victim" model to this incident, it would find that any feelings of restraint that the individual experienced were "the natural result of his decision to take the [elevator]"³⁹⁷ rather than walk the 100 flights to the top floor.

If a "blame the victim" analysis seems inappropriate and troublesome in the elevator hypothetical,³⁹⁸ it is equally so in *Bostick*. A Court genuinely interested in assessing the coercive effects of a po-

³⁹⁵ *Id.* at 2387.

³⁹⁶ See Maclin, *supra* note 105, at 1305; Tracey Maclin, *New York v. Class: A Little-Noticed Case With Disturbing Implications*, 78 J. CRIM. L. & CRIMINOLOGY 1, 34-38 (1987).

³⁹⁷ *Bostick*, 111 S. Ct. at 2387.

³⁹⁸ I thought of the elevator hypothetical described above before I learned that Justice Scalia would have no trouble finding a non-seizure in such an encounter. See Official Transcript Proceedings Before The Supreme Court of the United States at 47-48, *Florida v. Bostick*, 111 S. Ct. 2382 (1991); "Arguments Before the Court," 59 U.S.L.W. 3625, 3626-27 (Mar. 19, 1991) ("Scalia protested that counsel had already appeared to concede that there can be no seizure without official force or a threat of such force. What if

lice encounter would not discuss relevant³⁹⁹ points in a manner that ignores the realities of police-citizen confrontations.

An example illustrates the rule's extreme results. Suppose that an individual purchases a ticket on a crowded bus for a non-stop trip from New York to Washington, D.C. As soon as the bus departs, officers accost the individual and request permission to search his bags for drugs. After he refuses, rather than leave him alone, the officers sit down in the adjoining seats and stare at him for the remainder of the trip. Has he been seized? I think so. Not only would the individual not feel free to leave, he would have nowhere to go on a crowded bus.⁴⁰⁰ Why should such police conduct implicate the Fourth Amendment? This sort of police presence jeopard-

the encounter was on an elevator, he asked. I don't think you would say this is necessarily a seizure.").

If Justice Scalia thinks no seizure would occur in this situation, if he believes that a person is free to ignore the presence of armed law enforcement officials in the cramped and confined space of an elevator, and if he interprets "the right to be let alone," *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), which is guaranteed in the Fourth Amendment, as not to cover this encounter, then, indeed, all persons

will suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and [all of us will be] subject to the administration of [government] officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.

National Treasury Employees Union v. Von Raab, 489 U.S. 656, 687 (1989) (Scalia, J., dissenting). I thank Professor Yale Kamisar for calling my attention to Justice Scalia's remarks at oral argument.

³⁹⁹ It would be inaccurate to characterize Bostick's choice of travel as totally irrelevant in determining whether drugs agents "working the buses" jeopardize Fourth Amendment principles. Indeed, Bostick's choice of travel had a direct correlation with both the likelihood of his being seized, as well as the motivation behind this type of police tactic.

Regarding the former point, the fact that Bostick chose to travel by inner-city bus or train, rather than a commercial airplane had a direct bearing on the probability he would be subject to this type of dragnet police procedure. While drug agents certainly employ similar tactics inside and outside airport lobbies, see *Florida v. Rodriguez*, 469 U.S. 1 (1984); *Florida v. Royer*, 460 U.S. 491 (1983); *Reid v. Georgia*, 448 U.S. 438 (1980); *United States v. Mendenhall*, 446 U.S. 544 (1980), I have yet to read or hear about drug agents accosting airplane passengers while they are seated and waiting for their plane to depart. I suspect the potential "political backlash" from the middle and upper income persons that normally patronize commercial airplanes prevents law enforcement officials from undertaking these raids.

Concerning the latter point, Bostick's mode of travel probably also influenced the police decision-making process.

By consciously deciding to single out persons who have undertaken interstate or intrastate travel, officers who conduct suspicionless, dragnet-style sweeps put passengers' to the choice of cooperating or of exiting their buses and possibly being stranded in unfamiliar locations. It is exactly because this 'choice' is no 'choice' at all that police engage this technique.

Bostick, 111 S. Ct. at 2394 (Marshall, J., dissenting).

⁴⁰⁰ The Bush Administration, however, might disagree. See Brief for the United States as *Amicus Curiae* 20, *Florida v. Bostick*, 111 S. Ct. 2382 (1991):

dizes "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."⁴⁰¹ If *Bostick*'s analysis is applied, however, his feeling of confinement is "the natural result of his decision to take the bus; it says nothing about whether or not the police conduct at issue was coercive."⁴⁰² A Court seriously interested in protecting liberty would not utilize an analysis so disdainful of Fourth Amendment values.

Although the "blame the victim" rule is only one component of the Court's overall analysis, the standard ultimately adopted in *Bostick* is equally troublesome for Fourth Amendment rights. After more than a decade of reliance on the "free to leave" test, first articulated in *United States v. Mendenhall*,⁴⁰³ the Court explains that that test is no longer applicable. Currently, the appropriate standard "is whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter."⁴⁰⁴

One can understand *Bostick*'s frustration when he learned that the Court had suddenly adopted a new standard—a standard conve-

As an initial matter, the fact that respondent could have moved from his seat showed that he was 'free to leave.' He could have told the officers that he did not want to talk to them and walked down the aisle or into the bathroom on the bus if he wished to distance himself from the officers[;]

(emphasis added). When narcotics officers accost a traveller and tell him that they are looking for illegal drugs, the last place he would go in order to avoid the officers' inquiries and dispel their suspicions would be the bathroom of a bus. The officers would think that the traveller's flight is an avoidance tactic, and his escape to the bathroom is an effort to "get rid of" illegal drugs.

⁴⁰¹ *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

⁴⁰² *Bostick*, 111 S. Ct. at 2387. Presumably even Justice Scalia—who likes to quote Justice Brandeis' famous *Olmstead* dissent, see *Treasury Employees Union v. Von Raab*, 489 U.S. 656, 680 (1989) (Scalia, J., dissenting) (quoting *Olmstead v. United States*, 227 U.S. at 479)—would not be bothered by this incursion on "the right to be let alone."

⁴⁰³ 446 U.S. 544, 553-55 (1980).

⁴⁰⁴ *Bostick*, 111 S. Ct. at 2387. Although the *Bostick* Court backs away from the "free to leave" test in the context of bus raids, it does not repudiate many of the assumptions underlying that test, as articulated by a majority of the Court over the past decade. For example, *Bostick* continues the fiction that police questioning about possible criminal conduct, "by itself, is unlikely to result in a Fourth Amendment violation." *INS v. Delgado*, 466 U.S. 210, 216 (1984). This notion, explained in 3 LAFAVE, *supra* note 232, § 9.2(h), is really a *policy* decision of the Court to allow law enforcement officials to stop and question persons, despite the inevitable coercive effects.

This value judgment by a conservative Court undermines the Fourth Amendment. See Maclin, *supra* note 105. Even assuming that the Court is correct in stating that the Fourth Amendment permits official pressure to induce persons to cooperate with police officers who accost and question them on the street or in other public places, the Court is wrong to conclude that police questioning in a bus aisle does not go beyond the inherent pressures accepted in social intercourse. See LaFave, *supra* note 15, at 746-47, 751-52 (Bus raids are "dramatically different in terms of the character of the police activity involved and its impact upon the reasonable traveler." The difference involves the "police dominance" of the situation, and the "uniquely heavy impact upon bus travelers precisely because they do not, as a practical matter, have available the range of avoidance options which pedestrians and airport travelers might utilize.").

niently designed to overrule his constitutional claims. For over ten years, the Court had repeatedly said that a police encounter violates the Fourth Amendment when it leaves a reasonable person with the belief that he or she was not free to leave. Bostick was one of the few litigants to come before the Court and satisfy that test. Apparently, the Court could not bring itself to allow this result.⁴⁰⁵

Even assuming the appropriateness of this change in standard, the new test—and the assumptions upon which it rests—remains a standard at odds with Fourth Amendment values. The Court assumes that a reasonable person in Bostick's position will "feel free to decline the officers' request," or even know of his right to "terminate the encounter."⁴⁰⁶ These assumptions are not well-founded.

Although the Court never acknowledges the fact, reality forces us to concede that law enforcement officers engaged in "working in the buses" or other aggressive patrol tactics are engaged in serious business. These are not casual encounters; officers are armed and have a mission. Confiscation of illegal drugs is one of the ends they seek, but they also have other goals in mind. One such goal is to "keep would-be felons off balance, and to establish a reputation for tough, decisive action. This belief in the deterrent effect of aggressive patrol often takes precedence over other objectives,"⁴⁰⁷ including respecting the Fourth Amendment rights of individuals.⁴⁰⁸

Moreover, officers often initiate these encounters "by asserting their authority by 'taking charge.'"⁴⁰⁹ This, in turn, causes (or should cause) most passengers to submit to the officers. The attitude of the officers usually is not friendly. Their approach is nonsense and they do not tolerate interference with their tasks.⁴¹⁰ People who challenge an officer's authority or respond in a manner

⁴⁰⁵ It was as if Bostick were a football player who, on the last play of the game, had managed to break into the open-field and was heading for an apparent touchdown with a lone defender chasing behind him. Just as Bostick is finally about to cross the goal-line, the Court decides to move the goal-post back an additional ten yards. This then allows the defender to tackle Bostick before he reaches the goal-line with no time left for another try at a touchdown. The reader will have to pardon my cynicism, but it is too much for this critic of the Court's Fourth Amendment jurisprudence to believe that this new standard fortuitously appeared in a case where it was clear that the old standard would compel the upholding of a Fourth Amendment claim.

⁴⁰⁶ *Bostick*, 111 S. Ct. at 2387.

⁴⁰⁷ BROWN, *supra* note 33, at 161.

⁴⁰⁸ Professor LaFave observes that "everything about the entry of a police team onto a bus and the commencement of a sweep is a rather clear indication to the passengers that the police have 'in effect "seized" the bus.'" LaFave, *supra* note 15, at 748 (quoting *United States v. Felder*, 732 F. Supp. 204, 208 (D.D.C. 1990)).

⁴⁰⁹ ALBERT J. REISS, JR., *THE POLICE AND THE PUBLIC* 180 (1971) ("Since police realize they cannot count on citizen support of their authority they commonly enter encounters with citizens by asserting their authority by 'taking charge.' Having asserted authority, they must seek to maintain it, if necessary, by force.").

⁴¹⁰ See, e.g., UVILLER, *supra* note 6, at 16:

deemed out-of-line by the police are "more likely to be treated in a hostile, authoritarian or belittling manner by the police than citizens who behave with civility or who extend deference."⁴¹¹ In fact, an officer may label one who challenges his control over an encounter difficult and deal with the uncooperative individual appropriately.⁴¹²

When faced with this reality, the Court's confidence in the bus passengers' ability to "just say no" to armed drug agents and its trust in police officers seems a bit strained.⁴¹³ Someone seated in the back of a bus and confronted by two armed police officers is in

Police officers relish respect and, in many small ways, insist on a show of deference from the ordinary folk among whom they work. . . . Manifest confidence begets submission, and the cops learn the firm tone and hand that informs even the normally aggressive customer of the futility of resistance. It's effective. In virtually every encounter I have witnessed, the response of the person approached was docile, compliant, and respectful.

⁴¹¹ REISS, *supra* note 409, at 53; *see also* CHRISTOPHER COMMISSION, *supra* note 110, at 21-33 (noting citizen complaints of brutal and aggressive police responses when citizens question police authority and practices).

⁴¹² Clearly, overt and covert challenges to police authority will not go unnoticed. In fact, they can be seen to push the encounter to a new level wherein any further slight to an officer, however subtle, provides sufficient evidence to a patrolman that he may indeed be dealing with a certifiable asshole and that the situation is in need of rapid clarification. From this standpoint, an affront can be seen, therefore, as disrupting the smooth flow of the police performance.

Van Maanen, *supra* note 112, at 299.

It seems that police officers in Los Angeles, California, the nation's second largest city, have developed a reputation for dealing with persons who strike officers as "uncooperative" or possess a "bad attitude." The Christopher Commission, which was established in the wake of the Rodney King police brutality case in Los Angeles, recently found that a "significant number of [police] officers tended to use force excessively, that these problem officers were well known in their divisions, and that the [Police] Department did not do enough to control or discipline these officers." CHRISTOPHER COMMISSION, *supra* note 110, at 34. In support of this finding, the Commission relied upon a May 1991 written survey of 960 randomly selected police officers conducted by the Los Angeles Police Department. That survey found that 4.6% "of officers in the survey agreed with the statement that an officer [was] justified in administering physical punishment 'to a suspect with a *bad or uncooperative attitude.*'" *Id.* (emphasis added). The Commission, quite understandably, remarked:

That nearly 5% of LAPD officers would acknowledge in a written survey sponsored by the Department that an officer would be entitled to use "street justice" against suspects with a "bad or uncooperative attitude," and that 11% would have "no opinion," are evidence of a serious problem in attitude toward the use of force among a significant group of LAPD officers.

Id.; *see id.* at 49-50 (transcripts of computer messages sent between Los Angeles police officers, where officers talked about beating suspects and other members of the public).

⁴¹³ Or, as Robert L. Andrews, a Florida circuit judge, bluntly stated:

What the cops are doing here . . . is engaging innocent people in such a coercive, intimidating manner that this 'right to say no' stuff is a crock of crap. You're sitting on a bus, in a cramped space, when an officer with a gun sticking out of his belt asks if he can look through your luggage. Maybe you've got something to hide, maybe you don't. But do you really think the average person believes he can say no? Or get up and walk off

no position to dictate the actions of the officers. It is unrealistic to suggest that Bostick had any control over the encounter. He did not initiate it, he did not feel free to leave, and he had no reason to believe that he could control the officers' conduct toward him. Indeed, the fact that Bostick did not feel free to leave says a great deal about whether he felt free to terminate the encounter or to decline the officers' requests. If a person cannot walk away from police officers, he is probably not in a position to ignore those same officers.⁴¹⁴

The Court's fallback position is that "an individual may decline an officer's request without fearing prosecution."⁴¹⁵ This does nothing to offset its insensitivity to Fourth Amendment principles. As Justice Marshall noted, the average passenger who is "unadvised of his rights and otherwise unversed in constitutional law *has no reason to know* that the police cannot hold his refusal to cooperate against him."⁴¹⁶ More important, fear of a subsequent criminal trial is probably one of the last things on the minds of those contemplating refusing a police officer's request. It is well-known that the police have various informal and extra-legal means available for situations where their authority is questioned. Officers, for example, may decide to "teach a lesson" to an uncooperative person.⁴¹⁷ Because of the violent nature of these "lessons" and the resulting denigration of the individual, the Court misses the mark when it speculates that a person considering refusal may do so "without fearing prosecution." In the forefront of a person's mind is the fear

that bus? Don't be ridiculous. It's a total violation of the basic right of any citizen to be left alone.

Kahn, *supra* note 151, at 18, 30.

⁴¹⁴ Cf. LaFave, *supra* note 15, at 749

Though the *Bostick* majority correctly asserts that [the "free to decline the officers' requests or otherwise terminate the encounter"] test, rather than the *Mendenhall-Royer* "free to leave" standard, is to be preferred, certainly whether a reasonable person would believe he was free to leave *remains relevant* under the broader test, for such departure is the most obvious way to "otherwise terminate the encounter." (third emphasis added).

⁴¹⁵ Florida v. Bostick, 111 S. Ct. 2382, 2387 (1991).

⁴¹⁶ *Id.* at 2393.

⁴¹⁷ "[T]eaching" occupies a particularly prominent position in the police repertoire of possible responses. Thus, the uncooperative and surly motorist finds his sobriety rudely questioned, or the smug and baughty college student discovers himself stretched over the hood of a patrol car and the target of a mortifying and brusque body search. The object of such degradation ceremonies is simply to reassert police control and demonstrate to the citizen that his behavior is considered inappropriate. Teaching techniques are numerous, with threat, ridicule, and harassment among the more widely practiced.

Van Maanen, *supra* note 112, at 304.

that a lack of cooperation may cause the police to arrest him,⁴¹⁸ to approach him again later in the trip,⁴¹⁹ or even worse, to respond violently⁴²⁰ and physically.⁴²¹

The Court never addresses or even acknowledges these realities in *Bostick*. Instead, the Court advances a theory that forces citizens to challenge or resist police authority in contexts where the Court has conceded that people are justifiably inhibited. Is this a model of the Fourth Amendment that affirmatively protects the right to be left alone? I think not. Rather, it is a model that allows coercive police tactics and permits violations of personal dignity. The Court apparently believes that this sort police practice is necessary, and therefore, reasonable. Most individuals will have little to worry about; only the guilty need fear.⁴²² Evidently the Court trusts the police not to search the bags of too many "innocent" persons that a political hacklash occurs. Alternatively, the Court believes that those "innocent" persons affected by the police tactics will tolerate them in order to avoid trouble with the authorities.⁴²³ Either way,

⁴¹⁸ Cf. Donald J. Black, *The Social Organization of Arrest*, 23 STAN. L. REV. 1087, 1109 (1971) (noting that "police arrest blacks at a comparatively high rate, but the difference between the races appears to result primarily from the greater rate at which blacks show disrespect for the police.").

⁴¹⁹ See *United States v. Felder*, 732 F. Supp. 204, 205 (D.D.C. 1990) (officer testified that "when passengers who appear nervous refuse to consent to an interview, certain members of his unit then take it upon themselves to notify authorities at the next stop"); *United States v. Cothran*, 729 F. Supp. 153, 156 (D.D.C. 1990) (officer testified that, when passengers refused to permit a search of their luggage, he would sometimes notify authorities at the next stop to subject the passengers to further scrutiny).

⁴²⁰ Police do not arrest everyone that they subject to force. One study documenting cases of police brutality noted that in 37 cases, 44 citizens had been assaulted over a seven-week period. "In 15 of these cases, no one was arrested. Of these, 8 [cases involved] no verbal or physical resistance [to the police] whatsoever, while 7 had." Reiss, *supra* note 338, at 280.

This same study noted that

police are very likely to use force in settings that they control. . . . When a policeman uses undue force, then, he usually does not risk a complaint against himself or testimony from witnesses who favor the complainant against the policeman. This, as much as anything, probably accounts for the low rate of formal complaints against policemen who use force unnecessarily.

Id. at 291-92.

⁴²¹ As California State Assemblyman Curtis Tucker noted in the aftermath of the Rodney King police brutality incident, when black people in Los Angeles see a police car approaching, "They don't know whether justice will be meted out or whether judge, jury and executioner is pulling up behind them." Stevensen, *supra* note 110, at A16.

⁴²² This is because the "reasonable" person that the Court has in mind when it constructs Fourth Amendment principles "presupposes an *innocent* person." *Florida v. Bostick*, 111 S. Ct. 2382, 2388 (1991).

⁴²³ Cf. LaFave, *supra* note 15, at 751

[I]n light of the show of authority involved in undertaking a bus sweep, the dynamics of the situation make a nonconforming refusal to cooperate an especially unlikely choice. That this is so is ineluctably apparent when it is considered that "such means of transportation are utilized largely by

the Court's analysis shows contempt for individual liberty and the Fourth Amendment. In the final analysis, the present Court's confidence in the police is abundant. One is tempted to say that if the Framers had this much confidence in executive branch officials, they probably would not have written the Fourth Amendment at all.

CONCLUSION

As a young attorney, Thurgood Marshall once told the Court: "Equal protection and due process under the law are the pillars upon which our democracy rests. A denial of these to the humblest of our citizens is a threat to the liberties of all."⁴²⁴ These words, written about objectionable police interrogation methods, apply as well to Justice Marshall's conception of Fourth Amendment values.

It is an extreme understatement to note that Fourth Amendment claims which reach the High Court are often raised in cases "involving not very nice people."⁴²⁵ Justice Marshall was well aware of that, but he also knew that the Fourth Amendment rules fashioned by the Court in criminal cases "apply to the innocent and the guilty alike."⁴²⁶ He understood that police encounters occur under various circumstances, ranging from the confrontation of a suspect in a dark alley to an encounter with a young lawyer at a isolated railroad station. Whatever the setting, Justice Marshall strove to construct a Fourth Amendment jurisprudence that preserved the right of all to be secure in our "persons, houses, papers, and effects."⁴²⁷ His life experiences, his contact with the police in a rough-and-ready world, his insights, and his generous reading of the Fourth Amendment will be sorely missed.

the underclass of this nation who, because of greater concerns (such as being able to survive), do not often complain about such deprivations."

(quoting *United States v. Lewis*, 728 F. Supp. 784, 789 (D.D.C. 1990).

⁴²⁴ Brief in Support of the Petition for Writ of Certiorari at 32; *Chambers v. Florida*, 309 U.S. 227 (1940).

⁴²⁵ *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) (noting that "the safeguards of liberty have frequently been forged in controversies involving not very nice people").

⁴²⁶ *United States v. Sokolow*, 490 U.S. 1, 13 (Marshall, J., dissenting).

⁴²⁷ U.S. CONST. amend. IV.